

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

November 30, 2006

In the Matter of
Mirant Kendall, LLC

Docket No. 2006-165
File No. MA0004898
Cambridge

In the Matter of
Mirant Kendall, LLC

Docket No. 2006- 156
WQC
Cambridge

ORDER STAYING EFFECTIVE DATE OF PERMIT
and
ORDER TO SHOW CAUSE

These matters are appeals respectively of a surface water discharge permit and water quality certification. The petitioner Mirant Kendall LLC and MassDEP jointly moved to stay the effective date of the surface water discharge permit appealed and referenced above, issued by MassDEP pursuant to the Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26 – 53.

The joint motion notes that the discharge permit was, in identical form, issued by the US EPA as a National Pollution Discharge Elimination (NPDES) permit under federal law, the federal permit has been appealed by the applicant to the Environmental Appeals Board (EAB),

and as a result, the effective date of the federal permit is stayed pending a determination by the US EPA Regional Administrator. The parties are requesting a parallel stay of the effective date of the state discharge permit.

In the interest of efficient coordination of the federal and state permit appeals, the Joint Motion to Stay the Effective Date of the state discharge permit is granted. The effective date of the state surface water discharge permit is stayed until the final resolution of this appeal (Docket No. 2006-165).

The stay of the permit's terms, raise a related matter: a more general stay of these proceedings. The applicant has requested adjudicatory hearings seeking review by the EAB of the federal NPDES permit No. MA0101974 issued by the U.S. Environmental Protection Agency ("EPA") pursuant to the federal Clean Water Act 33 USC § 1251 et seq., and review of the state permit issued pursuant to the Massachusetts Clean Waters Act by the MassDEP (Docket No. 2006-165). In addition, the applicant has requested an adjudicatory appeal with MassDEP to review the Department's issuance of a Water Quality Certification of the federal NPDES permit (Docket No. 2006-156).

Stay of the Surface Water Discharge Permit Appeal

Because the applicant has filed a petition for review of the federal NPDES permit with the EAB, the provisions of 310 CMR 1.01(6)(h) apply. The rule states:

Upon notice or motion of any party, the Department or the Presiding Officer shall stay administratively any appeal of a Surface Water Discharge Permit when the NPDES permit issued by the Environmental Protection Agency for the same discharge has been appealed under the federal Clean Water Act.

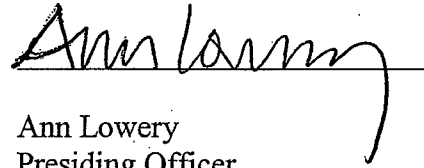
Because this permit authorizing the same discharge has been appealed by the applicant under the federal Clean Water Act to the EAB, and in order to prevent unnecessary expenditure of the Department's administrative resources, the appeal of the state surface water discharge permit is hereby stayed pursuant to 310 CMR 1.01(6)(h). In accordance with that same regulation, the stay shall remain in place until a motion to proceed is granted supported by proof of approval under the federal Clean Water Act or other ruling providing a basis for lifting the stay, or certification by the Department or another public agency that immediate resolution of the appeal may be necessary to protect public health and safety. The parties shall file status reports jointly, if possible, on the status of the pending appeal with the EAB at six-month intervals beginning **June 1, 2007** and continuing every six months thereafter.

Stay of the Water Quality Certification Appeal

The adjudicatory proceeding rules also provide for staying appeals "where the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure if the Department's administrative resources, or for other good cause." 310 CMR 1.01(5)(a)3. As the federal discharge permit has been appealed, its terms may change as a result of the review by the US EPA. Massachusetts DEP would then presumably consider any necessary changes to the state Water Quality Certification of that revised permit, and may revise or reissue the certification under appeal.

Therefore, in order to conserve administrative resources by reserving review of the state's Water Quality Certification until after the federal permit is finalized, I order the parties to show cause why the Water Quality Certification appeal should not also be stayed pursuant to 310 CMR 1.01(5)(a)3. The petitioners may submit their positions, including any specific objections,

on the issue by **December 13, 2006**. If no objections are received the Water Quality Certification appeal will be stayed pursuant to 310 CMR 1.01(5)(a)3.


Ann Lowery
Presiding Officer

SERVICE LIST

In The Matter Of:

Mirant Kendall, LLC

Docket No. 2006-156
2006-165

File No. WQC
File No: MA0004898

Representative

Party

Ralph A. Child
Mintz, Levin
One Financial Center
Boston, MA 02111

PETITIONER

Cc:

Robert Brown
MassDEP Office of General Counsel
One Winter Street, 3rd Floor
Boston, MA 02108

DEPARTMENT
Dept. of Environmental Protection

Date: November 30, 2006