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15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN FRANCISCO DIVISION

18 BAYVIEW HUNTERS POINT COMMUNITY)	Case No. C-01-2348-PJH
19 ADVOCATES; COMMUNITIES FOR A BETTER)	
20 ENVIRONMENT; OUR CHILDREN'S EARTH)	FIRST AMENDED COMPLAINT
FOUNDATION,)	[Clean Air Act Citizen Suit;
Plaintiffs,)	California Environmental Quality Act;
v.)	California Unfair Practices Act]
21)	
22 MIRANT POTRERO, LLC, BAY AREA AIR)	
23 QUALITY MANAGEMENT DISTRICT, and Ellen)	
Garvey, in her official capacity as the Air Pollution)	
24 Control Officer of the Bay Area Air Quality)	
Management District,)	
Defendants.)	

1 Plaintiffs Bayview Hunters Point Community Advocates, Communities for a Better
2 Environment and Our Children's Earth Foundation allege as follows:

3 INTRODUCTION

4 1. This is a citizen suit brought pursuant to section 304(a)(3) of the Clean Air Act ("Clean
5 Air Act" or "Act"), 42 U.S.C. § 7604(a)(3), by Bayview Hunters Point Community Advocates,
6 Communities for a Better Environment and Our Children's Earth Foundation ("Plaintiffs") against
7 Mirant Potrero, LLC ("Mirant"), for violations of the Act. Plaintiffs also bring suit against the Bay Area
8 Air Quality Management District ("BAAQMD") and its Air Pollution Control Officer ("APCO") Ellen
9 Garvey (collectively, "BAAQMD" in reference to Clean Air Act causes of actions) for violations of the
10 Clean Air Act and against BAAQMD for violations of the California Environmental Quality Act
11 ("CEQA"), Cal. Pub. Res. Code § 21000 *et seq.*

12 2. Mirant (formerly Southern Energy Company) operates three 52 megawatt peakers fired
13 by distillate or fuel oil ("Peakers") at its power plant located at 1201 Illinois Street, in the Potrero
14 neighborhood in the Southeast area of San Francisco, California ("Potrero Power Plant"), with over
15 99,000 residents within its two-mile radius and 70 schools within its three-mile radius. The Peakers,
16 each with two turbines, are permitted under the Act to operate no more than 877 hours per year per
17 turbine. Mirant's predecessor sought this limit on the hours of operation to avoid installing state-of-the-
18 art pollution control equipment and providing emission offsets, both of which would have been required
19 if the Peakers were allowed to operate without such limits.

20 3. On March 30, 2001, BAAQMD and Mirant entered into an agreement eliminating the
21 877 hour permit limit without any requirement for Mirant to obtain permits or emission offsets and to
22 install additional pollution control equipment, as mandated by the Clean Air Act's Prevention of
23 Significant Deterioration ("PSD") and New Source Review ("NSR") provisions. Operation of the
24 Peakers beyond the permitted limit, without additional pollution control equipment and emission offsets,
25 will result in increased emissions of nitrogen oxides, particulate matter, sulfur dioxide, and carbon
26

1 monoxide, as well as cancer-causing chemicals, such as benzene, formaldehyde, dioxin, and hexavalent
2 chromium and other toxins, including mercury, nickel, and lead.

3 4. In allowing Mirant to operate its Peakers beyond the 877 hour permit limit, BAAQMD
4 failed to comply with several provisions of the Clean Air Act. In so allowing Mirant, BAAQMD also
5 failed to comply with the requirements of CEQA, which was designed to facilitate, and indeed require,
6 public involvement in government decision-making that affects the environment. CEQA requires that,
7 before a government agency approves a project that may impact the environment, the public must first be
8 allowed to review and comment on the proposed project's likely environmental impacts. CEQA also
9 requires the government agency to consider alternatives to the project and to require all feasible
10 measures to mitigate any adverse environmental impacts. CEQA was designed to prohibit backroom
11 deals between government and industry by bringing the permit approval process under public scrutiny.
12 BAAQMD entered into a backroom deal with Mirant and then failed to open the deal up to public
13 scrutiny.

14 5. Plaintiffs thus seek an injunction, pursuant to the Clean Air Act, CEQA, and the
15 California Unfair Business Practices Act, Cal. Bus. & Prof. Code § 17200 *et seq.*, to stop Mirant from
16 exceeding the permitted limits on the hours of operation of the Peakers, unless and until Mirant applies
17 for and obtains the permits required by the PSD and NSR provisions of the Clean Air Act, 42 U.S.C.
18 §§ 7475 and 7503. Among other things, such permits would require Mirant to apply the most stringent
19 pollution controls on the Peakers as well as to provide sufficient offsetting emissions reductions to equal
20 or exceed the emissions increase. *Id.* at §§ 7475, 7503. Plaintiffs also seek an assessment of civil
21 penalties under the Clean Air Act and additional relief under the California Unfair Business Practices
22 Act against Mirant and a declaration that exceeding the permitted hours of operation, without permits
23 required by the Clean Air Act, constitutes a violation of the Clean Air Act and the California Unfair
24 Business Practices Act. Plaintiffs further seek an injunction requiring BAAQMD to rescind its
25 agreement with Mirant, unless and until the requirements of the Clean Air Act and CEQA have been
26 satisfied, and Plaintiffs seek an assessment of civil penalties against BAAQMD.

JURISDICTION

1
2 6. This Court has jurisdiction over the subject matter of this action pursuant to section 304
3 of the Act, 42 U.S.C. § 7604, and 28 U.S.C. §§ 1331 (federal question), 1367 (supplemental
4 jurisdiction), 2201 (declaratory relief), and 2202 (injunctive relief).

5 7. Section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1), authorizes citizen suits against
6 “any person (including . . . any other governmental instrumentality or agency to the extent permitted by
7 the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that
8 the alleged violation has been repeated) or to be in violation of . . . an emission standard or limitation
9 under [the Act.]” On June 19, 2001, Plaintiffs gave notice to Mirant, BAAQMD, EPA and the State of
10 California of Plaintiffs’ intent to file suit against Mirant and BAAQMD for violations of emission
11 standards and limitations under the Act. Copies of the notices concerning the violations of Mirant and
12 BAAQMD are attached hereto as Exhibits A and B, respectively. More than sixty days have passed
13 since Plaintiffs provided such notices, and neither EPA nor the State of California has commenced and is
14 diligently prosecuting a civil action in a court of the United States or a State to require compliance with
15 the emission standards and limitations.

16 8. Section 304(a)(3) of the Act, 42 U.S.C. § 7604(a)(3), also authorizes citizen suits
17 against “any person who proposes to construct or constructs any new or modified major emitting
18 facility” without the permits required by the new source review and prevention of significant
19 deterioration provisions of the Act.

VENUE

20
21 9. Venue is proper in this judicial district pursuant to section 304 of the Act, 42 U.S.C.
22 § 7604, and 28 U.S.C. § 1391(b) and (e) because a substantial part of the events or omissions giving rise
23 to the claim occurred within this district, and Plaintiffs reside in this district.
24
25
26

1 increased operations. CBE's organizational goals include protecting and enhancing the environment and
2 public health by reducing air pollution in California's urban areas. CBE works with ethnically and
3 economically diverse residents, community groups, labor organizations and other environmental groups
4 to prevent air and water pollution, eliminate toxic hazards and improve public health. CBE has been
5 extremely active in air quality issues in the Bay Area for over twenty years.

6 13. Our Children's Earth Foundation ("OCE") is a non-profit public benefit corporation
7 organized under the laws of the State of California with its principal place of business in San Francisco,
8 California. OCE is dedicated to protecting the public, especially children, from the health impacts of
9 pollution and other environmental hazards and to improving environmental quality for the public benefit.
10 One of OCE's missions is to enforce environmental laws, both federal and state, to reduce pollution and
11 to educate the public concerning those laws and their enforcement. In furtherance of this mission, OCE
12 has actively participated in proceedings related to activities affecting air quality throughout the State of
13 California, including (1) monitoring hearings before BAAQMD, in particular relating to applications
14 submitted by sources of air pollution for variances from the requirements of the federal and state air
15 laws; (2) providing comments to BAAQMD on the 2000 Clean Air Plan; (3) providing comments to
16 BAAQMD concerning proposed issuance of federal operating permits to sources and certifications
17 required to be submitted by certain sources of air pollution; and (4) devising specific strategies to control
18 harmful emissions from mobile sources.

19 14. Plaintiffs' members live, work, recreate and breath the air in the Bay Area and in San
20 Francisco, in specific. Many members live in the immediate vicinity of Mirant's Potrero Power Plant.
21 Interests of Plaintiffs' members have been and continue to be harmed by Defendants' violations of the
22 Clean Air Act.

23 15. The conservational, environmental and economic interests, including the aesthetic
24 interests in the Bay Area environment, as well as health, wellbeing and enjoyment of Plaintiffs' members
25 have been, and continue to be threatened, by Mirant's proposal to operate, and operation of, its Peakers
26 in violation of the Clean Air Act and BAAQMD's violation of the Act in affirmatively allowing Mirant

1 to proceed with such proposal and operation. Plaintiffs' members have been and will continue to be
2 harmed by the air pollution from and health risks caused by the operation of the Peakers in excess of the
3 permit limit without additional pollution controls. They are already exposed to air in the Bay Area that
4 does not meet the national ozone standard established under the Clean Air Act to protect public health.
5 Mirant's excess emissions of nitrogen oxides ("NOx") is contributing to the Bay Area's ozone problem
6 because NOx is an ozone precursor. Ozone can cause acute respiratory problems, aggravate asthma,
7 cause significant temporary decreases in lung function of 15 to over 20 percent in some healthy adults,
8 cause inflammation of lung tissue, cause changes in lung tissue, and impair the body's immune system
9 defenses, making people more susceptible to respiratory illnesses, and may cause hospital admissions
10 and emergency room visits. Many of Plaintiffs' members live, work, recreate and breathe the air in the
11 Potrero and Hunters Point neighborhoods, where the emissions from the Peakers are having the most
12 immediate impacts. Plaintiffs' members in the Bayview Hunters Point neighborhood already suffer from
13 excessive health risks resulting from the concentration of pollution sources in the neighborhood that emit
14 ozone precursors and carcinogens.

15 16. A secondary impact of the Peakers operating beyond the 877 hour permit limit that may
16 be even more serious from a public health standpoint are additional emissions of fine particulate matter,
17 PM₁₀, and toxic chemicals. PM₁₀ can cause negative effects on respiratory systems, aggravation of
18 existing respiratory and cardiovascular disease, alteration of the body's defense systems against foreign
19 materials, damage to lung tissue, carcinogenesis and premature death. The elderly, children and people
20 with chronic obstructive pulmonary or cardiovascular disease, influenza or asthma are especially
21 sensitive to the effects of PM₁₀. The Bayview Hunters Point neighborhood in Southeast area of San
22 Francisco has the highest rate of childhood asthma hospitalization in the state of California. PM₁₀ can
23 also serve as a carrier for a variety of toxic metals and compounds.

24 17. In addition, because Mirant failed to apply for and obtain the necessary permits under
25 the Clean Air Act, and because BAAQMD affirmatively, although illegally, allowed Mirant to bypass
26 the permit process, which includes public notice, public hearings, and public comment. Plaintiffs'

1 thousands of members living, working and breathing the air in the Bay Area were denied their right to
2 participate fully and meaningfully in the permitting process for the Peakers. As a direct result of
3 Mirant's failure to comply with, and BAAQMD's affirmative action not to require, the permitting
4 process, Mirant is emitting and will continue to emit pollutants in excess of the allowed levels, without
5 installing pollution control equipment.

6 18. The interests Plaintiffs seek to further in this action under the Clean Air Act, namely,
7 the protection and improvement of air quality, are within the purposes and goals of each organization.
8 Plaintiffs bring the Clean Air Act claims in this action on behalf of their members who would have
9 standing to sue in their own right. Their individual participation, however, is not necessary for a just
10 resolution of this case.

11 19. Should the Court grant the injunctive and declaratory relief requested by Plaintiffs
12 against Mirant and BAAQMD in the present action, the harm to Plaintiffs' interests will be redressed
13 because, among other things, Mirant will not be allowed to emit excess pollution without additional
14 pollution controls and BAAQMD will be required to carry out its duty under the Clean Air Act to require
15 compliance with, and implement, the federal requirements for the attainment of federal ozone standards,
16 among other things. An assessment of civil penalties for Mirant's and BAAQMD's Clean Air Act
17 violations alleged in this complaint will also redress the harms to Plaintiffs' interests by deterring
18 Mirant, BAAQMD, and others, from future violations of the Act.

19 20. Defendant Mirant is a Delaware limited liability corporation. Mirant owns and operates
20 the Potrero Power Plant, which is within the jurisdiction of BAAQMD.

21 21. Defendant BAAQMD is a regional government agency created by the California
22 Legislature in 1955. BAAQMD has authority to develop and enforce regulations for the control of air
23 pollution within its jurisdiction. BAAQMD's jurisdiction encompasses seven counties – Alameda,
24 Contra Costa, Marin, San Francisco, San Mateo, Santa Clara and Napa, and portions of two others –
25 southwestern Solano and southern Sonoma.

26 22. Defendant Ellen Garvey is the APCO of BAAQMD and is sued in her official capacity.

1 The Health and Societal Costs of Ozone Pollution

2 28. Ozone, the principal element of smog, is a secondary pollutant produced when two
3 precursor air pollutants - volatile organic compounds (“VOCs”) and NOx - react in sunlight.

4 29. The human health and associated societal costs from ozone pollution are extreme:

5 A large body of evidence shows that ozone can cause harmful respiratory effects,
6 including chest pain, coughing and shortness of breath, which affect people with
7 compromised respiratory systems most severely. When inhaled, ozone can cause
8 acute respiratory problems; aggravate asthma; cause significant temporary
9 decreases in lung function of 15 to over 20 percent in some healthy adults; cause
10 inflammation of lung tissue, produce changes in lung tissue and structure; may
11 increase hospital admissions and emergency room visits; and impair the body's
12 immune system defenses, making people more susceptible to respiratory illnesses.

13 66 Fed. Reg. 5002, 5012 (Jan. 18, 2001). Moreover, ozone strikes the most vulnerable segments of our
14 population the hardest: children, the elderly, and people with respiratory ailments. Id. Children are at
15 greater risk because their lung capacity is still developing, because they spend significantly more time
16 outdoors than adults – especially in the summertime when ozone levels are the highest, and because they
17 are generally engaged in relatively intense physical activity that causes them to breathe more ozone
18 pollution. Id.

19 30. Ozone has severe impacts on millions of Americans with asthma. See 66 Fed. Reg. at
20 5012. Moreover, the impacts of ozone on “asthmatics are of special concern particularly in light of the
21 growing asthma problem in the United States and the increased rates of asthma-related mortality and
22 hospitalizations, especially in children in general and black children in particular.” 62 Fed. Reg. 38856,
23 38864 (July 18, 1997). In fact:

24 [A]sthma is one of the most common and costly diseases in the United States. . . .
25 Today, more than 5 percent of the US population has asthma [and] [o]n average
26 **15 people died every day** from asthma in 1995. . . . In 1998, the cost of asthma to
the U.S. economy was estimated to be \$11.3 billion, with hospitalizations
accounting for the largest single portion of the costs.

66 Fed. Reg. at 5012 (emphasis added). The health and societal costs of asthma are wreaking havoc here
in California. There are currently 2.2 million Californians suffering from asthma. See California
Department of Health Services, California County Asthma Hospitalization Chart Book, 1 August 2000.
In 1997 alone, nearly 56,413 residents, including 16,705 children, required hospitalization because their

1 asthma attacks were so severe. Asthma is now the leading cause of hospital admissions of young
2 children in California. Id. Combined with very real human suffering is the huge financial drain of
3 asthma hospitalizations on the state's health care system. The most recent data indicate that the
4 statewide financial cost of these hospitalizations was nearly \$350,000,000, with nearly a third of the bill
5 paid by the State Medi-Cal program. Id. at 4.

