



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
ONE CONGRESS STREET SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

VIA FIRST CLASS MAIL

Eurika Durr, Clerk of the Board
Environmental Appeals Board (MC 1103B)
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: NPDES Appeal Nos. 06-12, 06-13
NPDES Permit No. MA 0004898
Mirant Kendall, LLC

April 26, 2007

Dear Ms. Durr,

Enclosed please find the original of Respondent's Status Report and Motion to Extend Stay of Proceedings and Continue Status Conference in the above-captioned case, as well as a certificate of service. The motion and the certificate of service have also been mailed to counsel of record today. In lieu of five additional paper copies for the Board, electronic copies of each document have been posted to the CDX system.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald A. Fein".

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114
617-918-1040
Fax: 617-918-0040

cc: Ralph A. Child, Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
Carol Lee Rawn, Conservation Law Foundation

remanding significant portions of the Phase II Rule to the Agency. See Riverkeeper, 475 F.3d at 130-31.

On February 28, 2007, the Region, with the assent of Petitioners Mirant, CLF, and CRWA, requested that the Board stay the proceedings in this matter until May 2, 2007. See Motion for Stay of Proceedings, at 4-5. The Region noted that, based on then-applicable filing deadlines in the Second Circuit and the United States Supreme Court, the Region would by that date know whether any party to the Riverkeeper litigation (including the United States) had requested further review of the decision, in whole or in part. See id. at 4. On March 14, 2007, the Board granted the Region's motion and ordered (1) 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; (2) the Petitioners to file any response to that status report by May 9, 2007; and (3) all parties to appear for a status conference on Wednesday, May 16, 2007. See Order Granting Motion to Stay, at 3.

STATUS REPORT

Since the Board issued its Order Granting Motion to Stay, there have been several relevant developments. On March 20, 2007, Benjamin Grumbles, the Agency's Assistant Administrator for the Office of Water, issued a memorandum discussing the Riverkeeper decision and stating that "[w]ith so many provisions of the Phase II Rule affected by the decision, the rule should be considered suspended." Ex. 1, Memorandum from Benjamin Grumbles (Mar. 20, 2007). The memorandum also stated that the Agency anticipated issuing a Federal Register notice formally suspending the Phase II Rule in the near future. See id.

Second, at the request of both the United States and certain industry petitioners in the Riverkeeper litigation,¹ the Supreme Court extended the time within which to file a petition for a writ of certiorari to May 25, 2007. See Ex. 2, Letter from Melissa Blalock (Apr. 13, 2007); see also Ex. 3, Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. As of the date of this status report, the United States has not decided whether to petition for a writ of certiorari.

Third, on April 16, 2007, the Utility Water Act Group (“UWAG”), an industry petitioner in the Riverkeeper litigation, requested that the Second Circuit extend the deadline for filing a petition for panel or en banc rehearing until May 14, 2007. See Ex. 4, Motion to Extend the Date for Filing Petitions for Rehearing or Rehearing En Banc (Apr. 16, 2007).

As of the date of this status report, the Region is unable to report whether any party to the Riverkeeper litigation, including the United States, intends to seek further review of the Riverkeeper decision in any forum. It is unlikely that the Region will have substantially more information on May 2, 2007, the date on which the Region’s status report will be due, or on May 16, 2007, the date of the status conference.

GROUND FOR EXTENSION OF STAY AND CONTINUANCE OF STATUS CONFERENCE

The Region requests that the Board extend the stay of proceedings, and continue the status conference, by approximately one month to reflect parallel extensions of deadlines in the Riverkeeper litigation.

¹ Mirant was not a named party in the Riverkeeper litigation, but the interests of power plants with cooling water intakes were represented by an industry trade association, the Utility Water Act Group, as well as certain individual energy companies. See Motion for Stay of Proceedings, at 2 n.1.

