



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

April 16, 2008

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,

A handwritten signature in black 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.  
Peter Shelley, Esq., Conservation Law Foundation  
Robert Brown, Esq., Massachusetts Department of Environmental Protection

**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**

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 and respectfully requests that the Environmental Appeals Board ("Board") extend the stay of proceedings in this case, in light of the status of a pending modification to the permit under appeal.

As explained in more detail below, the Region today requests that the stay be extended to May 28, 2008. This extension will enable the Region to conduct a preliminary review of the public comments submitted on the draft permit modification. Based upon that preliminary review, the Region will then develop, and submit by the date noted above, a second status report, in which the Region will request an additional, longer extension based on its estimate of the time necessary to fully review and respond to the comments and issue a final permit modification.

## BACKGROUND

The history of this permit appeal is set forth in the Board's most recent order. *See* Order Extending Stay of Proceedings (Sept. 28, 2007), Dkt. No. 106, at 1-5 ("September 28 Order"). To summarize, this proceeding concerns a final National Pollutant Discharge Elimination System ("NPDES") permit, NPDES Permit No. MA0004898 ("Permit"), which the Region, in coordination with the Massachusetts Department of Environmental Protection ("MassDEP"),<sup>1</sup> issued to Mirant for its Kendall Station power plant. Both Mirant (the permittee) and CLF (on behalf of itself and CRWA) filed Petitions for Review of the Permit, each of which challenged, *inter alia*, the Permit's cooling water intake structure (CWIS) requirements imposed under Section 316(b) of the Clean Water Act.

As explained in the Region's most recent status reports, two developments during the course of the appeal changed an aspect of the underlying legal regime upon which the Permit had been developed. *See* Respondent's Status Report and Motion to Extend Stay of Proceedings (July 25, 2007), Dkt. No. 81, at 2-4 ("July 25 Status Report"). First, the United States Court of Appeals for the Second Circuit invalidated and remanded numerous provisions of EPA's "Phase II Rule" for implementing Section 316(b) of the Clean Water Act at large, existing power plants such as Kendall Station. *See Riverkeeper, Inc., et al. v. United States EPA*, 475 F.3d 83 (2d Cir. 2007).<sup>2</sup> Second, in response to the *Riverkeeper* decision, the Agency formally suspended the Phase II Rule. *See* 72 Fed. Reg. 37,107 (July 9, 2007).

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<sup>1</sup> The NPDES program has not been delegated to Massachusetts. However, the Region closely coordinates NPDES permit issuance with MassDEP, and the two agencies endeavor whenever possible to jointly issue identical permits under their separate authorities.

<sup>2</sup> The United States Supreme Court recently granted certiorari in the *Riverkeeper* appeal. *See* 2008 U.S. LEXIS 3144 (U.S. Apr. 14, 2008); 2008 U.S. LEXIS 3145 (U.S. Apr. 14, 2008); 2008 U.S. LEXIS 3193 (U.S. Apr. 14, 2008) (Nos. 07-588, 07-589, 07-597).

After these developments, the Region elected, pursuant to 40 C.F.R. § 124.19(d), to withdraw the provisions of the Permit informed by the Phase II Rule and prepare a draft permit modification addressing the portions so withdrawn. *See* July 25 Status Report, at 4. Consequently, the Region requested a nine-month stay of proceedings, and proposed to submit a status report on April 18, 2008. *See id.* at 5-6. The Board granted the Region's request for a stay, and denied contrary procedural requests by Mirant and CLF. *See* September 28 Order at 5-6.

### STATUS REPORT

Since announcing its intent to withdraw and modify the affected provisions of the Permit, the Region has worked diligently to prepare a permit modification addressing the CWIS-related provisions of the Permit. On September 19, 2007, the Region organized a meeting with Mirant, CLF, CRWA, MassDEP, and other government agencies, at which Mirant, CLF, and CRWA presented their views regarding various CWIS technologies in light of the requirements of Section 316(b) of the Clean Water Act. Mirant—both on its own and in response to an October 25, 2007 request for information that the Region issued under Section 308 of the Clean Water Act—submitted further technical and legal information on September 28, 2007, October 5, 2007, October 29, 2007, October 30, 2007, December 3, 2007, and January 23, 2008.

On March 6, 2008, the Region sent a letter to the Board, Mirant, and CLF, formally withdrawing specified provisions of the Permit. *See* Notice of Withdrawal of Contested Conditions (Mar. 6, 2008), Dkt. No. 110. On March 10, 2008, the Region submitted for public comment a draft permit modification addressing the portions so withdrawn.<sup>3</sup> The

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<sup>3</sup> A copy of the draft permit modification, including the Statement of Basis and public notice, may be accessed at <<http://www.epa.gov/ne/npdes/permits/draft/2008/draftma0004898permitmod.pdf>>.

public notice provided for a 38-day comment period, closing on April 17, 2008. *Cf.* 40 C.F.R. § 124.10(b) (requiring “at least 30 days for public comment”). The notice also stated that a public hearing would be held on April 15, 2008.

On April 2, 2008, the Region received a request from Mirant to extend the public comment period by two weeks, to May 1, 2008. The public hearing was held as scheduled on April 15, 2008. At the hearing, pursuant to 40 C.F.R. § 124.12(c), the Region granted Mirant’s request and extended the comment period to May 1, 2008.

#### **GROUND FOR EXTENSION OF STAY**

The Region requests that the Board extend the stay of proceedings so that the Region may evaluate and respond to public comments received. While the Region had intended, as of its July 25 Status Report, to have completed the final permit modification by this point, the draft permit modification has not yet been finalized. Therefore, the Region will require additional time to consider and respond to comments and finalize the permit modification. Moreover, since the public comment period is still open, the Region cannot yet estimate how long it will need to respond to comments and finalize the permit modification.

The Region requests a brief extension of the stay of proceedings, and proposes to submit an additional status report no later than May 28, 2008. This brief extension will enable the Region to receive all public comments; evaluate their number, nature, and complexity; and estimate the amount of time that the Region, in coordination with MassDEP, will require to respond to the comments and issue a final permit modification. The Region will then request, in its status report, a further extension in order to enable the Region to complete the permit modification so that this permit appeal proceeding may

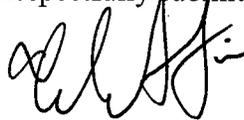
resume. This two-step process is required because the public comment period is still open, and the Region cannot supply a meaningful estimate of the time it will take to complete the permit modification until it has received and at least initially reviewed all public comments.

### **REQUESTED RELIEF**

In the interest of judicial economy and to enable the Region to complete the permit modification process contemplated by 40 C.F.R. § 124.19(d) and the September 28 Order, the Region requests that the Board issue an order extending the stay of proceedings. The Region proposes to submit a status report no later than May 28, 2008, in which it will request an additional, longer extension to complete the permit modification.

The Region represents that its undersigned counsel has discussed this Status Report and Motion to Extend 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  
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Date: April 16, 2008

Of Counsel:

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

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 were sent on the 16th day of April 2008 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  
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Signed: April 16, 2008



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