6 31. In the Bay Area, African-American children pay the highest price for ozone pollution.
7 Whereas the statewide asthma hospital discharge rate is an unacceptably high 216 per 100,000 children,
8 the rates for African-American children in the four most populous counties – Santa Clara, Alameda,
9 Contra Costa, and San Francisco counties – soar almost ten-fold to 2036, 1578, 1099 and 361,
10 respectively.

11 The Bay Area's Repeated Failures to Attain the Ozone Standard

12 32. The Bay Area has exceeded the national ozone standard in 29 of the 30 years since it
13 was promulgated by the EPA. After the Bay Area missed its first deadline for attaining that standard in
14 1975, the region was in 1978 formally designated by EPA as a nonattainment area – a designation that,
15 except for an erroneous and quickly reversed re-designation to attainment, continues to this day. See
16 generally, 66 Fed. Reg. 17379 (Mar. 30, 2001). The first inadequate plan for controlling ozone
17 pollution, the San Francisco Bay Area Air Quality Plan was adopted by the responsible local and State
18 agencies – MTC, BAAQMD, the Association of Bay Area Governments and the California Air
19 Resources Board (“CARB”) – in 1978 and was intended to achieve attainment by the next attainment
20 deadline, December 31, 1982.

21 33. When the region failed to meet that attainment deadline, EPA granted the maximum
22 extension authorized by the Clean Air Act, to December 31, 1987. See 48 Fed. Reg. 4075, 5075 (Feb. 3,
23 1983). In December 1982, the responsible agencies adopted the Bay Area Air Quality Plan (“1982
24 Plan”). The plan was formally submitted to EPA on February 4, 1983 and approved by EPA as part of
25 California's State Implementation Plan on January 27, 1984. See 48 Fed. Reg. 57,130 (Dec. 28, 1983).

1 34. When the Bay Area failed to attain by the 1987 deadline, EPA in 1988 formally found
2 that the 1982 Plan was substantially inadequate to bring the Bay Area into attainment with the national
3 ozone standard – and the responsible agencies back returned to the drawing board. See 59 Fed. Reg.
4 49361 (May 26, 1994).

5 35. In 1989, because BAAQMD and MTC were not even carrying out the 1982 Plan, CBE
6 and the Sierra Club filed suit and succeeded in forcing these agencies to implement many of the 1982
7 control measures. See CBE v. Deukmejian, 731 F.Supp. 1448, 1454 (N.D. Cal. 1990); CBE v. Wilson,
8 775 F.Supp. 1291, 1298 (N.D. Cal. 1991).

9 36. In 1993, BAAQMD and other agencies claimed that the Bay Area had reached
10 attainment with the national ozone standard and requested EPA to re-designate the region as an
11 attainment area. In June 1995, EPA re-designated the Bay Area and approved the Bay Area plan for
12 ozone. 60 Fed. Reg. 27,028 (May 22, 1995). However, less than forty-eight hours after the
13 redesignation became final, the Bay Area again exceeded the national ozone standard. That summer,
14 more than 32 exceedances were recorded at 15 different monitoring stations in the Bay Area. The re-
15 designation was obviously in error. The 1994 Maintenance Plan had clearly failed, and the Bay Area
16 was not in attainment with the national ozone standard as of the November 15, 1996 deadline.

17 37. When EPA again failed to take action, CBE and other plaintiffs formally petitioned
18 EPA to re-designate the Bay Area yet again. EPA granted the petition in 1998, restoring the Bay Area's
19 ozone non-attainment status. 63 Fed. Reg. 37,258 (July 10, 1998). At the same time, EPA demanded
20 that BAAQMD and the other agencies submit a plan by June 15, 1999 to bring the Bay Area into
21 attainment with the ozone standard by Nov. 15, 2000.

22 38. On August 13, 1999, CARB submitted to EPA the San Francisco Bay Area Ozone
23 Attainment Plan ("1999 Attainment Plan") developed by BAAQMD and the other agencies. Once again,
24 the Bay Area's attainment deadline came and went without attainment of the ozone standard. On
25 January 8, 2001, CBE and Bayview Hunters Point Community Advocates, later joined by OCE, brought
26 an enforcement action to force EPA to take action on the 1999 Attainment Plan. See Bayview Hunters

1 Point Community Advocates et. al v. Whitman, No. C-01-0050 TEH (N.D. Cal. filed Jan. 8, 2001).

2 After suit was filed, EPA published a proposed rulemaking doing exactly that. It has now entered into a
3 proposed consent decree committing to a deadline to finalize the disapproval. 66 Fed. Reg. at 17381.

4 Clean Air Act – Statutory and Regulatory Background: General Provisions

5 39. The Clean Air Act, 42 U.S.C. §§ 7401-7671q, enacted in 1970 and amended in 1977
6 and 1990, establishes a comprehensive program to “protect and enhance the quality of the Nation’s air
7 resources so as to promote the public health and welfare and the productive capacity of its population,”
8 42 U.S.C. § 7401(b)(1). This program is founded on shared federal and state responsibility.

9 40. Sections 108 and 109 of the Act require the U.S. EPA to establish, review, and revise
10 nationally applicable standards for a small class of common air pollutants, called the NAAQS. 42
11 U.S.C. § 7408-7409. The NAAQS establish permissible concentrations of those pollutants in the
12 “ambient,” or outside, air.

13 41. Section 110 of the Act, 42 U.S.C. § 7410, in turn requires each state to adopt, and
14 submit to EPA for approval, a plan for the implementation, maintenance, and enforcement of the
15 NAAQS in each air quality control region within the state. These plans are known as State
16 Implementation Plans (“SIPs”).

17 42. Among other things, SIPs contain controls on individual sources of air pollution as
18 necessary to attain and maintain the NAAQS. 42 U.S.C. § 7410. SIPs approved by the EPA become
19 federal law. Thus, violations of SIP requirements applicable to state agencies and individual sources of
20 air pollution are subject to enforcement by the United States as well as by citizens.

21 Clean Air Act: Nonattainment Provisions

22 43. In addition to requiring all reasonably available control measures on existing sources,
23 42 U.S.C. § 7502(c)(1), the Act requires SIPs in nonattainment areas to include a permit program for the
24 construction and operation of new or modified major stationary sources. 42 U.S.C. §§ 7410(a)(2)(C);
25 7502(c)(5). The Act imposes more stringent regulatory requirements for such new or modified sources.
26 Part D of Title I of the Act, 42 U.S.C. §§ 7501-7508. The purpose of these new source review or NSR

1 provisions is to ensure that air pollution control districts determine, prior to construction or modification,
2 whether such activity will interfere with the attainment of the NAAQS. 42 U.S.C. §§ 7502(c)(4);
3 7503(a)(1)(A); 40 C.F.R. § 51.160(a), (b). New source permits may only be issued, for example, if “the
4 proposed source is required to comply with the lowest achievable emission rate,” there are sufficient
5 reductions (or offsets) in emissions from the source or elsewhere to result in a net air quality benefit, and
6 the source is in compliance with all applicable emission limitations and standards. 42 U.S.C.
7 §§ 7502(c)(5), 7503(a).

8 44. One of the national standards that EPA sets for protection of public health is the
9 maximum acceptable limits for ozone. See 40 C.F.R. § 81.305. Ground-level ozone is formed when
10 emissions of NO_x and VOCs mix in heat and sunlight. The health effects of ozone at levels above the
11 national ozone standard include coughing, throat irritation, shortness of breath, chest pain, inflammation
12 of and damage to the lining of the lung and increased frequency and severity of asthma attacks. Lung
13 damage caused by exposure to ozone may be permanent. While asthmatics, children, the elderly and
14 persons with respiratory illnesses are particularly vulnerable, even healthy adults who exercise or work
15 vigorously outdoors are susceptible to adverse health effects from ozone exposure.

16 45. BAAQMD is in an area in which the national standard for ozone has not yet been
17 attained. 40 C.F.R. § 81.305.

18 46. Because the Bay Area is in a nonattainment area for federal ozone standards, the Bay
19 Area SIP, as required by the Act, contains an NSR program providing for preconstruction review. See
20 64 Fed. Reg. 3,850 (Jan. 26, 1999); 40 C.F.R. § 52.220(c)(199)(i)(A)(8).

21 47. BAAQMD’s federally approved NSR rules, which are part of the SIP, are contained in
22 Regulation 2, Rule 2 (“Rule 2-2”). Rule 2-2, in addition to containing SIP rules, incorporates by
23 reference 40 C.F.R. § 51.165, federal regulations promulgated by EPA governing requirements for
24 preconstruction review. Rules 2-2-101, 2-2-314.

25 48. Under Rule 2-2, a “major modification” is defined as “[a]ny modification at an existing
26 major facility that the APCO [Air Pollution Control Officer] determines will cause an increase of the

1 facility's emissions by [40 tons of NOx per year]." Rule 2-2-221. A major modification includes any
2 change in the method of operation of a major stationary source that would result in such increases. 40
3 C.F.R. § 51.165(a)(1)(v)(A); see Rule 2-2-223. The maximum potential emissions the operation of the
4 Peakers must be calculated, because Mirant and BAAQMD made an agreement that eliminated the 877
5 hour permit limit. Rule 2-2-604.

6 49. Before a source may make a major modification in the Bay Area, it must submit to
7 BAAQMD an application for and receive authority to construct ("ATC"). Rules 2-1-301 and 2-1-402
8 (Permits – General Requirements) (received final limited approval as a SIP rule, 63 Fed. Reg. at 3,850).

9 50. Before a source operates equipment the use of which may cause the emission of air
10 contaminants, the source must first apply for and obtain a permit to operate ("PTO"). Rules 2-1-302 and
11 2-1-402.

12 51. A modified major source is required to apply the Best Available Control Technology
13 ("BACT") if the modification results in an increase of certain air pollutants, including NOx, in excess of
14 10 pounds per highest day or a cumulative increase since April 5, 1991 of 10 pounds per highest day.
15 Rule 2-2-301. The BACT requirement is also triggered if cumulative increases of emissions of certain
16 air pollutants at the facility, including the increases resulting from the modification, since December 1,
17 1982 exceeds certain annual and/or daily amounts. Id. BACT is set to be equivalent to the "lowest
18 achievable emission rate" required by the Act to be achieved by modified major sources. Rule 2-2-206.

19 52. A modified major source is also required to provide emission offsets for the emission
20 from the modified source. Rule 2-2-302. Offsets are reductions equal to or greater than the emission
21 increases at the modified facility.

22 Clean Air Act: Prevention of Significant Deterioration Provisions

23 53. In an area for which the NAAQS have been attached, the Act requires a preconstruction
24 permit process for major sources or major modifications resulting in significant emissions of pollutants.
25 Part C of Title I of the Act, 42 U.S.C. §§ 7470-7479. (An area can be in attainment for one or more
26 pollutants for which the NAAQS have been established and in non-attainment for other such pollutants.)

1 The purpose of the prevention of significant deterioration or PSD provisions is to prevent degradation of
2 air that meets the national standards. 42 U.S.C. §§ 7470 and 7475(a). A PSD permit, which must be
3 obtained before a major modification, must require application of BACT for pollutants for which the
4 modification would result in a significant net emissions increase. *Id.* at § 7475(a)(4); 40 C.F.R.
5 §§ 52.21(i), 52.21(j)(3). For such pollutants, the permit applicant must also perform an analysis of
6 ambient air quality impacts in the area before a PSD permit can be obtained. 42 U.S.C. § 7475(a)(6); 40
7 C.F.R. § 52.21(m).

8 54. A “major modification” includes changes in the method of operation of a major
9 stationary source that would result in a significant net emissions increase of any pollutant subject to
10 regulation under the Act. 40 C.F.R. § 52.21(b)(2)(i).

11 55. “Significant” means a rate of emissions that would equal or exceed 100 tons per year
12 (“tpy”) of carbon monoxide (“CO”), 40 tpy of nitrogen oxides, 15 tpy of particulate matter whose
13 aerodynamic size is less than or equal to 10 microns (“PM₁₀”), or 40 tpy of sulfur dioxide (“SO₂”).

14 56. BAAQMD is in an area in which the NAAQS for nitrogen dioxide, PM₁₀, sulfur
15 dioxide and carbon monoxide have each been deemed attained. 40 C.F.R. § 81.305. Sources within the
16 jurisdiction of BAAQMD therefore must comply with PSD provisions of the Act, as set forth in 40
17 C.F.R. § 52.21(b)-(w), *id.* § 52.270(a), for any major modifications affecting carbon monoxide, nitrogen
18 oxides, PM₁₀ or sulfur dioxide.

19
20 **FIRST CLAIM**

21 [Violation of New Source Review Provisions of the Clean Air Act
22 – Against Mirant for Excess Emissions of NOx]

23 57. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 56, as though fully
24 alleged herein.

25 58. The citizen suit provision of the Clean Air Act authorizes any “person” to sue “any
26 [other] person who proposes to construct or constructs any new or modified major emitting facility
without a permit required under part C of subchapter I of [the Act] (relating to significant deterioration

1 of air quality) or part D of subchapter I of [the Act] (relating to nonattainment).” Section 304(a)(3) of
2 the Act, 42 U.S.C. § 7604(a)(3). Such a suit can proceed without any prior notice to the violator.

3 59. The Potrero Power Plant is an existing major facility as defined in section 302(j) of the
4 Act, 42 U.S.C. § 7602(j).

5 60. Mirant proposes to construct or is constructing a major modification within the meaning
6 of Part D of subchapter I of the Act because operating the Peakers, and each of them, without the 877
7 hour permit limit, will cause an increase of the emissions of a major existing facility of at least 40 tons
8 of NOx per year and at least 10 pounds of NOx per highest day.

9 61. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
10 \$27,500 per day for each day that it has failed to apply BACT at the Peakers, for each day that it has
11 failed to provide offsets for excess emissions of NOx from the Peakers, and for each day that it has
12 failed to apply for and obtain the NSR permit as required by the Act, including failing to supply the
13 information required in the permit application.

14 62. Unless ordered by this Court, Mirant will continue to violate Part D of subchapter I of
15 the Clean Air Act by proposing to modify and modifying its existing major facility without obtaining a
16 NSR permit required by the Act and without applying BACT at the Peakers, and each of them, and
17 without providing emission offsets.

18
19 **SECOND CLAIM**

20 [Violation of SIP Provision: BAAQMD Rule 2-1-301, Authority To Construct;
21 - Against BAAQMD and Mirant]

22 63. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 62, as though fully
23 alleged herein.

24 64. Section 304(a)(1) of the Act authorizes citizen suits against “any person (including...
25 any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to
26 the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been

1 repeated) or to be in violation of ... an emission standard or limitation under [the Act].” 42 U.S.C.
2 §7604(a)(1). An emission standard or limitation includes permit conditions or requirements and “any
3 other standard [or] limitation established... under any applicable State implementation plan approved by
4 the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of
5 operations.” 42 U.S.C. § 7604(f)(1), (3) and (4).
6

7 65. The operation of the Peakers, without the 877 hour permit limit, will result in an
8 increase of the emissions of a major existing facility of at least 40 tons of NOx per year and at least 10
9 pounds of NOx per highest day.

10 66. BAAQMD Regulation 2, Rule 1-301 (“Rule 2-1-301”) requires the acquisition of an
11 Authority to Construct (“ATC”) before any modification may occur. Rule 2-1-301 provides,

12 Any person who, after July 1972, builds, erects, installs, **modifies**, alters or
13 replaces any article, machine, equipment or other contrivance, the use of which
14 may cause, reduce or control the emission of air contaminants, **shall first secure**
15 **written authorization from the APCO in the form of an authority to**
16 **construct**. Routine repairs, maintenance, or cyclic maintenance that includes
replacement of components with identical or equivalent equipment is not
considered to be an alteration, modification or replacement for the purpose of this
section. (Emphasis added.)

