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A FAX FROM:

ENVIR. APPEALS BOARD

TO:

Evrika Durr
Clerk of the EAB
Cynthia Liebman, CLF
Ralph Child, Mintz Levin

FAX NO.:

202-233-0121
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SUBJECT:

Mirant Kendall (NPDES Appeal Nos. 06-12, 06-13)

FROM:

Ron Fern

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COMMENTS:

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

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ENVIR. APPEALS BOARD

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

July 25, 2007

Dear Ms. Durr,

Enclosed please find the original of Respondent's Status Report and Motion to Extend Stay of Proceedings 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,

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region I
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

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316(b) of the Clean Water Act, 33 U.S.C. § 1326(b). In 2004, EPA promulgated the "Phase II Rule" under Section 316(b) to address cooling water intake structures at large, existing power plants, such as Kendall Station. See generally 40 C.F.R. Part 125 Subpart J. Pursuant to a provision of the Phase II Rule, the Region developed the Permit's cooling water intake structure requirements using Best Professional Judgment ("BPJ"). See 40 C.F.R. § 125.95(a)(2)(ii). However, the Region's exercise of BPJ was to some extent explicitly informed and guided by certain substantive elements of the Phase II Rule.

On October 30, 2006, both the Conservation Law Foundation ("CLF") (on behalf of itself and the Charles River Watershed Association) and Mirant filed Petitions for Review of the Permit. Each petition, albeit for different reasons, challenged, inter alia, the Permit's cooling water intake structure requirements imposed under Section 316(b) of the Clean Water Act.¹

On January 25, 2007, the United States Court of Appeals for the Second Circuit issued an opinion in litigation challenging the Phase II Rule. See Riverkeeper, Inc., et al. v. United States EPA, 475 F.3d 83 (2d Cir. 2007).² The Court of Appeals held that certain provisions of the Phase II Rule were not adequately explained, inconsistent with Section 316(b) of the Clean Water Act, and/or inconsistent with the requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, and remanded significant portions of the Phase II Rule to the Agency.

¹ CLF argued that the Region "unjustifiably applied the Phase II Rule" and used the Phase II Rule "as a rationale for making particular determinations." CLF Pet. at 8-9. CLF noted that, in its comments, it had argued that "the Phase II Rule [was] the subject of ongoing litigation, and clearly vulnerable to remand." Id. at 9. CLF developed this point in more detail in its Supplement to Petition for Review. See CLF Supp. Pet. at 3-7. Mirant argued essentially the opposite, i.e., that the Region should have heeded more closely to the substantive requirements of the Phase II Rule. See generally Mirant Supp. Pet. at 189-96.

² The petitioners in Riverkeeper included CLF, a petitioner here, and the Commonwealth of Massachusetts, which co-issued the Permit with the Region. 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.

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As set forth more fully in the Board's March 14, 2007 Order Granting Motion to Stay, its May 3, 2007 Order Granting Motion to Extend Stay of Proceedings, and its June 12, 2007 Order Granting Motion to Extend Stay of Proceedings and Continue Status Conference ("June 12 Order"), the Board has to date granted the Region's assented-to requests to stay proceedings in this matter in light of ongoing developments in the Riverkeeper litigation, and in order for the Region to assess how best to proceed.

In its most recent order, the June 12 Order, the Board ordered (1) the Region to submit 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, 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 no later than seven days after the filing of the status report. See June 12 Order, at 4.

STATUS REPORT

On July 5, 2007, the Court of Appeals issued two slip orders denying the separate petitions of Entergy Corporation and of three other industry petitioners for rehearing or rehearing en banc of the Riverkeeper panel decision. At this time the Region does not know for certain whether any industry petitioner in the Riverkeeper proceeding, or the United States, will petition the Supreme Court for a writ of certiorari, or, in the event of a petition, oppose another party's petition for certiorari.³ Absent an extension, any petitions

³ In a motion for leave to file an amicus curiae brief and the accompanying brief filed on July 24, 2007, by Entergy Corporation in the Section 316(b) "Phase III" litigation, ConocoPhillips Co. et al. v. United States

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for certiorari would be due to the Supreme Court by October 3, 2007. See U.S. Sup. Ct. R. 13(1), 13(3).