The Region initially proposed May 2, 2007 for its status report based on the then-applicable filing deadlines in the Riverkeeper litigation² and the expectation that, by that date, the Region would be able to determine whether any party, including the United States, had sought further review of the Riverkeeper decision. The Board appeared to rely on the same rationale when, in the Order Granting Motion to Stay, it adopted May 2, 2007 for the Region's status report, and included the subsequent dates of May 9, 2007 for any response from Petitioners, and May 16, 2007 for a status conference.

In light of the extensions granted, particularly the Supreme Court's extension of the deadline for a petition of certiorari, the rationale behind the selection of the above dates now suggests that an extension of the stay is appropriate. The Region does not expect to have any more information on May 2, 2007 than it does now, nor does it expect to have substantially more information on May 16, 2007, with the possible exception of knowing whether UWAG will have filed a petition for rehearing or rehearing en banc in the Second Circuit. By contrast, barring any further extensions, the Region does expect to be able to provide more concrete information to the Board in June, after the now-extended judicial deadlines will have passed, and the parties either will have, or will not have, sought further review in the Second Circuit and/or Supreme Court.

REQUESTED RELIEF

In the interest of judicial economy, the Region requests that the Board extend the stay of proceedings, relieve Petitioners of the obligation to file a response to this status report by May 9, 2007, and continue the status conference to reflect the parallel extensions of time in the Riverkeeper litigation. The Region proposes to submit a status report by

² At the time of the Region's Motion for Stay of Proceedings, the applicable filing deadlines were March 12, 2007 for any petition for rehearing in the Court of Appeals, and April 25, 2007 for any petition of certiorari. See Motion for Stay of Proceedings, at 3 & n.2.

June 6, 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 Region further proposes that the Board revise the dates by which Petitioners' responses are due, and the date of any status conference, accordingly. Finally, the Region proposes that, in its status report due June 6, 2007, it will propose one or more dates, mutually acceptable to the Region and all Petitioners, for the rescheduled status conference, or, if the parties are unable to agree on one or more proposed dates for the status conference, so advise the Board.

The Region represents that its undersigned counsel has discussed this Motion for Stay of Proceedings with Petitioners' respective counsel and that Petitioners assent to the motion.

Respectfully submitted,



Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114
617-918-1040
Fax: 617-918-0040

Date: April 26, 2007

Of Counsel:

Robert Stachowiak, Attorney-Adviser
Office of General Counsel
U.S. Environmental Protection Agency
Washington, D.C. 20460

Exhibit 1

Memorandum from Benjamin Grumbles



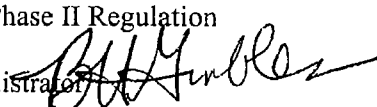
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 20 2007

MEMORANDUM

OFFICE OF
WATER

SUBJECT: Implementation of the Decision in *Riverkeeper, Inc. v. EPA*, Remanding the Cooling Water Intake Structures Phase II Regulation

FROM: Benjamin Grumbles, Assistant Administrator 

TO: Regional Administrators

The purpose of this memorandum is to provide guidance on the status of the Cooling Water Intake Structures Phase II regulation under section 316(b) of the Clean Water Act ("Phase II rule" or "Rule"). The Phase II rule set national standards for cooling water withdrawals by large, existing power producing facilities ("Phase II facilities"). See 40 C.F.R. Part 125 Subpart J; 69 Fed. Reg. 41576 (July 6, 2004). The Second U.S. Circuit Court of Appeals recently issued its decision in the litigation over the Phase II regulation. See *Riverkeeper, Inc., v. EPA*, No. 04-6692, (2d Cir. Jan. 25, 2007).

The court's decision remanded several provisions of the Rule on various grounds. The provisions remanded include:

- EPA's determination of the Best Technology Available under section 316(b);
- The Rule's performance standard ranges;
- The cost-cost and cost-benefit compliance alternatives;
- The Technology Installation and Operation Plan provision;
- The restoration provisions; and
- The "independent supplier" provision.

