



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

VIA FAX AND 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

June 6, 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, with an attached certificate of service. The motion and the certificate of service have also been mailed to the Board and 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 blue ink, appearing to read "R. 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, Esq., Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
Cynthia Liebman, Esq., Conservation Law Foundation

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

In re: Mirant Kendall, LLC)	
Mirant Kendall Station)	NPDES Appeal Nos. 06-12, 06-13
)	
NPDES Permit No. MA 0004898)	

**RESPONDENT'S STATUS REPORT AND
MOTION TO EXTEND STAY OF PROCEEDINGS AND
CONTINUE STATUS CONFERENCE**

Region 1 ("Region") of the United States Environmental Protection Agency ("Agency"), with the assent of Petitioners Mirant Kendall, LLC ("Mirant"), the Conservation Law Foundation ("CLF"), and the Charles River Watershed Association ("CRWA"), hereby provides this status report ("Report") and respectfully requests that the Environmental Appeals Board ("Board") extend the stay of proceedings in this case in light of recent developments in the Riverkeeper, Inc. v. United States EPA, 475 F.3d 83 (2d Cir. 2007) ("Riverkeeper"), litigation that provided the grounds for the initial request for a stay.

BACKGROUND

As set forth more fully in the Board's March 14, 2007 Order Granting Motion to Stay ("March 14 Order") and the Board's May 3, 2007 Order Granting Motion to Extend Stay of Proceedings ("May 3 Order"), the proceedings in this National Pollutant Discharge Elimination System permit appeal are significantly affected by ongoing litigation regarding regulations (the "Phase II Rule") that EPA promulgated under Section 316(b) of the Clean Water Act. See May 3 Order, at 1-2. Specifically, on January 25, 2007, the United States

Court of Appeals for the Second Circuit (the “Court of Appeals”) issued an opinion remanding significant portions of the Phase II Rule to the Agency.

In the March 14 Order, the Board granted the Region’s request, assented to by Petitioners Mirant, CLF, and CRWA, to stay proceedings in this matter until May 2, 2007. On April 26, 2007, the Region, with the assent of Petitioners Mirant, CLF, and CRWA, requested that the Board extend the stay of proceedings in this case by approximately one month in light of parallel extensions granted in the Riverkeeper litigation. See Respondent’s Status Report and Motion to Extend Stay of Proceedings and Continue Status Conference (Apr. 26, 2007) (“Motion to Extend Stay”), at 3-4. As grounds for the extension, the Region noted that the Supreme Court had extended the time within which to file a petition for a writ of certiorari to May 25, 2007, and that the United States had not yet decided whether to petition for a writ of certiorari. See id. at 3. The Region informed the Board that it was unable to provide any meaningful status update by May 2, but that, barring any further extensions, the Region expected to be able to provide more concrete information to the Board in June. See id. at 4. The Region requested that the Board extend the stay of proceedings, relieve Petitioners of the obligation to file a response to the Region’s status report, and continue the previously scheduled status conference to reflect the parallel extensions of time in the Riverkeeper litigation. The Region proposed to submit a status report by 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. See id. at 4-5.

On May 3, 2007, the Board granted the Region’s motion and ordered (1) the Region to submit a status report by 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; (2) the Region to propose two dates, mutually acceptable to the Region and all petitioners, for a status conference, or, if unable to agree on such dates, to so advise the Board; and (3) Petitioners to file any response to that status report by June 14, 2007. See May 3 Order, at 4.

STATUS REPORT

On May 14, 2007, three industry petitioners¹ filed a joint Petition for Panel Rehearing or Rehearing En Banc in the United States Court of Appeals for the Second Circuit, requesting either panel or en banc review of the Riverkeeper panel decision. Also on May 14, 2007, Entergy Corporation, another industry petitioner, separately filed a Petition for Rehearing En Banc, requesting en banc review of the Riverkeeper panel decision. No response may be filed to a petition for rehearing or rehearing en banc unless the court specifically orders a response. Fed. R. App. P. 35(e), 40(a)(3).

Although the United States did not file a petition for rehearing, the filing of these petitions renders it premature for any party, including the United States, to petition the United States Supreme Court for a writ of certiorari. See U.S. Sup. Ct. R. 13(3) (When any party files a timely petition for panel or en banc rehearing, "the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.").