17 67. The operation of the Peakers, and each of them, without restriction on the number of
18 hours is a “major modification” under BAAQMD Rule 2-2-221 if the APCO determines that the “change
19 will cause an increase of the facility’s emissions by [40 tons of NOx per year].”

20 68. The operation of the Peakers, and each of them, beyond the permit limitation on hours
21 is a modification that requires written authorization from the APCO in the form of an ATC. After
22 Mirant entered into the agreement with BAAQMD purportedly allowing Mirant to exceed the hours of
23 operation of the Peakers, Mirant has operated the Peakers in such a manner to result in increased
24 emissions of regulated air contaminants.
25
26

1 75. Before operating the Peakers, and each of them, beyond the 877-hour permit limit,
2 Mirant must obtain a Permit to Operate under Rule 2-1-302. BAAQMD Regulation 2, Rule 1-302
3 (“Rule 2-1-302”) provides,

4 Before any person, as described in Section 2-1-401 (“any person who has secured
5 an authority to construct shall secure a permit to operate”), uses or operates any
6 article, machine, equipment or other contrivance, the use of which may **cause**,
7 reduce or control **the emission of air contaminants**, such person shall first secure
written authorization from the APCO in the form of a permit to operate.
(Emphasis added.)

8 76. BAAQMD Rule 2-1-301 requires that BAAQMD issue a PTO before a source proceeds
9 with any modification that will cause an increase of the facility’s emissions. This requirement was not
10 met prior to the issuance of the agreement between BAAQMD and Mirant purportedly allowing Mirant
11 to exceed the hours of operation of the Peakers. By failing to require Mirant to follow the appropriate
12 procedure before authorizing the operation of the Peakers, and each of them, BAAQMD is in violation
13 of Rule 2-1-302, and thus the Clean Air Act pursuant to section 304(a)(1). 42 U.S.C. § 7604(a)(1).

14 77. By operating the Peakers, and each of them, without obtaining a Permit to Operate
15 (“PTO”) as required by Rule 2-1-302, Mirant has violated and is in violation of the Rule and thus the
16 Clean Air Act pursuant to section 304(a)(1). Id.

17 78. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
18 \$27,500 per day for each day that it has failed to apply for and obtain the PTO. 42 U.S.C. § 7604(a).
19 BAAQMD is also liable for civil penalties of up to \$27,500 per day for each day that it has failed to
20 require a PTO. Id.

21 79. Unless ordered by this Court, Mirant and BAAQMD will continue to violate Rule 2-1-
22 302, and thus the Clean Air Act.
23
24
25
26

FOURTH CLAIM

[Violation of Provision: BAAQMD Rule 2-1-402, Applications
- Against BAAQMD and Mirant]

80. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 79, as though fully alleged herein.

81. The operation of the Peakers, without the 877 hour permit limit will result in an increase of the emissions of a major existing facility of at least 40 tons of NOx per year and at least 10 pounds of NOx per highest day.

82. BAAQMD Regulation 2, Rule 1-402 ("Rule 2-1-402") provides,

Every application for an authority to construct or a permit to operate shall be submitted to the APCO on the forms specified, and shall contain all of the information required. Sufficient information must be received to enable the APCO to make a decision or a preliminary decision on the application and/or on any exemptions authorized by this Regulation. The APCO may consult with appropriate local and regional agencies to determine whether the application conforms with adopted plans and with local permit conditions.

83. Before operating the Peakers, and each of them, beyond the 877 hour permit limit, Mirant must obtain both an ATC and PTO under Rules 2-1-301 and 2-1-302. Pursuant to Rule 2-1-402, Mirant is required to supply the APCO with information on specified forms in order to acquire the ATC and PTO. In the absence of such information, the APCO is precluded from making an affirmative decision on the modification.

84. Mirant did not submit the appropriate forms to the APCO. Operation of the Peakers, and each of them, beyond the 877 hour permit limit without the submission of applications for an ATC and PTO as required pursuant to Rule 2-1-402 constitutes a violation of Rule and thus the Clean Air Act pursuant to section 304(a)(1). 42 U.S.C. § 7604(a)(1).

85. BAAQMD Rule 2-1-402 requires that BAAQMD review applications for an ATC and PTO before a source proceeds with any modification that will cause an increase of the facility's emissions. This requirement was not met prior to the issuance of the agreement between BAAQMD and

1 Mirant purportedly allowing Mirant to exceed the hours of operation of the Peakers. By failing to
2 require Mirant to follow the appropriate procedure before authorizing the operation of the Peakers, and
3 each of them, BAAQMD is in violation of Rule 2-1-402, and thus the Clean Air Act pursuant to section
4 304(a)(1). Id.

5
6 86. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
7 \$27,500 per day for each day that it has failed to comply with BAAQMD Rule 2-1-402. 42 U.S.C.
8 § 7604(a). BAAQMD is also liable for civil penalties of up to \$27,500 per day for each day that it has
9 failed to require compliance with BAAQMD Rule 2-1-402. Id.

10 87. Unless ordered by this Court, Mirant and BAAQMD will continue to violate the SIP,
11 and thus the Clean Air Act.

12 **FIFTH CLAIM**

13 [Violation of SIP Provision: BAAQMD Rule 2-2-301,
14 Best Available Control Technology Requirement
15 - Against BAAQMD and Mirant]

16 88. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 87, as though fully
17 alleged herein.

18 89. The operation of the Peakers, without the 877 hour permit limit will result in an
19 increase of the emissions of a major existing facility of at least 40 tons of NOx per year and at least 10
20 pounds of NOx per highest day.

21 90. BAAQMD Regulation 2, Rule 2-301 ("Rule 2-2-301") requires the implementation of
22 the Best Available Control Technology ("BACT") before a modification such as the change in operation
23 of the Peakers may occur. Rule 2-2-301 provides,

24 An applicant for an authority to construct or a permit to operate shall apply BACT
25 to any new or modified source; (1) Which results in an increase in emissions from
26 a modified source of precursor organic compounds, non-precursor organic
compounds, nitrogen oxides, sulfur dioxide, PM10 or carbon monoxide in excess
of 10 pounds per highest day.

1 91. Before operating the Peakers, and each of them, beyond the 877-hour annual limit,
2 Mirant must apply BACT, described at Rule 2-2-206 as,

3 the more stringent of (1) the most effective emission control device or technique which
4 has been successfully utilized for the type of equipment comprising the source; or (2) the
5 most stringent emission limitation achieved by an emission control device or technique...
6 ; or (3) any emission control device or technique determined to be technologically
feasible and cost-effective by the APCO; or (4) the most effective emission control
limitation for the type of equipment... which the EPA states, prior to or during the public
comment period, is contained in an approved implementation plan of any state.

7 92. Mirant's failure to implement BACT before proceeding to operate the Peakers, and
8 each of them, without operating limitations is a violation of Rule 2-2-301, and thus a violation of the
9 Clean Air Act pursuant to section 304(a)(1). 42 U.S.C. § 7604(a)(1).

10 93. BAAQMD Rule 2-2-301 requires that BAAQMD require the implementation of BACT
11 before a source proceeds with any modification that will cause an increase of the facility's emissions.
12 This requirement was not met prior to the issuance of the agreement between BAAQMD and Mirant
13 purportedly allowing Mirant to exceed the permitted hours of operation of the Peakers. By failing to
14 require Mirant to follow the appropriate procedure before authorizing the operation of the Peakers, and
15 each of them, BAAQMD is in violation of Rule 2-2-302, and thus the Clean Air Act pursuant to section
16 304(a)(1). 42 U.S.C. § 7604(a)(1).

17 94. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
18 \$27,500 per day for each day that it has failed to install BACT. Id. at § 7604(a). BAAQMD is also
19 liable for civil penalties of up to \$27,500 per day for each day that it has failed to require BACT. Id.

20 95. Unless ordered by this Court, Mirant and BAAQMD will continue to violate Rule 2-2-
21 301 and the Clean Air Act.
22
23
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SIXTH CLAIM

[Violation SIP Provision, BAAQMD Rule 2-2-302: Offset Requirements,
Precursor Organic Compounds and Nitrogen Oxides
- Against BAAQMD and Mirant]

96. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 95, as though fully
alleged herein.

97. The operation of the Peakers, without 877 hour permit limit will result in an increase of
the emissions of a major existing facility of at least 40 tons of NOx per year and at least 10 pounds of
NOx per highest day. A facility must offset the increased emissions resulting from a modification by
providing alternate control measures at the site at a ratio to decrease or cancel out the emissions resulting
from the modification.

98. BAAQMD Regulation 2, Rule 2-302 ("Rule 2-2-302") sets the guidelines for the
required offsets. Rule 2-2-302 provides,

[B]efore the APCO may issue an authority to construct or permit to operate for a
new or modified source at a facility which emits 50 tons per year or more or will
be permitted to emit 50 tons per year or more, on a pollutant specific basis, or
precursor organic compounds or nitrogen oxides, federally enforceable emission
offsets shall be provided, for the emission from the new or modified source and
any pre-existing cumulative increase, minus any onsite contemporaneous emission
reduction credits... at a 1.15 to 1.0 ratio.

99. Operation of the Peakers, and each of them, beyond the 877 hour permit limit without
the implementation of emission offsets will result in significant increase in emissions of air
contaminants. Mirant's failure to provide emission offsets within the facility is a violation of Rule 2-2-
302 and thus a violation of the Clean Air Act. 42 U.S.C. § 7604(a)(1).

100. BAAQMD Rule 2-2-302 requires that BAAQMD require the implementation of
sufficient emissions offsets before a source proceeds with any modification that will cause an increase of
the facility's emissions. This requirement was not met prior to the issuance of the agreement between
BAAQMD and Mirant purportedly allowing Mirant to exceed the hours of operation of the Peakers. By

1 failing to require Mirant to follow the appropriate procedure before authorizing the operation of the
2 Peakers, and each of them, BAAQMD is in violation of Rule 2-2-302, and thus the Clean Air Act
3 pursuant to section 304(a)(1). Id.

4 101. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
5 \$27,500 per day for each day that it failed to obtain sufficient emission offsets. Id. at § 7604(a).
6 BAAQMD is also liable for civil penalties of up to \$27,500 per day for each day that it has failed to
7 require Mirant to obtain sufficient emission offsets. Id.

8 102. Unless ordered by this Court, Mirant and BAAQMD will continue to violate the
9 emission standard in the Rule, and thus the Clean Air Act.
10

11
12 **SEVENTH CLAIM**

13 [Violation of Prevention of Significant Deterioration Provisions of the Clean Air Act
14 – Against Mirant for Excess Emissions of NOx]

15 103. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 102, as though
16 fully alleged herein.

17 104. Mirant proposes to construct or is constructing a major modification within the meaning
18 of Part C of subchapter I of the Clean Air Act because operating the Peakers, and each of them, without
19 the 877 hour permit limit will result in a major modification with a net emissions increase at a major
20 existing facility of at least 40 tons of nitrogen oxides per year in the form of NOx.

21 105. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
22 \$27,500 per day for each for each day that it has failed to apply BACT for excess emissions of NOx
23 from the Peakers and for each day that it has failed to apply for and obtain the PSD permit as required by
24 the Act, including failing to supply the information required in the permit application.

25 106. Unless ordered by this Court, Mirant will continue to violate Part C of subchapter I of
26 the Clean Air Act by proposing to modify and modifying its existing major facility without applying for

1 and obtaining a PSD permit, which permit process would require, among other things, application of
2 BACT at the Peakers, and each of them, and an air quality impact analysis.

3 **EIGHTH CLAIM**

4 [Violation of Prevention of Significant Deterioration Provisions of the Clean Air Act
5 – Against Mirant for Excess Emissions of CO]

6 107. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 106, as though
7 fully alleged herein.

8 108. CO is a colorless, odorless, poisonous gas. CO, if inhaled, enters the bloodstream and
9 reduces oxygen delivery to the body's organs and tissues. The health threat from CO is most serious to
10 those who suffer from cardiovascular disease. At higher levels of exposure, healthy individuals are also
11 affected.

12 109. Mirant proposes to construct or is constructing a major modification within the meaning
13 of Part C of subchapter I of the Clean Air Act because operating the Peakers, and each of them, without
14 the 877 hour permit limit will result in a major modification with a net emissions increase at a major
15 existing facility of at least 100 tons of CO per year.

16 110. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
17 \$27,500 per day for each day that it has failed to apply BACT for excess emissions of CO from the
18 Peakers and for each day that it has failed to apply for and obtain the PSD permit as required by the Act,
19 including failing to supply the information required in the permit application.

20 111. Unless ordered by this Court, Mirant will continue to violate Part C of subchapter I of
21 the Clean Air Act by proposing to modify and modifying its existing major facility without applying for
22 and obtaining a PSD permit, which permit process would require, among other things, application of
23 BACT at the Peakers, and each of them, and an air quality impact analysis.

24 **NINTH CLAIM**

25 [Violation of Prevention of Significant Deterioration Provisions of the Clean Air Act
26 – Against Mirant for Excess Emissions of PM₁₀]

112. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 111, as though
fully alleged herein.

1 113. PM₁₀ can cause negative effects on respiratory systems and aggravate existing
2 respiratory and cardiovascular disease. The elderly, children and people with chronic obstructive
3 pulmonary or cardiovascular disease, influenza or asthma are especially sensitive to the effects of PM₁₀.
4 In the Bay Area, the asthma hospital discharge rate among African American children climbs almost ten
5 times the national average. Plaintiffs' members are exposed to greater health risks resulting from
6 Mirant's operation of the Peakers in excess of the 877 hour permit limit, because of the increased
7 emissions of PM₁₀.

8 114. Mirant proposes to construct or is constructing a major modification within the meaning
9 of Part C of subchapter I of the Clean Air Act because operating the Peakers, and each of them, without
10 877 hour permit limit will result in a major modification with a net emissions increase at a major
11 existing facility of at least 15 tons of PM₁₀ per year.

12 115. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
13 \$27,500 per day for each day that it has failed to apply BACT for excess emissions of PM₁₀ from the
14 Peakers and for each day that it has failed to apply for and obtain the PSD permit as required by the Act,
15 including failing to supply the information required in the permit application.

16 116. Unless ordered by this Court, Mirant will continue to violate Part C of subchapter I of
17 the Clean Air Act by proposing to modify and modifying its existing major facility without applying for
18 and obtaining a PSD permit, which permit process would require, among other things, application of
19 BACT at the Peakers, and each of them, and an air quality impact analysis.

20 **TENTH CLAIM**

21 [Violation of Prevention of Significant Deterioration Provisions of the Clean Air Act
22 – Against Mirant for Excess Emissions of SO₂]

23 117. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 116, as though
24 fully alleged herein.

25 118. Exposure to high concentrations of SO₂ can adversely affect breathing and respiratory
26 and cardiovascular systems. Major subgroups of the population that are most sensitive to SO₂ include

1 asthmatics and individuals with cardiovascular disease or chronic lung disease as well as children and
2 the elderly.

3 119. Mirant proposes to construct or is constructing a major modification within the meaning
4 of Part C of subchapter I of the Clean Air Act because operating the Peakers, and each of them, without
5 the 877 hour permit limit will result in a major modification with a net emissions increase at a major
6 existing facility of at least 40 tons of SO₂ per year.

7 120. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
8 \$27,500 per day for each day that it has failed to apply BACT for excess emissions of SO₂ from the
9 Peakers and for each day that it has failed to apply for and obtain the PSD permit as required by the Act,
10 including failing to supply the information required in the permit application.

11 121. Unless ordered by this Court, Mirant will continue to violate Part C of subchapter I of
12 the Clean Air Act by proposing to modify and modifying its existing major facility without applying for
13 and obtaining a PSD permit, which permit process would require, among other things, application of
14 BACT at the Peakers, and each of them, and an air quality impact analysis.

15
16 **ELEVENTH CLAIM**

17 [Violation of SIP Provisions Governing NO_x Emissions
18 - Against BAAQMD and Mirant]

19 122. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 121, as though
20 fully alleged herein.