With so many provisions of the Phase II rule affected by the decision, the rule should be considered suspended. I anticipate issuing a Federal Register notice formally suspending the Rule in the near future.¹ In the meantime, all permits for Phase II facilities should include conditions under section 316(b) of the Clean Water Act developed on a Best Professional Judgment basis. See 40 C.F.R. § 401.14.

If you have questions regarding the application of section 316(b) at Phase II facilities, please contact either Janet Goodwin with the Office of Science and Technology at 202-566-1060 (goodwin.janet@epa.gov) or Deborah Nagle with the Office of Wastewater Management at 202-564-1185 (nagle.deborah@epa.gov).

¹ In the event that the court's decision is overturned prior to publication of the Federal Register notice, then I will not proceed to effect the suspension; if the court's decision is overturned after publication of the notice, the Agency will take appropriate action in response.

Exhibit 2

Letter from Melissa Blalock

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

April 13, 2007

William K. Suter
Clerk of the Court
(202) 479-3011

RECEIVED
OFFICE OF THE
SOLICITOR GENERAL
APR 16 PM 4:05

Mr. Paul D. Clement

Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, DC 20530-0001

Re: Environmental Protection Agency, et al.
v. Riverkeeper, Inc., et al.
Application No. 06A975

Dear Mr. Clement:

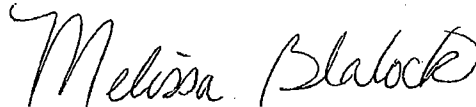
The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on April 13, 2007 extended the time to and including May 25, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by



Melissa Blalock
Case Analyst

Exhibit 3

Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

IN THE SUPREME COURT OF THE UNITED STATES

No. A-_____

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
STEPHEN L. JOHNSON, APPLICANTS

v.

RIVERKEEPER, INC., ET AL.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States Environmental Protection Agency (EPA) and Stephen L. Johnson, respectfully requests a 30-day extension of time, to and including May 25, 2007, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The judgment of the court of appeals was entered on January 25, 2007. Unless extended, the time for filing a petition for a writ of certiorari will expire on April 25, 2007. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). A copy of the court of appeals' opinion is attached to this application.

1. The Clean Water Act mandates, in some circumstances, that "the location, design, construction, and capacity of cooling water

intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. 1326(b). After considering a number of factors, including costs, EPA determined that closed-cycle recirculating cooling towers are not the best technology available for minimizing adverse environmental impact at existing large electrical generating facilities. Instead, EPA adopted a performance standard, under which such facilities must use a suite of technologies to reduce impingement mortality (trapping of large aquatic organisms against intake structures) by 80-95%, and entrainment (drawing of smaller aquatic organisms into such structures) by 60-90%, depending on several factors. 475 F.3d at 89, 92-94.

2. The Second Circuit upheld portions of the rule, but remanded several others. 475 F.3d at 89. Among other things, the court held that EPA may not generally consider the relationship of costs to benefits in determining the best technology available for minimizing adverse environmental impact. Id. at 88-89. In the court of appeals' view, "EPA may permissibly consider cost in two ways: (1) to determine what technology can be 'reasonably borne' by the industry and (2) to engage in cost-effectiveness analysis," i.e., "to choose a less-expensive technology that achieves essentially the same results" as a more expensive available technology. Id. at 99-100. Because the court found the basis for EPA's determination to be unclear, it remanded for the agency to

clarify and if necessary reassess its reasoning. Id. at 101, 102-103.

3. The Second Circuit has previously explained that because Section 1326(b) gives EPA broad authority to determine how to weigh costs and other relevant factors in determining the best available technology to minimize environmental impacts, judicial review of EPA's weighing must be highly deferential. Riverkeeper, Inc. v. EPA, 358 F.3d 174, 195-196 (2d Cir. 2004). Another court of appeals has similarly upheld EPA's balancing of costs and other factors where costs would be wholly disproportionate to benefits. Seacoast Anti-Pollution League v. Costle, 597 F.2d 306, 311 (1st Cir. 1979). In contrast, the decision in this case oversteps the courts' bounds under Chevron USA, Inc. v. NRDC, 467 U.S. 837 (1984), by confining the agency's consideration of costs to two specific inquiries not mandated by the statute's text, structure, or history.

