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- EPA R1 motion to stay Kendall 2-28-07.pdf



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

**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

February 28, 2007

Dear Ms. Durr,

Enclosed please find the original of Respondent's Motion for Stay of Proceedings in the above-captioned case, as well as a certificate of service. The motion and the certificate of service have also been mailed 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, Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.  
Carol Lee Rawn, Conservation Law Foundation

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

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

**RESPONDENT'S MOTION FOR 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"), respectfully requests that the Environmental Appeals Board ("Board") stay the proceedings in this case until May 2, 2007, in light of a recent decision of the United States Court of Appeals for the Second Circuit with potentially substantial implications for this permit appeal.

**BACKGROUND**

On September 26, 2006, the Region issued a final National Pollutant Discharge Elimination System ("NPDES") permit for Mirant's Kendall Station power plant, NPDES Permit No. MA0004898 ("Permit"). The Permit superseded a prior permit that the Region issued on August 17, 1988. The Permit includes both thermal discharge limits imposed under Section 316(a) of the Clean Water Act, 33 U.S.C. § 1326(a), and cooling water intake structure requirements imposed under Section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b). On July 22, 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. The Rule became effective on September 7, 2004. 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 aspects of the Phase II Rule.

On October 30, 2006, Mirant filed a Petition for Review of the Permit. Also on October 30, 2006, CLF, on behalf of itself and CRWA (together, "CLF/CRWA"), filed a Petition for Review of the Permit. Each petition, albeit for different reasons, challenged the Permit's thermal discharge limits and its cooling water intake structure requirements imposed under Sections 316(a) and (b), respectively, of the Clean Water Act.

Simultaneously with their petitions, both Mirant and CLF/CRWA filed separate motions, in each case joined by the Region, requesting an opportunity for Petitioners to submit Supplements to their Petitions for Review by December 15, 2006, and for the Region to submit its Response to the Petitions and the Supplements thereto by April 9, 2007. On November 22, 2006, the Board granted both scheduling motions.

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).<sup>1</sup> The Second Circuit held that certain provisions of the Phase II Rule were not adequately explained, inconsistent with Section

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<sup>1</sup> 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.

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.

If any party to the Riverkeeper litigation wishes to file a petition for rehearing, those petitions must be received by the court by March 12, 2007. See Fed. R. App. P. 40.<sup>2</sup> If no party requests panel or en banc rehearing, any petition for certiorari would be due by April 25, 2007. See U.S. Sup. Ct. R. 13.

### GROUNDS FOR STAY

The Riverkeeper decision may have substantial implications for this permit proceeding. 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.

The Region believes that a 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. First, the Agency cannot yet determine the exact implications of the Riverkeeper decision for this case because it is not yet known whether parties to the Riverkeeper case may seek further review of the decision. Such review could be sought by either a petition for panel or en banc rehearing in the Court of Appeals, or a petition for certiorari in the United States Supreme Court. Adding to this uncertainty is the fact that there are multiple parties that

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<sup>2</sup> On February 28, 2007, the United States requested that this deadline be extended to April 26, 2007. The Court of Appeals has not yet acted on this request.

could seek such review. The Federal Government has not yet made a decision whether to file petitions for rehearing or certiorari. Moreover, attempting to respond to the arguments concerning the Permit's Section 316(b) limits within the original briefing schedule would not likely advance this appeal, as ongoing developments in the Riverkeeper case (e.g., a petition for rehearing and its grant or denial, 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.

In addition, as a precautionary matter in the event no party seeks rehearing or certiorari, the Agency is working to assess how the Riverkeeper decision affects the Phase II Rule and, therefore, this Permit. As related above, the Region's exercise of BPJ in this case was to some extent explicitly informed and guided by certain aspects of the Phase II Rule. A stay of proceedings here would allow the Agency to fully assess how to proceed.

In the interests of judicial economy and to conserve resources, the Region therefore requests that these proceedings be stayed until May 2, 2007. By that time, the Region will know whether any party to the Riverkeeper litigation has requested further review of the decision, in whole or in part, and, in the event neither rehearing nor certiorari is sought by any party, will allow the Agency time to evaluate the current status of the Phase II Rule. Absent a stay, the Region would be forced to brief the Board on legal questions which are in flux due to circumstances beyond the Region's control and upon which the Agency has not yet formulated a position because of the ongoing developments in the Riverkeeper litigation.

**REQUESTED RELIEF**

Accordingly, the Region requests that this matter be stayed until May 2, 2007. As soon as possible, but no later than May 2, 2007, the Region proposes to submit a status report to advise the Board whether it is appropriate to continue the stay, or establish a revised schedule for the Region's response to the Petition and any additional briefing by the parties. 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: February 28, 2007

Of Counsel:

Robert Stachowiak, Attorney-Advisor  
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, Sally Burt, hereby certify that copies of the foregoing Respondent's Motion for Stay of Proceedings were sent on this 28th day of February 2007 to the following persons in the manner described below:

|                                      |  |
|--------------------------------------|--|
| Original by first class mail         | Eurika Durr, Clerk of the Board        |
| Copy posted to CDX electronic system | Environmental Appeals Board (MC 1103B) |
|                                      | U.S. Environmental Protection Agency   |
|                                      | Ariel Rios Building                    |
|                                      | 1200 Pennsylvania Avenue, N.W.         |
|                                      | Washington, D.C. 20460-0001            |

|                          |                             |
|--------------------------|-----------------------------|
| Copy by first class mail | Carol Lee Rawn              |
|                          | Conservation Law Foundation |
|                          | 62 Summer Street            |
|                          | Boston, MA 02110            |

|                          |  |
|--------------------------|--|
| Copy by first class mail | Ralph A. Child                                     |
|                          | Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C. |
|                          | One Financial Center                               |
|                          | Boston, MA 02111                                   |

Dated: February 28, 2007