21 123. BAAQMD's Rule 9-9 (entitled, "Nitrogen Oxides from Stationary Gas Turbines") was
22 approved into the SIP by EPA in 1997. See 62 Fed. Reg. 65,611 (1997); 40 C.F.R.
23 § 52.220(c)(239)(i)(E)(1). The purpose of the Rule is to limit NO_x emissions from stationary gas
24 turbines.

25 124. Rule 9-9 prohibits a stationary gas turbine, which is not equipped with Selective
26 Catalytic Reduction ("SCR") and rated above 10 megawatts, from being operated unless NO_x emission

1 concentrations, corrected to 15% O₂ (dry basis) do not exceed 15 ppmv, unless the turbine operates less
2 than 877 hours per year, in which case the emission limit is higher. Rules 9-9-301.2 and 9-9-302.

3 125. Each turbine in each Peaker is identified by a Source number.

4 126. Source 12 lacks SCR, which is a type of pollution control equipment.

5 127. Source 12 is a stationary gas turbine governed by Rule 9-9-301.

6 128. Source 12 emits more than 15 ppmv of NO_x, corrected to 15% O₂ (dry basis).

7 129. On May 30, 2001, Source 12 reached and exceeded a total of 877 hours of operation in
8 2001. Since then Source 12 has exceeded the 877 hour permit limit on May 31, June 2 and June 10.

9 130. Mirant has thus violated and is in violation of Rule 9-9-301.2 at that Source.

10 131. By failing to require Mirant to follow the hour limitation in Rule 9-9-301.2, BAAQMD
11 is in violation of Rule 9-9-301.2 for Source 12, and thus the Clean Air Act pursuant to section 304(a)(1).

12 132. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
13 \$27,500 per day for each day that it has failed to comply with the emission limit set forth in Rule 9-9-
14 301.2 at Source 12. BAAQMD is also liable for civil penalties of up to \$27,500 per day for each day
15 that it has failed to require Mirant to comply with the emission limit set forth in Rule 9-9-301.2 at
16 Source 12.

17 133. Unless ordered by this Court, Mirant and BAAQMD will continue to violate Rule 9-9-
18 301.2 at Source 12.

19 **TWELFTH CLAIM**

20 [Violation of SIP Provisions Governing NO_x Emissions
21 – Against BAAQMD and Mirant]

22 134. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 133, as though
23 fully alleged herein.

24 135. Source 13 lacks SCR, which is a type of pollution control equipment.

25 136. Source 13 is a stationary gas turbine governed by Rule 9-9-301.

26 137. Source 13 emits more than 15 ppmv of NO_x, corrected to 15% O₂ (dry basis).

1 149. By failing to require Mirant to follow the hour limitation in Rule 9-9-301.2 for Source
2 14, BAAQMD is in violation of Rule 9-9-301.2, and thus the Clean Air Act pursuant to section
3 304(a)(1).

4 150. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
5 \$27,500 per day for each day that it has failed to comply with the emission limit set forth in Rule 9-9-
6 301.2 at the Peaker. BAAQMD is also liable for civil penalties of up to \$27,500 per day for each day
7 that it has failed to require Mirant to comply with the emission limit set forth in Rule 9-9-301.2 at
8 Source 14.

9 151. Unless ordered by this Court, Mirant and BAAQMD will continue to violate Rule 9-9-
10 301.2 at the Peaker.

11 **FOURTEENTH CLAIM**

12 [Violation of SIP Provisions Governing NOx Emissions
13 - Against BAAQMD and Mirant]

14 152. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 151, as though
15 fully alleged herein.

16 153. Source 15 lacks SCR, which is a type of pollution control equipment.

17 154. Source 15 is a stationary gas turbine governed by Rule 9-9-301.

18 155. Source 15 emits more than 15 ppmv of NOx, corrected to 15% O₂ (dry basis).

19 156. On May 20, 2001, Source 15 reached a total of 877 hours of operation in 2001. Since
20 then, Source 15 has exceeded the 877 hour permit limit on May 21-23, May 25, May 26, May 30, May
21 31, and June 2.

22 157. Mirant has thus violated and is in violation of Rule 9-9-301.2 at that Source.

23 158. By failing to require Mirant to follow the hour limitation in Rule 9-9-301.2 for Source
24 15, BAAQMD is in violation of Rule 9-9-301.2, and thus the Clean Air Act pursuant to section
25 304(a)(1).

26 159. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
\$27,500 per day for each day that it has failed to comply with the emission limit set forth in Rule 9-9-

1 301.2 at the Peaker. BAAQMD is also liable for civil penalties of up to \$27,500 per day for each day
2 that it has failed to require Mirant to comply with the emission limit set forth in Rule 9-9-301.2 at
3 Source 15.

4 160. Unless ordered by this Court, Mirant and BAAQMD will continue to violate Rule 9-9-
5 301.2 at the Peaker.

6 **FIFTEENTH CLAIM**

7 [Violation of Federal Operating (Title V) Permit
8 - Against Mirant]

9 161. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 160, as though
10 fully alleged herein.

11 162. Title V of the Clean Air Act establishes a comprehensive federal operating permitting
12 program for major sources of pollution, among others, to be administered by local air pollution control
13 districts. 42 U.S.C. §§ 7661-7661f. The federal operating permit, commonly known as a Title V permit,
14 is required to contain all applicable and enforceable air quality requirements, including SIP
15 requirements. Id. § 7661c(a).

16 163. In 1995, EPA granted BAAQMD interim approval to administer the federal operating
17 permit program. 60 Fed. Reg. 32,606 (June 23, 1995).

18 164. Pursuant to the federally approved program, BAAQMD issued Mirant a Title V permit
19 on September 14, 1998. Condition 15816 of the Title V permit requires Mirant to operate each Peaker
20 turbine no more than 877 hours in any calendar year.

21 165. Mirant has exceeded the 877 hour limit on the hours of operation at its Source No. 12
22 on the following dates in 2001: May 30, May 31, June 2 and June 10.

23 166. Mirant has violated and is in violation of Condition 15816 of the Title V permit for
24 Source 12, and thus, in violation of the Clean Air Act.

25 167. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
26 \$27,500 per day for each day that it has failed to comply with the emission limit set forth in Condition
15816 of the Title V permit.

1 168. Unless ordered by this Court, Mirant will continue to violate Condition 15816 of the
2 Title V permit.

3 **SIXTEENTH CLAIM**

4 [Violation of Federal Operating (Title V) Permit
5 – Against Mirant]

6 169. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 168, as though
7 fully alleged herein.

8 170. Pursuant to the federally approved program, BAAQMD issued Mirant a Title V permit
9 on September 14, 1998. Condition 15816 of the Title V permit requires Mirant to operate each Peaker
10 turbine no more than 877 hours in any calendar year. Mirant has exceeded the 877 hour permit limit at
11 its Source No. 13 on the following dates in 2001: May 19–23, May 25 –28, May 30, May 31, June 2,
12 and June 10.

13 171. Mirant has violated and is in violation of Condition 15816 of the Title V permit, in
14 violation of the Clean Air Act.

15 172. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
16 \$27,500 per day for each day that it has failed to comply with the emission limit set forth in Condition
17 15816 of the Title V permit.

18 173. Unless ordered by this Court, Mirant will continue to violate Condition 15816 of the
19 Title V permit.

20 **SEVENTEENTH CLAIM**

21 [Violation of Federal Operating (Title V) Permit
22 – Against Mirant]

23 174. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 173, as though
24 fully alleged herein.

25 175. Pursuant to the federally approved program, BAAQMD issued Mirant a Title V permit
26 on September 14, 1998. Condition 15816 of the Title V permit requires Mirant to operate each Peaker
turbine no more than 877 hours in any calendar year. Mirant has exceeded the 877 hour permit limit at

1 its Source No. 14 on the following dates in 2001: May 10, May 11, May 14-16, May 19-23, May 25,
2 May 26, May 30, May 31, and June 2.

3 176. Mirant has violated and is in violation of Condition 15816 of the Title V permit, in
4 violation of the Clean Air Act.

5 177. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
6 \$27,500 per day for each day that it has failed to comply with the emission limit set forth in Condition
7 15816 of the Title V permit.

8 178. Unless ordered by this Court, Mirant will continue to violate Condition 15816 of the
9 Title V permit.

10 **EIGHTEENTH CLAIM**

11 [Violation of Federal Operating (Title V) Permit
12 - Against Mirant]

13 179. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 178, as though
14 fully alleged herein.

15 180. Pursuant to the federally approved program, BAAQMD issued Mirant a Title V permit
16 on September 14, 1998. Condition 15816 of the Title V permit requires Mirant to operate each Peaker
17 turbine no more than 877 hours in any calendar year. Mirant has exceeded the 877 hour permit limit at
18 its Source No. 15 on the following dates in 2001: May 20 – 23, May 25, May 26, May 30, May 31, and
19 June 2.

20 181. Mirant has violated and is in violation of Condition 15816 of the Title V permit, in
21 violation of the Clean Air Act.

22 182. Pursuant to section 304(a) of the Act, Mirant is liable for civil penalties of up to
23 \$27,500 per day for each day that it has failed to comply with the emission limit set forth in Condition
24 15816 of the Title V permit.

25 183. Unless ordered by this Court, Mirant will continue to violate Condition 15816 of the
26 Title V permit.

1 NINETEENTH CLAIM

2 [Violation of CEQA
3 - Against BAAQMD]

4 184. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 183, as though
5 fully alleged herein.

6 185. CEQA, Public Resources Code § 21000 *et seq.* (“CEQA”), was enacted in 1970 to
7 preserve and enhance the environment of the state of California. Cal. Pub. Res. Code § 21000(e). A
8 major purpose of CEQA and the policy of this state is to “[e]nsure that the long-term protection of the
9 environment, consistent with the provision of a decent home and suitable living environment for every
10 Californian, . . . be the guiding criterion in public decisions.” *Id.* § 21001(d). In addition, all agencies of
11 the state government which regulate activities of corporations which are found to affect the quality of the
12 environment are required to regulate such activities so that major consideration is given to preventing
13 environmental damage, while providing a decent home and satisfying living environment for every
14 Californian. *Id.* § 21000 (g).

15 186. CEQA requires that public agencies prepare an Environmental Impact Report (“EIR”)
16 whenever the approval of a project may cause significant effects on the environment. Cal. Pub. Res.
17 Code §§ 21100(a), 21151(a). CEQA, through the Public Resources Code and the interpretive Guidelines
18 in Cal. Code Regs., tit. 14, § 15000 *et seq.* (“Guidelines”), establishes the process every state public
19 agency must follow when undertaking any activity that may have an impact upon the environment. The
20 process begins with the threshold determination of whether the agency action is an “approval” of a
21 “project.” If the activity is an approval of a project, a “three-tiered” analysis is necessary to determine
22 (1) whether the project is exempt from CEQA, (2) if not exempt, whether the project may have a
23 significant effect on the environment and, depending on the conclusion of that analysis, (3) whether no
24 further action is required or an environmental assessment is required in the form of either a Negative
25 Declaration or an EIR. Cal. Pub. Res. Code § 21080; Guidelines §§ 15061, 15063. .

26 187. Once an agency has determined that a proposed project is not exempt from CEQA, the
agency must then conduct an Initial Study to determine whether the project may have a significant effect

1 on the environment. Guidelines § 15063(a). A project may be significant if the record contains
2 substantial evidence that supports a “fair argument” that the project may have a significant effect on the
3 environment. Id. § 15064(f)(1).

4 188. Section 15064.7 of the Guidelines allows each public agency

5 to develop and publish thresholds of significance that the agency uses in the
6 determination of the significance of environmental effects. A threshold of
7 significance is an identifiable quantitative, qualitative or performance level of a
particular environmental effect, non-compliance with which means the effect will
normally be determined to be significant by the agency.

8 BAAQMD has established the thresholds for significance for NO_x, PM₁₀, and reactive organic gas
9 (“ROG”) emissions by stationary sources as 15 tons per year, and 100 tons per year for CO.

10 189. After the agency determines that the project may have a significant effect on the
11 environment and issues its environmental assessment (either as a draft EIR or a Negative Declaration),
12 the next step in the CEQA process is providing the opportunity for public participation. Public review
13 and comment on an agency’s environmental assessment is “an essential part of the CEQA process.”

14 Guidelines § 15201. CEQA requires proper public notice, adequate time for public review and
15 acceptance of public comments. Cal. Pub. Res. Code §§ 21091, 21092; Guidelines §§ 15087, 15105.

16 The agency must consider alternatives to the project and require implementation of all feasible measures
17 to mitigate adverse environmental impacts. Cal. Pub. Res. Code § 21002. Installation of BACT and
18 requiring emission offsets would clearly constitute feasible mitigation measures. Further, CEQA
19 requires the agency to make a finding that the project complies with other laws. Cal. Pub. Res. Code
20 § 21002.1. Given the violations of the Clean Air Act here at issue, such a finding would be impossible.

21 190. The agreement between BAAQMD and Mirant allowing Mirant to operate its Peakers
22 in excess of the permitted limit is a “project” within the meaning of CEQA. Cal. Pub. Res. Code
23 § 21065; Guidelines § 15378.

24 191. This project will cause a significant impact on the environment because emissions from
25 the Peakers operating in excess of the permitted hours will exceed the thresholds of significance for
26 NO_x, PM₁₀, ROG and CO.

1 192. BAAQMD is the lead agency responsible for complying with CEQA for this project.

2 193. On June 4, 2001, CBE mailed written comments to BAAQMD regarding the agreement
3 between BAAQMD and Mirant allowing Mirant to operate its Potrero Peakery in excess of the permitted
4 limit, in which CBE requested that BAAQMD adhere to CEQA. CBE informed BAAQMD that the
5 agreement required a CEQA analysis. On June 12, 2001, Bayview Hunters Point Community Advocates
6 and OCE notified BAAQMD that they agreed with CBE's comments and requested that BAAQMD
7 adhere to CEQA.

8 194. Plaintiffs complied with Cal. Public Resources Code § 21167.5 by serving a notice of
9 this action on BAAQMD on June 18, 2001. A true and correct copy of the proof of service of the notice
10 is attached hereto as Exhibit C.

11 195. Plaintiffs have served the California Attorney General with a copy of this complaint
12 along with notice of its filing, in compliance with Cal. Pub. Res. Code § 21167.7. A true and correct
13 copy of the proof of service is attached hereto as Exhibit D.

14 196. BAAQMD's decision approving this project was a discretionary decision within the
15 purview of its role as an agency responsible for the protection of public health. CEQA defines a
16 discretionary project as one that "requires the exercise of judgment or deliberation when the public
17 agency or body decides to approve or disapprove a particular activity." Cal. Pub. Res. Code § 21080(a);
18 Guidelines §§ 15357, 15002(i). BAAQMD exercised its judgment when it approved this project.

19 197. BAAQMD failed to comply with CEQA requirements when it approved this project
20 without following the provisions of CEQA. BAAQMD failed to perform any CEQA review before
21 issuing a final decision on the project, including, but not limited to, preparing an Initial Study, assessing
22 whether the project may have a significant impact, preparing an EIR or Negative Declaration, publishing
23 notice of the same, allowing the public to review and comment, and responding to comments. Most
24 importantly, BAAQMD failed to impose all feasible mitigation measures to mitigate any and all
25 significant adverse environmental impacts. Requiring Mirant to install BACT and to provide offsets,
26 would obviously be a feasible means to mitigate the Project's adverse air quality impacts.

1 198. BAAQMD, therefore violated CEQA, for which relief is warranted, including the
2 issuance of an injunction.

3 **TWENTIETH CLAIM**

4 [California Unfair Business Practices Act
5 – against Mirant]

6 199. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 198, as though
7 fully alleged herein.