The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. An extension of time is requested to permit further consultations regarding the legal and practical ramifications of the court of appeals' decision, and, if a decision is made to file a petition for a writ of certiorari, to prepare and print the petition.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
Counsel of Record

APRIL 2007

Exhibit 4

**Motion to Extend the Date for Filing Petitions
for Rehearing or Rehearing En Banc**

ORAL ARGUMENT HELD JUNE 9, 2006
DECISION ISSUED JANUARY 25, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____)	
RIVERKEEPER, INC., et al.)	Case No. 04-6692(L)
)	Consolidated with Case Nos.
Petitioners,)	04-6693-ag, 04-6694-ag,
)	04-6695-ag, 04-6696-ag,
v.)	04-6697-ag, 04-6698-ag,
)	and 04-6699-ag
U.S. ENVIRONMENTAL PROTECTION)	
AGENCY, ET AL.,)	EXPEDITED CONSIDERATION
)	REQUESTED
Respondent.)	
_____)	

**PETITIONER UTILITY WATER ACT GROUP'S
MOTION TO EXTEND THE DATE FOR FILING
PETITIONS FOR REHEARING OR REHEARING *EN BANC***

The Utility Water Act Group (UWAG) respectfully requests that the Court extend by 18 days, from April 26, 2007, until May 14, 2007, the date for any party to file a petition for panel rehearing or rehearing *en banc* of the Court's January 25, 2007 opinion *Riverkeeper, Inc. v. U.S. Environmental Protection Agency*, 475 F.3d 83 (2d Cir. 2007).

Counsel for UWAG tried to contact counsel of record for the other parties in this case on April 16 to ask if they consent to this motion. PSEG, Appalachian Power Company, Illinois Energy Association, and Entergy Corporation consent to the motion. EPA does not oppose the motion. State Petitioners¹ could not give us an answer in the limited time available to them. Environmental Petitioners² do not consent to the motion.

¹ State Petitioners include the State of Rhode Island, State of Connecticut, State of Delaware, Commonwealth of Massachusetts, State of New Jersey, and State of New York.

² Environmental Petitioners include Riverkeeper, Inc., Natural Resources Defense Council, Waterkeeper Alliance, Soundkeeper, Inc., Scenic Hudson, Inc., Save the Bay-People for
(continued...)

UWAG respectfully requests expedited consideration of this motion because the time ordinarily allowed for briefing and judicial resolution under the Federal Rules of Appellate Procedure (FRAP) will not permit the Court to grant the relief requested before the present April 26, 2007 deadline for filing petitions for rehearing and rehearing *en banc*. Pursuant to FRAP 26 and 27, any response to the motion would be due at the earliest on the April 26 deadline, and replies would be due after the deadline has passed.

For the reasons stated below, good cause exists to grant this motion for an extension of time. In support of this motion, UWAG states as follows:

1. The consolidated petitions for review challenged EPA's Final Rule Establishing Requirements for Cooling Water Intake Structures at Phase II Existing Facilities. 69 Fed. Reg. 41,576 (Jul. 9, 2004), 40 C.F.R. §§ 125.90 - . 99 (the "Phase II Rule"), promulgated pursuant to Section 316(b) of the Clean Water Act ("CWA"), 33 U.S.C. § 1326(b).
2. In its January 25, 2007 opinion, the Court upheld portions of the Phase II Rule and remanded substantial portions of it to EPA.
3. The Environmental Protection Agency, by motion of February 27, 2007, requested an extension of the time to file a petition for rehearing from March 12 to April 26, 2007. In its motion EPA said that the United States was considering whether to file a petition for panel rehearing or rehearing *en banc* of the Court's opinion.
4. UWAG requests an extension of 18 days, until May 14, 2007, to the period of time for a party to file a petition for rehearing or rehearing *en banc*.