On July 9, 2007, the Agency published a notice in the Federal Register formally suspending the Phase II Rule. See 72 Fed. Reg. 37,107 (July 9, 2007). This notice suspended 40 C.F.R. Part 125 Subpart J except for section 125.90(b), which provides that "[e]xisting facilities that are not subject to requirements under [Part 125] must meet requirements under section 316(b) of the CWA determined by the Director on a case-by-case, best professional judgment (BPJ) basis." The "suspension provides a clear statement by the Agency that the existing Phase II requirements (with the exception of [section 125.90(b), which was] unaffected by the Riverkeeper decision . . .) are suspended and are not legally applicable." 72 Fed. Reg. at 37,108. Pursuant to 5 U.S.C. §§ 553(b) and (d), the suspension took effect immediately upon publication.⁴

As a result of these developments, the Region has elected, pursuant to 40 C.F.R. § 124.19(d), to withdraw the provisions of the Permit informed by the suspended portions of the Phase II Rule and prepare a draft permit modification addressing the portions so withdrawn. The Region intends to issue a letter to the Board, Petitioners, and all parties that commented on the draft Permit, identifying the specific portions withdrawn. The Region does not intend to withdraw other provisions of the Permit, and the draft permit modification and concomitant opportunity for public comment (and, if appropriate, public hearing) will not address any provisions of the Permit other than those that were informed by the suspended portions of the Phase II Rule.

EPA et al., No. 06-60662 (5th Cir.), Entergy stated that it intends to file a petition for certiorari in the Riverkeeper proceeding.

⁴ The suspension also noted that "[i]n the event that the [Riverkeeper] decision is overturned . . . the Agency will take appropriate action in response." 72 Fed. Reg. 37,108 at n.1.

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GROUNDS FOR EXTENSION OF STAY

The Region requests that the Board extend the stay of proceedings so that the Region may, pursuant to 40 C.F.R. § 124.19(d), withdraw the provisions of the Permit informed by the suspended Phase II Rule and prepare a permit modification addressing the portions so withdrawn. This extension will enable the Region to exercise its option under section 124.19(d) and will conserve judicial resources by not requiring the Region to defend conditions of the Permit that the Region proposes to withdraw.

Specifically, the Region requests that the Board extend the stay of proceedings by nine months, until April 18, 2008. This extension is necessary in order to allow the Region to (1) develop a new draft permit modification addressing the withdrawn portions of the Permit, (2) receive public comment, (3) if necessary, conduct a public hearing, (4) consult with state and federal regulatory agencies, including but not limited to the Massachusetts Department of Environmental Protection, the Massachusetts Division of Coastal Zone Management, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service (NOAA Fisheries), (5) respond to public comments, and (6) issue a final permit modification addressing the withdrawn portions of the Permit.

The Region assumes that any person who files comments on the draft permit modification or participates in the public hearing (if any), may, within 30 days of the Region's issuance of the final permit modification, petition the Board to review the permit modification. If any such petition is filed, the Region will likely propose that such petition should then be consolidated with the existing, stayed petitions.

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REQUESTED RELIEF

In the interest of judicial economy and to enable the Region to proceed pursuant to section 124.19(d), the Region requests that the Board issue an order extending the stay of proceedings for nine months, until April 18, 2008. The Region proposes to submit a status report no later than April 18, 2008 advising whether the Board should extend the stay, establish a revised schedule for the litigation, or take other appropriate action.

The Region further requests that the Board, in its order, clarify that, with respect to the portions of the Permit that were neither withdrawn under section 124.19(d) nor otherwise newly affected by the permit modification, neither the Petitioners nor any other party may file additional petitions for review or provide new arguments not present in the original Petitions or supplements thereto that have been filed with the Board as of this date. The Region requests this clarification in order to ensure that the Region's exercise of its option under section 124.19(d) will not subvert the filing requirements in section 124.19(a) and thereby subject unaffected portions of the Permit to additional challenges that could have been, but were not, timely raised.

If the Board desires the parties to appear for a status conference, the Region advises the Board that its counsel and Petitioners' respective counsel are available on either September 18 or 27, 2007.⁵

The Region represents that its undersigned counsel has discussed this Status Report and Motion to Extend Stay of Proceedings with Petitioners' respective counsel.

⁵ Petitioners and the Region were unable to identify any mutually acceptable dates earlier than these.

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Respectfully submitted,



Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
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Boston, MA 02114
617-918-1040
Fax: 617-918-0040

Date: July 25, 2007

Of Counsel:

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

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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 were sent on this 25th day of July 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)
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Dated: July 25, 2007