8 200. California Business & Professions Code § 17200 defines “unfair competition” to
9 include an “unlawful” business practice. A business practice constitutes unfair competition if it is
10 forbidden by any law, be it civil or criminal, federal, state, or municipal, statutory, regulatory or court-
11 made. Section 17200 borrows violations of other laws and treats these violations, when committed
12 pursuant to a business activity, as unlawful practices independently actionable under section 17200 and
13 subject to the distinct remedies provided thereunder.

14 201. Section 17202 of the Cal. Bus. & Prof. Code allows for “specific or preventive relief
15 [to] be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.”

16 202. Section 17203 of the Cal. Bus. & Prof. Code provides that “[t]he court may make such
17 orders or judgments . . . as may be necessary to prevent the use or employment by any person of any
18 practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to
19 restore to any person in interest any money or property, real or personal, which may have been acquired
20 by means of unfair competition.”

21 203. Section 17204 of the Cal. Bus. & Prof. Code provides for suits for injunctive relief to
22 be brought by private attorneys general: “Actions for relief pursuant to this chapter shall be prosecuted
23 exclusively in a court of competent jurisdiction by . . . any person acting for the interests of itself, its
24 members or the general public.”

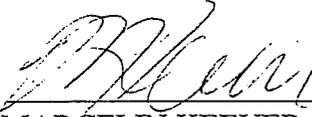
25 204. The remedies authorized for violation of Section 17200 are cumulative to each other
26 and to any other penalties or remedies available elsewhere in the law. Cal. Bus. & Prof. Code § 17205.

205. Plaintiffs bring this claim on behalf of its members and on behalf of the general public.

1 7. Award such other and further relief as this Court deems just and proper.

2 Dated: August 20, 2001

ENVIRONMENTAL LAW AND JUSTICE CLINIC

3
4 By: 

MARCELIN KEEVER
HELEN H. KANG

5
6 Attorneys for Plaintiffs
7 BAYVIEW HUNTERS POINT COMMUNITY
8 ADVOCATES and OUR CHILDREN'S EARTH
9 FOUNDATION

COMMUNITIES FOR A BETTER ENVIRONMENT

10
11 By: 

WILLIAM B. ROSTOV

12 Attorneys for Plaintiff
13 COMMUNITIES FOR A BETTER ENVIRONMENT

Exhibit A

June 19, 2001

**BY CERTIFIED MAIL –
RETURN RECEIPT REQUESTED**

Anne M. Cleary, President
Mirant Potrero, LLC
900 Ashwood Parkway, Suite 500
Atlanta, GA 30338

Michael Lyons, Plant Manager
Mirant Potrero, LLC
1201 Illinois Street
San Francisco, CA 94107

Mark A. Gouveia, Production Manager
Mirant Potrero, LLC
1350 Treat Blvd., #500
Walnut Creek, CA 94596

Re: Notice of Intent to File Suit Under the Clean Air Act

Dear Ms. Cleary and Messrs. Gouveia and Lyons:

The Clean Air Act (the "Act") requires that citizens give sixty (60) days' notice of their intent to file suit under section 304(a) of the Act, 42 U.S.C. § 7604(a). Section 304(b) of the Act, 42 U.S.C. § 7604(b). Accordingly, Bayview Hunters Point Community Advocates, Communities for a Better Environment and Our Children's Earth Foundation (collectively, "Community Groups") hereby provide notice to the following persons in their capacities identified below:

- Mirant Potrero LLC ("Mirant"), as the violator of an emission standard or limitation as used in section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1);
- United States Environmental Protection Agency ("EPA"); and
- State of California, as the state in which the violation occurred and will continue to occur.

The Community Groups intend to bring suit under the Act, after expiration of sixty (60) days from the date of this letter. The lawsuit will be brought in the United States District Court for the Northern District of California, against Mirant for its violations of the Act, as more specifically stated below.

A. Background

Mirant, formerly known as Southern Energy Potrero LLC, owns and operates an electricity generation facility located at 1201 Illinois Street, in the Potrero neighborhood of San Francisco, CA 94107. On September 14, 1998, BAAQMD issued to Mirant a Major Facility Permit ("Title V Permit" or "Permit") for the operation at the Potrero plant.

The Permit, among other things, regulates the operation of three 52 megawatt peakers fired by distillate or fuel oil ("Peakers"), each with two turbines (Source Nos. 10 through 15). Permit, pp. 7, 26-28. Condition 15816 of the Permit requires Mirant to operate each Peaker no more than 877 hours per turbine in any calendar year. Permit, p. 28. Because of the limits on the hours of operation, the Peakers are each governed by the NOx emission limit set forth in BAAQMD Regulation 9-9-302, of 65 parts per million (volume) ("ppmv") for non-gaseous fuel. Without the limit on the hours of operation, the Peakers would be governed by the more stringent limit of 15 ppmv, with limited exceptions not applicable here. Mirant cannot achieve the more stringent emission limit without installing additional pollution controls. See Administrative Order on Consent, In re Mirant Potrero LLC Potrero Generating Facility, R9-2001-04 (EPA Region IX), p. 1.

On March 30, 2001, BAAQMD and Mirant entered into a Compliance and Mitigation Agreement dated March 29, 2001 ("BAAQMD Agreement"), allowing Mirant to exceed the permitted hours of operation at the Peakers, without installation of additional pollution controls, in return for payment of \$20,000 per ton of excess NOx emissions as "mitigation fees."

Mirant exceeded the 877-hour limit on the hours of operation at its Peakers on the following dates:

Source No. 12	May 30, 2001
Source No. 13	May 19, 2001
Source No. 14	May 10, 2001
Source No. 15	May 20, 2001

See information submitted by Mirant to BAAQMD on June 11, 2001, entitled, "BAAQMD Gas Turbine Hours Compliance Report," for May 2001. Mirant's violations of the Act have continued each and every day since May 10, 2001, and will continue until Mirant achieves full compliance with the Act, including obtaining the permits required by the Act and complying with the applicable emissions standards.

B. Mirant's Violations of an Emission Standard or Limitation

1. Mirant's Violations Arising from Exceedances of Hourly Maximum

The Act authorizes citizen suits against any person who has violated or is in violation of an "emission standard or limitation." Section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1). The term "emission standard or limitation" is broadly defined to include an emission limitation; emission standard; "any condition or requirement under an applicable implementation plan relating to . . . air quality maintenance plans;" any other standard or limitation established under "any applicable State implementation plan" or any permit issued pursuant to subchapter V of this chapter [otherwise known as Title V];" or any term or permit condition. Section 304(f)(1), (3), (4) of the Act, 42 U.S.C. § 7604(f)(1), (3), (4).

Condition 15816 of Mirant's Title V Permit requires Mirant to operate each Peaking Turbine for less than 877 hours in any calendar year. Permit, p. 28. Condition 15816 constitutes an emission standard or limitation within the meaning of section 304 of the Act because it is an emission standard or limitation or a condition of a permit issued under subchapter V of the Act. See 42 U.S.C. § 7604(f)(1), (3), (4). The 877 hour limit is also an emission limitation or standard within the meaning of section 304 of the Act because it was established under Rule 9-9-302, which EPA approved as part of the California State Implementation Plan ("SIP") on December 15, 1997, 62 Fed. Reg. 65,611 (1997). Further, the 877 hour limit is an emission limitation or standard within the meaning of section 304 of the Act because it is a permit term or condition. 42 U.S.C. § 7604(f)(4).¹

Because Mirant has exceeded the 877-hour limit at the Peakers, Mirant has violated and will continue to violate the Act. (See Section A above.)

¹ Mirant is also in violation of Rule 9-9-301.2, which prohibits operation of the Peakers unless NOx emissions from the turbines do not exceed 15 ppmv (with exceptions not applicable here). Rule 9-9-301.2 is a SIP rule and thus an emission standard or limitation. See 62 Fed. Reg. 65,611 (1997); 40 C.F.R. § 52.220(c)(239)(i)(E)(1).

2. Mirant's Violation Arising from NSR (New Source Review) and PSD (Prevention of Significant Deterioration Provisions) of the Act

The citizen suit provision of the Act authorizes suit for violation of an "emission standard or limitation" which is defined to include any condition or requirement of a permit under Part C or D of Title I of the Act, 42 U.S.C. § 7604(f)(3), and "any requirement to obtain a permit as a condition of operations," *id.* § 7604(f)(4), as well as any SIP condition or requirement, *id.* § 7604(f)(3). Mirant violated the Act by failing to obtain NSR (new source review) and PSD (prevention of significant deterioration) permits for major modifications at its Potrero facility resulting from operation of the Peakers without any limitation on the hours of operation.

a. NSR Violation for Excess Emissions of NOx

Operating the Peakers without any limitation on the hours of operation will cause an increase of NOx emissions at the Potrero facility of at least 40 tons per year or more. Such an increase, arising from operational changes, constitutes a "major modification" under the NSR rules applicable to the Potrero facility.

In specific, Rule 2-2-221, which is federally approved as part of the SIP, defines a "major modification" as "[a]ny modification at an existing major facility that the APCO [Air Pollution Control Officer] determines will cause an increase of the facility's emission by [40 tons of NOx per year ("tpy") or more]." A major modification includes any change in the method of operation of a major stationary source that would result in such increases in NOx emissions. 40 C.F.R. § 51.165(a)(1)(v)(A); Rule 2-2-223. Before a source may make a major modification in the Bay Area, it must submit to BAAQMD an application for and receive authority to construct ("ATC"). Rule 2-1-301 and 2-1-402 (Permits – General Requirements) (approved as a SIP rule, 63 Fed. Reg. at 3850). In addition, before a source operates equipment the use of which may cause the emission of air contaminants, the source must first apply for and obtain a permit to operate ("PTO"). Rules 2-1-302 and 2-1-402.

A modified major source is required to apply the Best Available Control Technology ("BACT") if the modification results in an increase of NOx in excess of 10 pounds per highest day or a cumulative increase since April 5, 1991 of 10 pounds per highest day. Rule 2-2-301. The BACT requirement is also triggered if cumulative increases of emissions of certain air pollutants at the facility, including the increases resulting from the modification, since December 1, 1982 exceeds certain annual and/or daily amounts. *Id.* BACT is set to be equivalent to the "lowest achievable emission rate" required by the Act to be achieved by modified major sources. Rule 2-2-206. Further, a modified major source is required to provide emission offsets for the emission from the modified source. Rule 2-2-302.

Operation of the Peakers without any limits on the hours of operation will result in an increase of at least 40 tpy of NO_x. Mirant's modification will also result in an increase in NO_x in excess of 10 pounds per highest day. Because Mirant has operated and will continue to operate the Peakers in excess of the permitted limits without obtaining an NSR permit, applying BACT and providing offsets, Mirant has violated and will continue to violate the Act. (See Section A above.)

b. PSD Violations for Excess Emissions of NO_x, CO, PM₁₀ and SO₂

Operating the Peakers without any limitation on the hours of operation will cause an increase at the Potrero facility of at least 40 tpy of NO_x, 100 tpy of CO (carbon monoxide), 15 tpy of PM₁₀ (particulate matter whose aerodynamic size is less than or equal to 10 microns) and 40 tpy of SO₂ (sulfur dioxide). Such increases, arising from operational changes, for each such pollutant constitute a "major modification" under the PSD rules applicable to the Potrero facility set forth at 40 C.F.R. § 52.21 ("PSD regulations").

In specific, the PSD regulations define the term "major modification" to include changes in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act. 40 C.F.R. § 52.21(b)(2)(i). "Significant" means a rate of emissions that would equal or exceed 100 tpy of CO, 40 tpy of NO_x, 15 tpy of PM₁₀, or 40 tpy of SO₂. Operation of the Peakers without any limits on the hours of operation will result in net emissions increase of at least 100 tpy of CO, 40 tpy of NO_x, 15 tpy of PM₁₀, and 40 tpy of SO₂.

Because Mirant has operated and will continue to operate the Peakers in excess of the permitted limits without obtaining a PSD permit, which permit process would require, among other things, application of BACT at the Peakers and an air quality impact analysis, Mirant has violated and will continue to violate the Act. (See Section A above.)

C. Potential Resolution of Issues During the Sixty Day Period

The entities giving this notice are Bayview Hunters Point Community Advocates, 5021 Third Street, San Francisco, CA 94124; Communities for a Better Environment ("CBE"), 1611 Telegraph Avenue, Suite 450, Oakland, CA 94612; and Our Children's Earth Foundation ("OCE"), 915 Cole Street, Suite 248, San Francisco, CA 94117.

Notice of Intent to Sue
June 19, 2001
Page 6

Legal counsel representing CBE and OCE in this matter are as follows:

For Bayview Hunters Point Community
Advocates and OCE:
Alan Ramo
Helen H. Kang
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105-2968
Telephone: (415) 442-6693
Facsimile: (415) 896-2450

For CBE:
Richard Toshiyuki Drury
William B. Rostov
Communities for a Better Environment
1611 Telegraph Avenue
Suite 450
Oakland, CA 94612
Telephone: (510) 302-0430
Facsimile: (510) 302-0438

During the sixty (60) day notice period, the Community Groups are willing to discuss effective remedies for the violations of the Act at issue in this notice. If you wish to pursue such discussions, we suggest that you initiate them as soon as possible so that the discussions may be completed before the end of the sixty (60) day notice period. We do not intend to delay the filing of a complaint in federal court if the discussions fail to resolve these matters within the sixty (60) day notice period, and we intend to seek all appropriate relief, including injunctive relief, penalties, and all costs of litigation, including, but not limited to, attorney's fees, expert witness fees and other costs.

We believe this notice provides information sufficient for you to determine the violations of the Clean Air Act at issue. If, however, you have any questions, please also feel free to contact us for clarification.

We look forward to hearing from you.

Very truly yours,



Helen H. Kang
Environmental Law and Justice Clinic
Attorneys for Bayview Hunters Point Community
Advocates and Our Children's Earth Foundation

Notice of Intent to Sue
June 19, 2001
Page 7

William B. Rostov

William B. Rostov
Communities for a Better Environment

cc: Corporation Service Company
Registered Agent for Service of Process
for Mirant Potrero, LLC
2730 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833
(Certified Mail/Return Receipt Requested)

Christine Todd Whitman, Administrator
1101A
United States Environmental Protection Agency Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
(Certified Mail/Return Receipt Requested)

Michael P. Kenny
Executive Officer
California Air Resources Board
1001 I Street
Sacramento, CA 95814
(Certified Mail/Return Receipt Requested)

Laura Yoshii, Acting Regional Administrator
ORA-1
United States Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105
(U.S. Mail)

Hon. Gray Davis
Governor of California
State Capitol Building
Sacramento, CA 95814
(U.S. Mail)

Exhibit B

June 19, 2001

**BY CERTIFIED MAIL –
RETURN RECEIPT REQUESTED**

Ellen Garvey
Air Pollution Control Officer
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Re: Notice of Intent to File Suit Under the Clean Air Act

Dear Bay Area Air Quality Management District and Its Air Pollution Control Officer:

The Clean Air Act (the "Act") requires that citizens give sixty (60) days' notice of their intent to file suit under section 304(a) of the Act, 42 U.S.C. § 7604(a). Section 304(b) of the Act, 42 U.S.C. § 7604(b). Accordingly, Bayview Hunters Point Community Advocates, Communities for a Better Environment and Our Children's Earth Foundation (collectively, "Community Groups") hereby provide notice to the following persons in their capacities identified below:

- Bay Area Air Quality Management District ("BAAQMD"), as the violator of an emission standard or limitation under the Act;
- Ellen Garvey, in her official capacity as the Air Pollution Control Officer ("APCO") of BAAQMD;
- United States Environmental Protection Agency ("EPA"); and
- State of California, as the state in which the violation occurred and will continue to occur.

The Community Groups intend to bring suit under the Act, after expiration of sixty (60) days from the date of this letter. The lawsuit will be brought in the United States District Court for the Northern District of California, against BAAQMD and Ellen Garvey, in her official capacity as the APCO of BAAQMD, as more specifically stated below.