Naragansett Bay, Friends of Casco Bay, American Littoral Society, Delaware Riverkeeper Network, Hackensack Riverkeeper, Inc., New York/New Jersey Baykeeper, Santa Montica Baykeeper, San Diego Baykeeper, California Coastkeeper, Columbia Riverkeeper, Conservation Law Foundation, and Surfrider Foundation.

5. The reasons for this request are similar to the ones stated in Respondent EPA's Motion to Extend the Date for Filing Petitions for Rehearing or Rehearing En Banc, dated February 26, 2007. As EPA said then, this case raises numerous and complex substantive issues. In light of the number, complexity, and importance of the issues, analysis of the opinion and of whether a party should file a petition for rehearing or rehearing *en banc*, or request some other type of relief, takes a long time.

6. This is particularly the case here because, as a result of the decision, UWAG's 43 members (encompassing 159 affiliates and subsidiaries), as well as many of the over 2,450 members of the three trade associations that are members of UWAG, have been forced to reassess their ongoing efforts to comply with the Phase II Rule and to evaluate, with limited information from EPA or state agencies, whether changes are needed.

7. Because of the number of UWAG members affected by the decision and the need to reach consensus among them, extra time is necessary to ensure that all members have an opportunity to understand and evaluate their procedural options and to arrive at a collective decision whether to apply for rehearing or rehearing *en banc*.

8. As of the time this motion was completed, UWAG and the other industry parties did not know whether EPA and the Department of Justice would ask for rehearing or rehearing *en banc*.³ However, we have found that all the complications in analyzing the Court's decision and the various avenues of relief, which EPA listed in its February 26 motion, have required more time even than EPA estimated at that time.

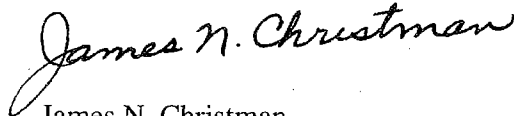
³ Also uncertain is whether any party will petition the U.S. Supreme Court for certiorari. On April 13, 2007, the Solicitor General asked the Supreme Court to allow until May 25, 2007, to file petitions for a writ of certiorari. Industry petitioners filed a similar request the same day.

9. Accordingly, UWAG requests an additional 18 days to petition for rehearing or rehearing *en banc* from this Court, until the end of the day May 14, 2007.

10. UWAG also requests expedited resolution of this motion. Without expedited consideration, the time allotted for briefing on this motion under Rule 27 of the Federal Rules of Appellate Procedure will not permit the Court to grant the relief requested before the April 26, 2007 deadline for filing petitions for rehearing and rehearing *en banc*. UWAG counsel has filed this motion as soon as possible after it became apparent that more time would be needed.

THEREFORE, for the reasons stated above, UWAG requests that the time for any party to file any petition for panel rehearing or rehearing *en banc* in this case be extended until May 14, 2007.

Respectfully submitted,



James N. Christman
Counsel for Utility Water Act Group

Hunton & Williams LLP
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, VA 23219-4074
(804) 788-8368

Dated: April 16, 2007

In re: Mirant Kendall, LLC
NPDES Appeal Nos. 06-12, 06-13

CERTIFICATE OF SERVICE

I, Ronald A. Fein, hereby certify that copies of the foregoing Respondent's Status Report and Motion to Extend Stay of Proceedings and Continue Status Conference, with exhibits, were sent on this 26th day of April 2007 to the following persons in the manner described below:

Original by first class mail
Copy posted to CDX electronic system

Eurika Durr, Clerk of the Board
Environmental Appeals Board (MC 1103B)
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Copy by first class mail

Carol Lee Rawn
Conservation Law Foundation
62 Summer Street
Boston, MA 02110

Copy by first class mail

Ralph A. Child
Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111

Dated: April 26, 2007