¹ The three referenced petitioners are the Utility Water Act Group, PSEG Fossil LLC, and PSEG Nuclear LLC. As noted in the Region's Motion for Stay of Proceedings, Mirant was not a named party in the Riverkeeper litigation, but the interests of power plants with cooling water intakes were represented by the Utility Water Act Group, which is an industry trade association, as well as by certain individual energy companies. See Respondent's Motion for Stay of Proceedings (Mar. 1, 2007), at 2 n.1.

At present, the Region can report that industry petitioners have sought rehearing of the Riverkeeper decision in the Court of Appeals. The Region is unable, however, to report whether the Court of Appeals will grant or deny such rehearing, or when it would issue its decision granting or denying rehearing. If the Court of Appeals denies rehearing, the Region is currently unable to report whether or not the United States would seek Supreme Court review. If, on the other hand, the Court of Appeals grants rehearing, the Region is unable to report what the scope of the rehearing would be with respect to particular challenged provisions of the Phase II Rule that may be relevant to this appeal, what position the United States would take with respect to the petitions for rehearing, or when the Court of Appeals might enter judgment after rehearing.

**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, to reflect the continued pendency of the Riverkeeper litigation in the Court of Appeals.

In brief, the current status of the Phase II Rule is that (1) a panel of the Court of Appeals has remanded significant portions of the Rule to the Agency, (2) the Agency has issued a memorandum stating that “the rule should be considered suspended,”² (3) industry petitioners have sought rehearing in the Court of Appeals, and (4) the United States has not stated a position with respect to those petitions for rehearing. Consequently, since certain aspects of the Region’s application of Section 316(b) of the Clean Water Act were informed and guided by the Phase II Rule, the Region cannot yet determine the impact of the Riverkeeper litigation on those aspects of the final permit decision.

² See Motion to Extend Stay, at 2.

An extension of the stay of the proceedings in this case is appropriate 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. Moreover, attempting to respond to the arguments concerning the permit's Section 316(b) limits now would not likely advance this appeal, as ongoing developments in the Riverkeeper case (e.g., the grant or denial of the petitions for rehearing, a decision on rehearing, a petition for certiorari and its grant or denial, and so forth) could require successive rounds of supplemental briefing to the Board. Finally, an extension of the stay would allow the Region an opportunity to confer with Petitioners regarding an appropriate course of action with respect to this permit litigation.

REQUESTED RELIEF

In the interest of judicial economy, the Region requests that the Board extend the stay of proceedings and continue the status conference to reflect the recent developments in the Riverkeeper litigation. The Region proposes to file a status report no later than 20 calendar days following the issuance of the Court of Appeals' order granting or denying rehearing or rehearing en banc, 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 proposes that the timing of the status report be based on the outcome of this decision rather than by a date certain. However, if the Board desires that the status report be filed by a date certain, the Region proposes in the alternative to file a status report the earlier of September 11, 2007, or 20 calendar days following the issuance of the Court of Appeals' order granting or denying rehearing or rehearing en banc. The Region further proposes that the Board revise the dates by which

Petitioners' responses to that status report are due, such that any responses are due no later than 7 days after the filing of the Region's status report.

Finally, the Region proposes that the status conference be continued until after the next status report has been filed and the status and forum of the litigation are better known. The Region proposes that, in its next status report, it will propose two 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. In the alternative, if the Board prefers that the parties appear for a status conference before that time, and to comply with the Board's May 5 Order requiring the Region to propose two mutually acceptable dates for a status conference, the Region hereby advises the Board that its counsel and Petitioners' respective counsel would be available for a status conference on June 19, 2007, or, as an alternate date, July 13, 2007, or, as a second alternate date, June 20, 2007.

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: June 6, 2007

Of Counsel:

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

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 6th day of June 2007 to the following persons in the manner described below:

Original by first class mail
Copy posted to CDX electronic system
Copy by fax

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

Fax (202) 233-0121

Copy by facsimile
Copy by first class mail

Cynthia Liebman, Esq.
Conservation Law Foundation
62 Summer Street
Boston, MA 02110

Fax (617) 350-4030

Copy by facsimile
Copy by first class mail

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

Fax (617) 542-2241

Dated: June 6, 2007