A. Background

Mirant, formerly known as Southern Energy Potrero LLC, owns and operates an electricity generation facility located at 1201 Illinois Street, in the Potrero neighborhood of San Francisco, CA 94107. On September 14, 1998, BAAQMD issued to Mirant a Major Facility Permit ("Title V Permit" or "Permit") for the operation at the Potrero plant.

The Permit, among other things, regulates the operation of three 52 megawatt peakers fired by distillate or fuel oil ("Peakers"), each with two turbines (Source Nos. 10 through 15). Permit, pp. 7, 26-28. Condition 15816 of the Permit requires Mirant to operate each Peaker no more than 877 hours per turbine in any calendar year. Permit, p. 28. Because of the limits on the hours of operation, the Peakers are each governed by the NOx emission limit set forth in BAAQMD Regulation 9-9-302, of 65 parts per million (volume) ("ppmv") for non-gaseous fuel. Without the limit on the hours of operation, the Peakers would be governed by the more stringent limit of 15 ppmv, with limited exceptions not applicable here. Mirant cannot achieve the more stringent emission limit without installing additional pollution controls. See Administrative Order on Consent, In re Mirant Potrero LLC Potrero Generating Facility, R9-2001-04 (EPA Region IX), p. 1.

On March 30, 2001, BAAQMD and Mirant entered into a Compliance and Mitigation Agreement dated March 29, 2001 ("BAAQMD Agreement"), allowing Mirant to exceed the permitted hours of operation at the Peakers, without installation of additional pollution controls, in return for payment of \$20,000 per ton of excess NOx emissions as "mitigation fees."

Mirant exceeded the 877-hour limit on the hours of operation at its Peakers on the following dates:

Source No. 12	May 30, 2001
Source No. 13	May 19, 2001
Source No. 14	May 10, 2001
Source No. 15	May 20, 2001

See information submitted by Mirant to BAAQMD on June 11, 2001, entitled, "BAAQMD Gas Turbine Hours Compliance Report," for May 2001. BAAQMD's violations of the Act have continued each and every day since May 10, 2001, and will continue until BAAQMD achieves full compliance with the Act.

B. BAAQMD's Violations of an Emission Standard or Limitation

The Act authorizes citizen suits against any person who has violated or is in violation of an "emission standard or limitation." Section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1). The term "emission standard or limitation" is broadly defined to include an emission limitation; emission standard; "any condition or requirement under an applicable implementation plan relating to . . . air quality maintenance plans;" any other standard or limitation established under "any applicable State implementation plan" or any permit issued pursuant to subchapter V of this chapter [otherwise known as Title V];" or any term or permit condition. Section 304(f)(1), (3), (4) of the Act, 42 U.S.C. § 7604(f)(1), (3), (4).

BAAQMD has violated, and continues to violate, an emission standard or limitation within the meaning of the Act because it has taken affirmative actions to allow Mirant to violate, and continue to violate, numerous federally approved State Implementation Plan ("SIP") rules. BAAQMD has a duty under the SIP and the Act to require compliance with, and to implement, the SIP requirements for the attainment of federal ozone standards ("National Ambient Air Quality Standards" or "NAAQS"), and its actions taken in connection with the BAAQMD Agreement violates the Act. See Oregon Environmental Council v. Oregon Department of Environmental Quality, 775 F. Supp. 353, 361-62 (D. Ore. 1991).¹

In entering into its agreement with Mirant to allow Mirant to exceed the hours of operation in the Title V Permit, BAAQMD has ignored at least the following SIP rules:²

¹ Citizens for a Better Environment v. Deukmejian, 731 F. Supp. 1448, 1458 (N.D. Cal. 1990), reconsideration granted in part, 746 F. Supp. 976 (N.D. Cal. 1990); American Lung Association of New Jersey v. Kean, 670 F. Supp. 1285, 1289 (D.N.J. 1987), affirmed, 871 F.2d 319 (3d Cir. 1989); NRDC v. N.Y. State Dept. of Environmental Conservation, 668 F. Supp. 848, 852 (S.D.N.Y. 1987).

² The Community Groups are particularly concerned about BAAQMD's failure to require compliance with the SIP because, among other things, the Bay Area is out of attainment with the national ozone standards.

In 1970, Congress set a 1975 attainment deadline for the national ozone standard. The San Francisco Bay Area failed to meet this deadline and was first designated as a "nonattainment" area for ozone in 1978. 63 Fed. Reg. 37258, 37261 (Jul. 10, 1998). Congress amended the Clean Air Act in 1977, establishing a 1987 deadline for the Bay Area to comply with the national ozone standard, which the Bay Area again missed. In 1990, Congress again provided new deadlines, incentives, and sanctions to encourage state compliance with the national air quality standards. Following these amendments, the Bay Area was classified as a "moderate"

1. Rule 9-9-301.2

BAAQMD Regulation ("Rule") 9-9-301 provides in pertinent part:

Except as provided by Sections 9-9-302 . . . a person shall not operate a stationary gas turbine unless nitrogen oxides (NOx) emission concentrations, corrected to 15 percent O₂ (dry basis), do not exceed the compliance limit listed below:

301.2 Gas turbines rated at 10.0 MW and over, without SCR [Selective Catalytic Reduction], shall not exceed 15 ppmv

Rule 9-9-302 provides in pertinent part:

Emission Limits, Low Usage: [A] person shall not operate a stationary gas turbine rated at 4.0 MW or greater and operating less than 877 hours per year unless nitrogen oxides (NOx) emission concentrations, corrected to 15% O₂ (dry basis), do not exceed 42 ppmv when firing with natural gas and 65 ppmv when firing with non-gaseous fuel, and provided the requirements of Section 9-9-502 [record keeping requirements] are satisfied.

EPA approved Rule 9-9 as part of the California SIP on December 15, 1997. 62 Fed. Reg. 65,611 (1997).³ Rule 9-9-301 is therefore an emission standard or limitation within the meaning

nonattainment area by operation of law under section 181(a) of the Act, with a new attainment deadline of 1996. 42 U.S.C. §7511(a). Although the EPA in 1995 erroneously designated the Bay Area as attaining the national ozone standard prior to expiration of this deadline, 60 Fed. Reg. 27028 (May 22, 1995), within days of this designation, the Bay Area again exceeded this standard. As a result, and in response to a petition filed by Communities for a Better Environment, the EPA changed the Bay Area's designation back to nonattainment in 1998. 40 C.F.R. § 81.305. In 1998, the EPA established November 15, 2000 as the latest deadline for attaining the national ozone standard in the Bay Area. 63 Fed. Reg. 37258, 37260 (Jul. 10, 1998). In March of this year, in settlement of a petition and lawsuit filed by the Community Groups (Bayview Hunters Point Community Advocates v. Whitman, No. C-01-0050 TEH (N.D. Cal. filed Jan. 8, 2001)), EPA proposed to find that the Bay Area had not attained the ozone standard by the latest deadline. 66 Fed. Reg. 17379 (Mar. 30, 2001).

³ Some SIP rules operate through controls on existing sources of pollution. Thus, the Act requires SIPs in nonattainment areas – *i.e.*, areas that have not attained the national standards for any of the six pollutants for which the standards have been set – to provide for the implementation of all reasonably available control measures, including reasonably available control technology, to reduce emissions from existing sources. 42 U.S.C. § 7502(c)(1).

of section 304 of the Act, 42 U.S.C. § 7604. As such, it is federally enforceable, with the force and effect of any provision of the Act. See, e.g., Her Majesty the Queen v. Detroit, 874 F.2d 332, 335 (6th Cir. 1989); American Lung Association v. Kean, 871 F.2d 319, 322 (3d Cir. 1989); United States v. Congoleum Corp., 635 F. Supp. 174, 177 (E.D. Pa. 1986).⁴

Mirant's predecessor voluntarily requested and accepted an 877-hour annual operating limit set forth in the Permit, BAAQMD Agreement, p. 1, to become subject to the "low usage" emission limit set forth in Rule 9-9-302. Now, under the BAAQMD Agreement, Mirant will be allowed to exceed the annual operating limit on the hours of operation, even though the Peakers, without the limit on the hours of operation, are required to be governed by the more stringent NOx limit of 15 ppmv set forth in Rule 9-9-301.2 (with exceptions not applicable here). Mirant cannot achieve the lower emissions limit without installing additional pollution controls. See Administrative Order on Consent, In re Mirant Potrero LLC Potrero Generating Facility, R9-2001-04 (EPA Region IX), p. 1.

Because BAAQMD has purported to excuse Mirant's non-compliance with Rule 9-9-301.2, BAAQMD is in violation of an emission standard or limitation within the meaning of the Act.

2. New Source Review Rules

In addition to requiring all reasonably available control measures on existing sources, the Clean Air Act requires state plans in nonattainment areas to include a permit program for the construction and operation of new or modified major stationary sources. 42 U.S.C. § 7410(a)(2)(C). The Act provides for more stringent regulatory requirements for such new or modified sources. Part D of Title I of the Act, 42 U.S.C. §§ 7501-7508. The purpose of these "new source review" provisions is to ensure that states determine, prior to construction or modification, whether such activity will interfere with the attainment of the national standards. 42 U.S.C. §§ 7502(c)(4), 7503(a)(1)(A); 40 C.F.R. § 51.160(a), (b). Thus, new source permits may only be issued if, among other things, "the proposed source is required to comply with the lowest achievable emission rate," there are sufficient reductions (or offsets) in emissions from the source or elsewhere to result in a net air quality benefit, and the source is in compliance with all applicable emission limitations and standards. 42 U.S.C. §§ 7502(c)(5), 7503(a).

⁴ The emission limitation and standard incorporated in Rule 9-9-301.2 is also an emission standard or limitation within the meaning of section 304 of the Act, 42 U.S.C. § 7604, because it is a condition or requirement under the 1994 Bay Area air quality maintenance plan. See Final Amendments to San Francisco Bay Area Redesignation Request and Maintenance Plan for the National Ozone Standard, October 1994, Table 7A; 40 C.F.R. § 52.220(c)(205)(i)(B)(1).

As required by the Act, because the Bay Area has not attained the federal ozone standards, BAAQMD administers a new source program pursuant to federally approved rules set forth at Rule 2-2. Rule 2-2 is part of the SIP. 64 Fed. Reg. 3850 (Jan. 26, 1999); 40 C.F.R. § 52.220(c)(199)(i)(A)(8);⁵ see 64 Fed. Reg. 3,850 (“BAAQMD Regulation 2 was originally adopted as part of BAAQMD’s effort to achieve the [NAAQS] for ozone”). BAAQMD’s new source review rules therefore constitute an emission standard or limitation within the meaning of section 304 of the Act, 42 U.S.C. § 7604. See discussion above at pp. 3-5.

In entering into the agreement with Mirant, BAAQMD has taken affirmative actions to allow Mirant to violate the new source review requirements of the Act. In specific, the relevant new source review rules define a “major modification” as ([a]ny modification at an existing major facility that the APCO determines will cause an increase of the facility’s emissions by [40 tons of NOx per year or more].” Rule 2-2-221. According to BAAQMD, Mirant will increase its NOx emissions by more than 60 tons per year as a result of the increased hours of operation.⁶ Mirant therefore should apply for and receive a new source review permit for its major modification before exceeding its permitted hours of operation. Mirant has not done so, and BAAQMD affirmatively allowed Mirant to violate this requirement by entering into the BAAQMD Agreement.⁷

Because BAAQMD took affirmative steps to allow Mirant to violate the Act, BAAQMD

⁵ EPA determined that BAAQMD’s new source review rules contain deficiencies that are not fully consistent with the Act’s requirements, EPA regulations and EPA policy. 64 Fed. Reg. at 3,850. EPA, however, granted final limited approval of the rules to further air quality by strengthening the SIP. Id.

⁶ Changes in the hours of operation that result in increased emissions by the amount specified in Rule 2-2-221 constitute major modifications, if the hours of operation were previously limited by a permit condition. Rule 2-2-223.

⁷ The Clean Air Act further defines the term “emission standard or limitation” to include “any or requirement to obtain a permit as a condition of operations.” 42 U.S.C. § 7604(f)(4). The SIP rules applicable in the Bay Area require that a source submit an application for and receive authority to construct (“ATC”) before it makes a major modification. Rule 2-1-301. The SIP rules also require that a source apply for and obtain a permit to operate (“PTO”) before it operates equipment the use of which may cause the emission of air contaminants. Rules 2-1-203 and 2-1-402. Thus, BAAQMD’s Agreement, which presumed to excuse Mirant from applying for and obtaining an ATC and a PTO for the major modification, also constitutes a violation of an emission standard or limitation.

is in violation of an emission standard or limitation within the meaning of the Act.

3. SIP Rules Concerning Title V Permits

Title V of the Clean Air Act establishes a comprehensive federal operating permitting program for major sources of pollution, among others, to be administered by local air pollution control districts. 42 U.S.C. §§ 7661-7661f. The operating permit for the first time in the history of the Act requires all applicable and enforceable federal and state emission limitations standards, schedules of compliance, monitoring and reporting requirements, *including any SIP rule requirements*, to be consolidated into a single document. 42 U.S.C. § 7661c(a). The primary purpose of issuing a single permit that contains all of the enforceable requirements is to “enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” 57 Fed. Reg. 32250, 32251 (Jul. 21, 1992). The federal operating permit program was also intended to “greatly strengthen EPA’s ability to implement the Act and enhance air quality planning and control, in part, by providing the basis for better emission inventories.” *Id.*

In 1995, EPA granted BAAQMD interim approval to administer the operating permit program. 60 Fed. Reg. 32,606 (June 23, 1995).⁸ Pursuant to the federally approved program, BAAQMD issued Mirant a Title V permit on September 14, 1998.

Once a source such as Mirant has a Title V permit, it must submit an application “prior to commencing an operation associated with a significant permit revision.” Rule 2-6-404.3, approved as a SIP rule, 60 Fed. Reg. 32,603 (June 23, 1995). Mirant did not submit an application for such a revision. Nor did BAAQMD require such a submission.

In entering into its agreement with Mirant, BAAQMD affirmatively allowed Mirant to violate the SIP rules governing significant modification of the terms and conditions of Mirant’s Title V Permit. Because Title V rules and permitting are intended to increase compliance with clean air rules, including SIP rules, and to improve air quality planning (see discussion above), BAAQMD’s failure to require compliance with its Title V rules violates the SIP and therefore violates the Act. See discussions above.

⁸ Where the program substantially, but not fully, meets the requirements of federal regulations promulgated to implement Title V of the Act, EPA may grant interim approval. 40 C.F.R. § 70.4(d).

C. Potential Resolution of Issues During the Sixty Day Period

The entities giving this notice are Bayview Hunters Point Community Advocates, 5021 Third Street, San Francisco, CA 94124; Communities for a Better Environment ("CBE"), 1611 Telegraph Avenue, Suite 450, Oakland, CA 94612; and Our Children's Earth Foundation ("OCE"), 915 Cole Street, Suite 248, San Francisco, CA 94117.

Legal counsel representing CBE and OCE in this matter are as follows:

For Bayview Hunters Point Community
Advocates and OCE:
Alan Ramo
Helen H. Kang
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105-2968
Telephone: (415) 442-6693
Facsimile: (415) 896-2450

For CBE:
Richard Toshiyuki Drury
William B. Rostov
Communities for a Better Environment
1611 Telegraph Avenue
Suite 450
Oakland, CA 94612
Telephone: (510) 302-0430
Facsimile: (510) 302-0438

During the sixty (60) day notice period, the Community Groups are willing to discuss effective remedies for the violations of the Act at issue in this notice. If you wish to pursue such discussions, we suggest that you initiate them as soon as possible so that the discussions may be completed before the end of the sixty (60) day notice period. We do not intend to delay the filing of a complaint in federal court if the discussions fail to resolve these matters within the sixty (60) day notice period, and we intend to seek all appropriate relief, including injunctive relief, penalties, and all costs of litigation, including, but not limited to, attorney's fees, expert witness fees and other costs.

