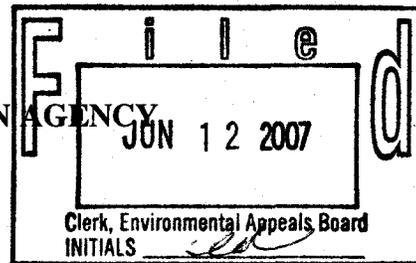


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:

Mirant Kendall, LLC,
Mirant Kendall Station

NPDES Permit No. MA0004898

NPDES Appeal Nos. 06-12, 06-13

**ORDER GRANTING MOTION TO EXTEND STAY OF PROCEEDINGS AND
CONTINUE STATUS CONFERENCE**

By motion dated June 6, 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") (collectively, "Petitioners"), requests that the Environmental Appeals Board (the "Board") further extend the stay of proceedings in the above-captioned matter, in light of recent developments in *Riverkeeper, Inc. v. United States EPA*, 475 F.3d 83 (2d Cir. 2007) ("*Riverkeeper*")— the litigation that provided the grounds for the initial request for a stay.

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

On March 1, 2007, the Region filed a Motion for Stay of Proceedings (“March 1 Motion for Stay”). In this motion, the Region explained 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 so-called “Phase II Rule,”¹ which EPA promulgated in 2004 under the authority of the CWA. On January 25, 2007, however, the Second Circuit issued an opinion in *Riverkeeper*— a case challenging the Phase II Rule— and remanded significant portions of the Rule to EPA. *See* March 1 Motion for Stay at 3. In the March 1 Motion for Stay, the Region argued that the *Riverkeeper* decision may have substantial implications for this appeal. The Region explained 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.* The Region further argued that a stay of the proceedings in this matter was 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.* On March 14, 2007, the Board granted the March 1 Motion for Stay, in consideration of the Region’s arguments and in the interest of judicial economy. *See id.* The Board directed the Region to file a status report no later than May 2, 2007, and advise whether the Board should extend the stay further. *See id.* The Board also directed the parties to appear for a status conference on May 16, 2007. *See id.*

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

On April 30, 2007, the Region filed a Motion for Extension of the stay (“April 30 Motion for Extension”). In support of the motion, the Region explained that, upon the request of the U.S. Solicitor General, 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 Utility Water Act Group, an industry petitioner in the *Riverkeeper* litigation, had requested that the Second Circuit extend the deadline for filing a petition for an en banc rehearing until May 14, 2007. April 30 Motion for Extension at 3. The Region requested that, in the interest of judicial economy, the Board extend the stay of proceedings and postpone the status conference to reflect the status of the *Riverkeeper* litigation. On May 3, 2007, the Board extended the stay and ordered the Region to submit a status report by June 6, 2007, and suggest dates when the parties would be available for a status conference.

On June 6, 2007, with the assent of Mirant, CRF, and CRWA, the Region filed a Status Report and Motion to Extend Stay of Proceedings and Continue Status Conference (“June 6 Status Report and Motion”). In it, the Region explained that on May 14, 2007, three industry petitioners in the *Riverkeeper* case 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. See June 6 Status Report and Motion at 3. Another industry petitioner separately filed a Petition for Rehearing En Banc. See *id.* The Region explained that the filing of these petitions renders it premature for any party to petition the United States Supreme Court for a writ of certiorari. See *id.*

The Region requests that the Board extend the stay of proceedings and postpone the status conference to reflect the recent developments in the *Riverkeeper* litigation. See *id.* The Region argues that an “extension of the stay of proceedings 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.” *Id.* at 5. The Region also

notes that "an extension of the stay would allow the Region an opportunity to confer with the petitioners regarding an appropriate course of action with respect to this permit litigation." *Id.* The Region proposes to file a status report no later than 20 calendar days from the issuance of the Court of Appeals' order granting or denying rehearing or rehearing en banc, and advise whether the Board should extend the stay, establish a revised briefing schedule, or take other appropriate action. The Region requests that the Petitioners' responses to the status report be due no later than seven days after the filing of the Region's status report. With respect to the status conference, the Region suggests that it will propose two or more mutually acceptable dates for a rescheduled conference. *Id.* at 6.

In the interest of judicial economy and for good cause shown, the Board hereby grants the Region's June 6 Status Report and Motion, extending the stay of proceedings and continuing the status conference. The Region shall file a status report no later than 20 days after the issuance of the Court of Appeals' order granting or denying rehearing or rehearing en banc in the *Riverkeeper* litigation. This status report shall advise whether the Board should extend the stay, establish a revised briefing schedule, or take other appropriate action. The status report also shall propose two or more dates, mutually acceptable to all parties, for the rescheduled status conference. If the parties are unable to agree on proposed dates, the Region shall so advise the Board. The Petitioners shall file their responses to the Region's status report no later than seven days after the filing of the status report.

So ordered.

Dated: June 12, 2007

ENVIRONMENTAL APPEALS BOARD

By: 

for Scott C. Fulton
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Granting Motion to Extend Stay of Proceedings and Continue 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:

Ralph A. Child
Breton Leone-Quick
Colin Van Dyke
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
fax: (617) 542-2241

Kristy A. Bulleit
Hunton & Williams LLP
1900 K St., NW
Washington, D.C. 20006-1109
fax: (202) 778-2201

Cynthia Liebman
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
fax: (617) 350-4030

By Pouch Mail and:
Facsimile:

Ronald A. Fein
Timothy Williamson
Mark Stein
U.S. Environmental Protection Agency
Region 1
1 Congress St., Suite 1100 RAA
Boston, MA 02114-2023
fax: (617) 918-0040

Dated: JUN 12 2007


Annette Duncan,
Secretary