We believe this notice provides information sufficient for you to determine the violations of the Clean Air Act at issue. If, however, you have any questions, please also feel free to contact us for clarification.

Notice of Intent to Sue
June 19, 2001
Page 9

We look forward to hearing from you.

Very truly yours,



Helen H. Kang
Environmental Law and Justice Clinic
Attorneys for Bayview Hunters Point Community
Advocates and Our Children's Earth Foundation



William B. Rostov
Communities for a Better Environment

cc: Corporation Service Company
Registered Agent for Service of Process
for Mirant Potrero, LLC
2730 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833
(Certified Mail/Return Receipt Requested)

Christine Todd Whitman, Administrator
1101A
United States Environmental Protection Agency Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
(Certified Mail/Return Receipt Requested)

Michael P. Kenny
Executive Officer
California Air Resources Board
1001 I Street
Sacramento, CA 95814
(Certified Mail/Return Receipt Requested)

Laura Yoshii, Acting Regional Administrator
ORA-1

Notice of Intent to Sue

June 19, 2001

Page 10

United States Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105
(U.S. Mail)

Hon. Gray Davis
Governor of California
State Capitol Building
Sacramento, CA 95814
(U.S. Mail)

Exhibit C

June 18, 2001

Via Certified U.S. Mail. Return Receipt Requested

Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

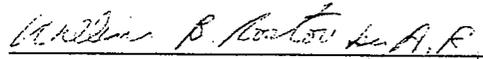
Re: NOTICE OF INTENT TO FILE CEQA CLAIM

To Bay Area Air Quality Management District:

PLEASE TAKE NOTICE, under Public Resources Code § 21167.5, that Bayview Hunters Point Community Advocates, Communities for a Better Environment, and Our Children's Earth Foundation intend to file a complaint under the provisions of the California Environmental Quality Act against the Bay Area Air Quality Management District ("BAAQMD"), in United States District Court, challenging the approval, without CEQA review, of the Compliance and Mitigation Agreement dated March 29, 2001 (and executed March 30, 2001) between BAAQMD and Mirant Potrero, LLC ("Mirant") to allow Mirant to operate Potrero Units 4 through 6 ("Peakers") at its Potrero Power Plant without any limits on the hours of operation.

The complaint seeks a declaration that the agreement between BAAQMD and Mirant allowing Mirant to operate its Peakers in excess of the permitted limit constitutes a violation of CEQA and that the agreement illegal and void. The complaint further requests the court to enter a preliminary and permanent injunction directing BAAQMD to conduct a full CEQA review and to prepare an environmental impact report.

Communities for a Better Environment



William B. Rostov
Staff Attorney

Environmental Law & Justice Clinic



Alan Ramo

Attorneys for Bayview Hunters Point
Community Advocates and Our Children's
Earth Foundation

Exhibit D

June 19, 2001

ENVIRONMENTAL LAW AND JUSTICE CLINIC • SCHOOL OF LAW

Via Certified U.S. Mail, Return Receipt Requested

Bill Lockyer, Attorney General
 Department of Justice
 P.O. Box 944255
 Sacramento, CA 94244-2550

Re: NOTICE OF INTENT TO FILE CEQA CLAIM

To the Attorney General of the State of California:

PLEASE TAKE NOTICE, under Public Resources Code § 21167.7, that on June 19, 2001, Bayview Hunters Point Community Advocates, Communities for a Better Environment and Our Children's Earth Foundation will file a complaint against the Bay Area Air Quality Management District ("BAAQMD") in United States District Court challenging the approval, without CEQA review, of the Compliance and Mitigation Agreement dated March 29, 2001 (and executed March 30, 2001) between BAAQMD and Mirant Potrero, LLC ("Mirant") to allow Mirant to operate Potrero Units 4 through 6 ("Peakers") at its Potrero Power Plant without any limits on the hours of operation.

The complaint seeks a declaration that the agreement between BAAQMD and Mirant allowing Mirant to operate its Peakers in excess of the permitted limit constitutes a violation of CEQA and that the agreement illegal and void. The complaint further requests the court to enter a preliminary and permanent injunction directing BAAQMD to conduct a full CEQA review and to prepare an environmental impact report.

A copy of the complaint is attached to this notice.

Dated: June 19, 2001

Communities for a Better Environment

William B. Rostov /WR
 William B. Rostov
 Staff Attorney

Environmental Law & Justice Clinic

Helen H. Kang
 Helen H. Kang

Attorneys for Bayview Hunters Point Community
 Advocates and Our Children's Earth Foundation

1
2
3 **PROOF OF SERVICE BY HAND DELIVERY**

4 **Re: Bayview Hunters Point Community Advocates, et al. v. Mirant Potrero LLC, et al.**
5 **) Case No. C-01-2348 PJH**

6 I, Andrea Paterson, the undersigned, hereby declare:

7
8 I am over the age of 18 years and am not a party to the above referenced cause. I am an
9 employee of the Environmental Law and Justice Clinic ("ELJC") in San Francisco, CA. My
10 business mailing address is 536 Mission Street, San Francisco, California 94105.

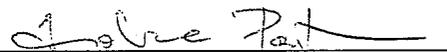
11
12 On August 20, 2001, I served a copy of Plaintiffs' **First Amended Complaint**, which is
13 attached hereto, by causing a copy to be hand delivered to:

14
15 David R. Farabee
16 Pillsbury Winthrop LLP
17 50 Fremont Street
18 San Francisco, CA 94105

19 Robert N. Kwong, District Counsel
20 Bay Area Air Quality Management District
21 939 Ellis Street
22 San Francisco, CA 94109

23 I hereby declare under penalty of perjury under the laws of the State of California that the
24 foregoing is true and correct and that this declaration was executed on August 20, 2001 at San
25 Francisco, California.

26
27 Dated this 20th day of August, 2001

28 
Andrea Paterson

Attachment D

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029**

In the Matter of: :
: :
Mirant Potomac River LLC : :
Potomac River Generating Station : :
Alexandria, Virginia : : Docket No. CAA-03-2006-0163DA
: :
: :
: :
: :

**ADMINISTRATIVE COMPLIANCE ORDER
BY CONSENT**

I. STATUTORY AUTHORITY

This Order is issued pursuant to Section 113(a)(1) of the Clean Air Act (the "Act"), 42 U.S.C. § 7413(a)(1). Under Section 113(a)(1) of the Act, the Administrator of the United States Environmental Protection Agency ("EPA" or "the Agency") has the authority to issue Orders requiring persons to comply with the requirements of an applicable State Implementation Plan ("SIP") or permit issued by a state. The Administrator has delegated his authority to issue such Orders within the geographical jurisdiction of EPA Region III to the Regional Administrator of EPA Region III, who has re-delegated this authority to the Director of the Air Protection Division of Region III. The geographical jurisdiction of EPA Region III includes the Commonwealth of Virginia.

This Order is issued to Mirant Potomac River, LLC ("Mirant") for its Potomac River Generating Station in Alexandria, Virginia.

II. FINDINGS OF FACT

1. Mirant owns and operates an electricity generating station known as the Potomac River Generating Station ("PRGS") in Alexandria, Virginia.
2. Mirant is a Limited Liability Company organized in the State of Delaware on August 2, 2000.
3. Pursuant to the Order By Consent entered into by Mirant and the Virginia Department of Environmental Quality ("VaDEQ"), effective September 23, 2004, Mirant performed a

Dispersion Modeling Analysis to assess the effect of Downwash (the "downwash study") of emissions from the PRGS. The downwash study used computer modeling to predict ambient concentrations of pollutants emitted by the PRGS under certain weather and atmospheric conditions.

4. Mirant provided the results of the downwash study to VaDEQ in August 2005. By letter dated August 19, 2005, VaDEQ informed Mirant that the downwash study demonstrated that emissions from the PRGS result in, cause or substantially contribute to, modeled violations of the primary National Ambient Air Quality Standards ("NAAQS") for sulfur dioxide ("SO₂"), nitrogen dioxide ("NO₂"), and PM₁₀ under certain atmospheric conditions.
5. VaDEQ's August 19th letter also requested that Mirant immediately undertake "such action as is necessary to ensure protection of human health and the environment, in the area surrounding the Potomac River Generating Station." VaDEQ cited 9 VAC 5-20-180(I) as the authority for this action.
6. The provision of the Virginia State Implementation Plan ("SIP") cited by VaDEQ, 9 VAC 5-20-180(I), has been approved and incorporated into the Virginia SIP at 40 C.F.R. § 52.2420(c), and is therefore federally-enforceable.
7. Mirant shut down all five Units of the PRGS at midnight on August 24, 2005.
8. On August 24, 2005, the District of Columbia Public Service Commission ("DCPSC") filed an "Emergency Petition and Complaint" with the United States Department of Energy ("DOE") and the Federal Energy Regulatory Commission ("FERC"), respectively, pursuant to the Federal Power Act ("FPA"), 16 U.S.C. § 824a(c), 824f and 825h, and Section 301(b) of the DOE Organization Act, 42 U.S.C. § 7151(b). The Emergency Petition requested that DOE find that an emergency exists under Section 202(c) of the FPA and issue an order requiring Mirant to continue operation of the PRGS.
9. Following additional modeling and assessment of the downwash study, Mirant re-started Unit 1 of the PRGS on September 21, 2005. Additional modeling conducted by Mirant indicated that operation of only Unit 1 would not cause any modeled NAAQS exceedances.
10. On December 20th, 2005, the Secretary of Energy issued Order No. 202-05-3 ("DOE Order") finding that an emergency did exist and ordering Mirant to, among other things, submit a plan to DOE detailing the steps to be taken to ensure Mirant's compliance with the DOE Order.
11. On December 30, 2005, Mirant submitted to DOE the Operating Plan setting forth the steps that Mirant would take to ensure compliance with the DOE Order.

12. By letter dated January 4, 2006, DOE required that Mirant "immediately take the necessary steps to implement Option A of the intermediate phase proposed in the [Operating Plan]." The DOE letter also noted that implementation of Option A was an interim measure.
13. In accordance with DOE's directive to maximize electric generation while not causing or contributing to a NAAQS violation, Mirant supplemented the original Operating Plan with additional operating configurations and modeling. The supplements contemplated that Mirant would use trona injection and a blend of low sulfur coal to manage SO₂ emissions. Mirant stated that these supplemental operating scenarios result in no modeled NAAQS exceedances.
14. By letter dated December 22, 2005, EPA issued a Notice to Mirant and the VaDEQ, alleging that Mirant did not immediately undertake the necessary action to protect human health and the environment required by VaDEQ's August 19, 2005 letter, and that Mirant was therefore in violation of 9 VAC 5-20-180(I) and the federally-enforceable Virginia SIP for the period of time in which it failed to immediately shut down all the PRGS Units.
15. Following issuance of the Notice, EPA met with Mirant on several occasions to discuss settlement of EPA's possible enforcement action for the violation alleged in the Notice under Section 113 of the CAA. These discussions, along with discussions with DOE and VaDEQ, have resulted in this Order.
16. In its evaluation of potential PRGS operating scenarios, DOE has determined that the levels of PRGS operation allowed under the terms and conditions of Part IV of this Order are necessary to assure an acceptable level of electric reliability to the District of Columbia under the circumstances.
17. EPA will require use of the AERMOD model with a 24 hour background SO₂ concentration of 51 micrograms per cubic meter ("ug/m³") when evaluating the PRGS's effects on the SO₂ NAAQS. In Mirant's December 30, 2005 Operating Plan and subsequent submissions to DOE and EPA, Mirant has used varying background concentrations for SO₂ in determining the maximum predicted impact of various operating scenarios at the PRGS. EPA has determined that Mirant's use of these varying background concentrations was technically defensible but that additional conservatism will be required in this Order. In an effort to build additional conservatism into Mirant's operating scenarios to ensure protection of the NAAQS, EPA has instructed Mirant to use a background concentration of 51ug/m³ to add to the AERMOD 24 hour SO₂ modeled pollutant concentrations to determine the maximum predicted impacts for all operational scenarios considered during and incorporated into this Order.
18. EPA has determined through modeling and analysis that there is a strong correlation between the days, hours, and locations of predicted highest 24-hour concentrations of

SO₂ and predicted highest 24-hour concentrations of PM₁₀; that the predicted highest concentrations of SO₂ are higher, relative to the SO₂ NAAQS, than the predicted highest concentrations of PM₁₀ relative to the PM₁₀ NAAQS; and that measures taken to reduce SO₂ emissions from the PRGS facility, such as reduced levels of operation and/or increased levels of trona usage, will also reduce emissions of PM₁₀.

III. CONCLUSIONS OF LAW

19. Mirant is a "person" within the meaning of Section 302(e) of the CAA, 42 U.S.C. § 7602(e), and within the meaning of Section 113(a) of the CAA, 42 U.S.C. § 7413(a), because it is a corporation.
20. EPA concludes that Mirant violated 9 VAC 5-20-180(I) by failing to immediately shut down the boilers at the PRGS upon receipt of the letter from VaDEQ, and that such failure is also a violation of Section 113(a) of the CAA, 42 U.S.C. § 7413(a).
21. Mirant has had an opportunity to confer with the Administrator or his designee regarding this alleged violation and the terms of this Order. Mirant denies that any violation occurred, but agrees to the entry of this Order.
22. EPA has determined that the following schedule and plan for compliance is reasonable, taking into account the seriousness of the modeled NAAQS exceedances and the concerns of DOE regarding electric reliability in the Central D.C. area, and that this schedule is expeditious given the length of time it will take Mirant to take more permanent measures as well as the time it will take for additional electric transmission lines to be put into service to alleviate the emergency as determined by DOE.

IV. ORDER

Based upon the forgoing, under Section 113(a)(4) of the Act, 42 U.S.C. § 7413(a)(4), IT IS DETERMINED AND ORDERED that:

A. Definitions - For the purpose of this Order, the following terms shall have the meanings defined below:

3-Hour Rolling SO₂ and 24-Hour Calendar Day SO₂ Emission Rate.

For the purpose of calculating the specified rate in Table 1 for a specified time period, the actual SO₂ emission rate is determined by dividing the sum of the total pounds of actual SO₂ emissions from the boiler stack of that unit, as determined by hourly CEMS data, as certified by 40 CFR Part 75, by the sum of the total heat input in million Btus from that coal-fired boiler unit.

For any 3 hour rolling period when there are fewer than 2 hours of actual emissions from a coal-fired boiler unit, an emission rate for that 3 hour period that would have to comply with the Table 1 emission rates does not need to be calculated for that unit.

For any calendar day when there are fewer than 3 hours of actual emissions from a coal-fired boiler unit, a 24 hour emission rate to comply with Table 1 need not be calculated for that unit.

On any day when a unit runs between 3 and 18 hours, the complying 24 hour emissions rate for Table 1 shall be calculated as follows:

If a unit operates between 3 hours and 10 hours, the SO₂ limit for that unit equals the 3 hour rate in Table 1 minus 1/3 of the difference between the 3 hr and 24 hr rate for that unit configuration;

If a unit operates 10 hours or more up to 18 hours, the SO₂ limit for that unit equals the 3 hour rate in Table 1 minus 2/3 of the difference between the 3 hr and 24 hr rate for that unit configuration.

If a unit operates 18 hours or more, the 24 hour rate in Table 1 shall apply.

Nothing in this paragraph is intended to allow greater operation of a unit than what is specified in Table 1 where this Order requires operation in accordance with Table 1. In addition, where this Order requires operation in accordance with Table 1 and that configuration calls for unit(s) to operate between 3 and 18 hours, then the Table 1 emission rates shall apply without the above adjustments.

AERMOD Default means Version 04300 of the AERMOD computer model, currently approved for general use by EPA.

AERMOD EBD means the AERMOD computer model with modified direction-specific building dimensions derived from the Wind Tunnel Study.

Alternative Operating Scenario means a method of operating the Potomac River Generating Station during the Model Evaluation Study, which has been approved by EPA and reviewed by VaDEQ.

DOE means the United States Department of Energy

DOE Order means Order No. 202-05-3, issued by the Department of Energy on December 20, 2005 in Docket No. EO-05-01 in response to an Emergency Petition and Complaint filed by the District of Columbia Public Service Commission.

EPA means the United States Environmental Protection Agency, Region III.

Line Outage Situation means that one or both 230 kV transmission lines, serving the Central D.C. area are out of service due to a planned or unplanned outage.

Mirant means Mirant Potomac River, LLC.

Modeled NAAQS Exceedance means a modeled 3-hour average sulfur dioxide concentration which, when a background concentration of 238.4 micrograms per cubic meter is added, exceeds 1,300 micrograms per cubic meter; or a modeled 24-hour average sulfur dioxide concentration which, when a background concentration of 51 micrograms per cubic meter is added, exceeds 365 micrograms per cubic meter; or, a modeled 24 hour PM10 concentration which, when a background concentration of 45 micrograms per cubic meter is added, exceeds 150 micrograms per cubic meter.

Model Evaluation Study or MES means a study proposed by Mirant and approved by EPA and reviewed by VaDEQ to compare multiple computer model predicted ambient air impacts to actual measured ambient air concentrations for the purpose of determining the best performing computer model in evaluating the effects of the emissions resulting from the operation of the PRGS.

Monitoring Plan means a plan proposed by Mirant and approved by EPA and reviewed by VaDEQ as part of the MES for the installation and use of ambient air monitors in the vicinity of the PRGS to monitor ambient air quality impacts of the PRGS.

Monitors means the ambient air monitors installed in accordance with the Monitoring Plan.

NAAQS means the National Ambient Air Quality Standards.

Non-Line Outage Situation means all periods of time that do not qualify as a Line Outage Situation.

Operating Parameters means the hourly average MW load of each unit for each hour of that day at the PRGS, the hourly average SO₂ emission rate expressed in lb/MMBtu for each unit for each hour of that day, and the emission rate of PM₁₀ expressed in lb/MMBtu.

Operating Plan means the December 30, 2005 Operating Plan submitted to DOE by Mirant to respond to the requirement for a compliance plan under the DOE Order.

Predictive Modeling means the daily use of an approved AERMOD computer model run in accordance with 40 C.F.R. Part 51, Appendix W, with forecasted weather conditions and planned Operating Parameters for the following day to predict modeled NAAQS compliance on a day-ahead basis.

PJM means the regional transmission organization for the region where the PRGS is located.

PRGS means the coal-fired electric generating station owned by Mirant and located in Alexandria, VA, comprised of three baseload generating units (Units 3, 4, 5) of approximately 102 MW each and two cycling units (Units 1 and 2) of approximately 88 MW each.

VaDEQ means the Virginia Department of Environmental Quality.

Wind Tunnel Study means a study proposed by Mirant using a physical model, as outlined in CPP Wind's Wind Tunnel Model Evaluation protocol, dated January 17, 2006, reviewed by EPA and VaDEQ, and conducted in accordance with EPA Guidance, to evaluate the accuracy of AERMOD Default's assumptions with respect to the direction-specific effective building dimensions when applied to the PRGS.

B. Operation During Non-Line Outage Situations

1. Mirant shall implement and comply with all of the single-unit, two-unit, and three-unit configuration constraints listed in Table 1 below until such time as Mirant is authorized by EPA and DOE to begin an alternative operating scenario as described below. Mirant shall operate each unit within the applicable hours-of-operation and SO₂ emission rate restrictions listed in the table each calendar day. Generally, unit transitions and unit startups will occur within (+/-) four hours of midnight. The following procedures will be followed when there is a transition between operating scenarios:

a. When transitioning between two units, the unit that is coming offline will cease burning coal before the starting unit begins burning coal. Number 2 oil will be burned during the warm-up phase of the starting unit and during the shutdown phase of the unit coming offline. The number of boilers burning coal will not exceed at any time the constraints applicable to the Unit Configurations listed in Table 1.

b. When a change in operating Unit Configuration occurs, Mirant shall, for the balance of the calendar day, meet the more stringent of the 3-hour SO₂ and/or 24-hour SO₂ rate caps and hours of operation applicable to:

- (i.) the Unit Configuration being ceased, and
- (ii.) the Unit Configuration being commenced.

TABLE 1

Unit Configuration	24-Hr Calendar Day SO ₂ Rate - lb/MBtu	3-Hr Rolling SO ₂ Rate - lb/MBtu	Operating Constraints
Unit 1	1.20	1.20	8 hrs max / 8 min / 8 off, 14,800 lb/day
Unit 1	0.84	1.14	None
Unit 2	0.41	0.73	None
Unit 3	0.31	0.66	None
Unit 4	0.36	0.70	None
Unit 5	0.61	0.90	None
Units 1 & 2	0.29	0.50	Both Units: 100% Load 24 hrs/day
Units 1 & 3	0.24	0.51	#1 @ 8 max / 8 min / 8 off, none on #3
Units 2 & 3	0.23	0.40	#2 @ 8 max / 8 min / 8 off, none on #3
Units 1 & 4	0.30	0.54	#1 @ 8 max / 8 min / 8 off, none on #4
Units 2 & 4	0.25	0.44	#2 @ 8 max / 8 min / 8 off, none on #4
Units 1 & 5	0.43	0.60	#1 @ 8 max / 8 min / 8 off, none on #5
Units 2 & 5	0.35	0.55	#2 @ 8 max / 8 min / 8 off, none on #5
Units 3 & 4	0.23	0.43	#3 @ 6 max / 18 min; #4 @ 7 max / 17 min
Units 3 & 5	0.24	0.43	Both units @ 12 hr max / 12 hr min
Units 4 & 5	0.27	0.51	Both units @ 12 hr max / 12 hr min
Units 1, 2 & 3	0.21	0.36	#1&2 @ 5 max / 4 min / 15 off, none on #3
Units 1, 2, &4	0.24	0.35	#1&2 @ 6 max / 5 min / 13 off, none on #4
Units 1, 2, &5	0.27	0.42	#1&2 @ 8 max / 8 min / 8 off, none on #5

2. Schedule for Installation of Trona Injection at All Boiler Units

a. In accordance with the schedule set forth in Mirant's Operating Plan of December 30, 2005, Mirant shall ensure that Trona injection units are installed and operated as follows:

(1). March 20, 2006 - In addition to the two portable, rental Trona units, Mirant shall have a third operational Trona injection unit, whether an engineered unit or a rental unit. Mirant shall operate all three Trona units whenever three or more boilers are operating.

(2). April 28, 2006 - Mirant shall have installed and be operating three engineered Trona injection units, and shall operate each unit whenever the boiler to which it is attached is operating. Mirant shall operate the rental Trona units on boilers not equipped with operating engineered units.

(3). May 31, 2006 - Mirant shall have installed and be operating

all five engineered Trona injection units, and shall operate each unit whenever the boiler to which it is attached is operating.

3. Model Evaluation Study

a. Mirant shall undertake a Model Evaluation Study to determine the best performing model for predicting the computer-modeled ambient air quality impacts from the PRGS's operations. Prior to beginning the MES, Mirant must submit to EPA for approval an MES protocol, and simultaneously send a copy to VaDEQ. Mirant may begin operating the PRGS in a manner that does not cause or contribute to Modeled NAAQS Exceedances by using Predictive Modeling as described in subsection 4 below, after completing the following tasks:

- (1). EPA approval of the MES protocol;
- (2). installation and operation of at least 3 SO₂ monitors in accordance with the approved monitoring plan;
- (3). execution of this Order by EPA; and
- (4). authorization by DOE for Mirant to operate in accordance with this Order.

b. Upon commencement of daily predictive modeling performed in conjunction with the MES, the SO₂ emission rate limitations and other unit operating restrictions set forth in Table 1 shall no longer apply unless otherwise indicated. The Table 1 restrictions apply if Mirant ceases to operate the PRGS in accordance with the MES.

4. Operations in Accordance with Daily Predictive Modeling

a. By 10 AM each morning, Mirant shall collect actual weather predictions from the National Weather Service for the Reagan National Airport and use them along with planned Operating Parameters as inputs to conduct a computer modeling run for the following day using AERMOD Default. If the modeling confirms that Mirant's planned operations for the following day will not cause or contribute to a Modeled NAAQS Exceedance, Mirant may operate on the day modeled in accordance with the modeled Operating Parameters. If the Predictive Modeling indicates that the planned Operating Parameters will result in one or more Modeled NAAQS Exceedances, Mirant shall not run under those operating parameters but shall continue to adjust its planned operations and conduct additional modeling runs using the adjusted Operating Parameters to confirm that the adjusted operations will not cause or contribute to a Modeled NAAQS Exceedance for the day modeled.

b. During Line Outage Situations, Predictive Modeling must continue to be performed but the PRGS shall be operated under the Line Outage Situation provision in accordance with the DOE Order and this Order.

c. If the Predictive Modeling indicates that the predicted weather conditions and planned Operating Parameters do not result in a Modeled NAAQS Exceedance,

Mirant is authorized to operate using the planned Operating Parameters and shall not be in violation of this Order; or 9 VAC 5-20-180(I), as incorporated into the Virginia SIP at 40 C.F.R. 52.2420(c); nor shall such operation be deemed to give a right for a cause of action for any alleged violation of the NAAQS as a result of Mirant causing or contributing to any modeled or monitored exceedance of the NAAQS. This release shall only apply to alleged exceedances or violations occurring during the lifetime of the Order or the duration of the MES if the requirements of this Order have been incorporated into a state operating permit; shall only apply to laws in existence on the effective date of the Order; and shall not prevent Virginia from issuing an order under 9 VAC 5-20-180(I) or EPA from taking action under Section 303 of the Clean Air Act.

5. Operation During Certain Periods of Elevated SO₂ Impacts After MES

Approval

a. As a precaution, after the installation of at least three monitors, Mirant shall institute additional measures that will apply whenever ambient concentrations of SO₂ are elevated, as defined below. Specifically, Mirant shall:

(1). Install a monitor alert system in the Potomac River Control Room that registers an audible alarm if in any one hour the average measured ambient concentration of SO₂ at any monitor is equal to or greater than 80% of the 3 hour SO₂ National Ambient Air Quality Standard, measured as 400 parts per billion (1,040 $\mu\text{g}/\text{m}^3$).

(a). During the hour following the sounding of the alarm, Mirant shall make operational adjustments, which may include increasing Trona injection and/or decreasing operation and shall observe the effect of these adjustments on the average, measured ambient concentration of SO₂.

(b). If, at the end of the second hour, the average measured ambient concentration of SO₂ is not equal to or less than 1,040 $\mu\text{g}/\text{m}^3$, Mirant shall adjust its operations to conform to the scenarios described in Table 1 until the rolling 3 hour average is less than 1,040 $\mu\text{g}/\text{m}^3$.

(2). Mirant shall also configure the audible alarm to sound if, in any 12 hour period, any monitor measures an average, ambient concentration of SO₂ equal to or greater than 80% of the 24 hour SO₂ National Ambient Air Quality Standard, measured as 112 parts per billion (292 $\mu\text{g}/\text{m}^3$).

(a). During the following 6 hours, Mirant shall make operational adjustments, which may include increasing Trona injection and/or decreasing operation and shall observe the effect of these adjustments on the measured ambient concentration of SO₂.

(b). If, at the end of the 6 hour period, the average, measured ambient concentration of SO₂ is not equal to or less than 292 $\mu\text{g}/\text{m}^3$, Mirant shall adjust its operations to conform to the scenarios described in Table 1 for the balance of the calendar day.

(3). Mirant shall also configure the audible alarm to sound if, after the first 6 months of operation, any monitor measures an average, ambient concentration of SO₂ equal to or greater than 80% of the annual average NAAQS, measured as 64 µg/m³.

(a). During the following 3 months, Mirant shall monitor the 7 month, 8 month and 9 month averages.

(b). If, at the end of 9 months, the average, measured ambient concentration of SO₂ is not equal to or less than 64 µg/m³, Mirant shall adjust its operations so that the annual, measured ambient concentration of SO₂ does not exceed 80 µg/m³.

(4). If the audible alarm sounds more than 5 times in a calendar month, Mirant shall, on a one-time basis, adjust the alarm to 75% of the applicable NAAQS.

6. PM10 Predictive Modeling

Whenever Mirant operates 4 or more units, it shall abide by an emission rate of 0.055 lbs/MM Btu and shall first conduct Predictive Modeling using this rate to determine whether operation of the units causes or contributes to a Modeled NAAQS Exceedance. If the Predictive Modeling indicates that the planned Operating Parameters will result in a Modeled NAAQS Exceedance for PM10, Mirant shall adjust its planned operating scenario and re-run the Predictive Modeling with an emission rate of 0.055 lbs/MM Btu until such time as Mirant confirms through Predictive Modeling that the adjusted operations will not cause or contribute to a Modeled NAAQS Exceedance for PM10.

7. AERMOD EBD - Physical Changes Requiring Model Changes

If Mirant elects to refine the AERMOD Default model by performing a Wind Tunnel Study, Mirant will submit a Wind Tunnel Study evaluation protocol for review by EPA and VaDEQ and approval by EPA. The protocol will describe the technical features of the proposed Wind Tunnel Study and the theoretical basis for demonstrating that the data generated should be used to develop a site-specific set of assumptions, including equivalent building dimensions, to be applied to AERMOD Default.

The results of the Wind Tunnel Study shall be submitted to EPA for approval and may result in site-specific equivalent building dimensions to be used in lieu of the assumptions in the AERMOD Default model. The results must be submitted to EPA no later than 90 days following entry of this AO. Upon approval of AERMOD EBD by EPA and VaDEQ, Mirant shall operate for the balance of the MES study period applying AERMOD EBD in its Predictive Modeling.

As the Model Evaluation Study progresses, Mirant may make other changes at the PRGS, including physical changes such as changes to the stacks. In that event, inputs utilized during the Predictive Modeling and in the models evaluated at the conclusion of the Model Evaluation Study (and the model used to develop emission limits for the PRGS) may, after EPA

approval, be adjusted to correspond to these changes. However, the MES study period must be conducted for a minimum of six months following any physical change in order to obtain monitoring data upon which to evaluate the models.

8. Monitoring and Comparison Modeling During the Model Evaluation

Study

In accordance with the MES Protocol, as attached, Mirant shall install and operate a total of six (6) ambient SO₂ monitors in the preferred locations or alternate locations as described below:

a. Preferred locations

(1). Two monitors on the roof of Marina Towers, with one located on the Southeast wing and one at the center of the building;

(2). One monitor east of the PRGS, approximately due east of Stack 5 on the west bank of the Potomac River;

(3). One monitor southeast of the PRGS, along the facility fenceline, near the River;

(4). One monitor approximately 800 meters north of Marina Towers; and

(5). One monitor on the roof of a building in the Harbor Terrace complex or a property within three blocks of Harbor Terrace, in the urbanized area southwest of the PRGS.

EPA will work with Mirant to assist in obtaining permission needed to install monitors in these preferred locations.

b. Alternate Locations: If EPA determines that notwithstanding Mirant's good faith and reasonable efforts to obtain permission to install monitors in the preferred locations, it is impractical to install some or all of the monitors in the preferred locations in a timely manner because the owner of the preferred monitor location declines to host the SO₂ monitor(s) or the preferred location is unavailable or impractical for any other reason, EPA will authorize installation of monitors at some or all of the five alternative SO₂ monitor locations set forth in the MES Protocol, as summarized below:

(1) Southwest of the PRGS on the rooftop of Braddock Place;

(2) Approximately 600 meters South-Southeast of the stack locations, at ground level along the Potomac River;

(3) Approximately 300 meters Southwest of the PRGS at ground level;

(4) Approximately 600 meters South-Southwest of the PRGS at ground level; and

(5) Approximately 100 meters SW of the plant at ground level.

c. **Deadline for ambient monitor installation:** Mirant shall have all six monitors installed and operating within 60 days of the execution of this Order. EPA may, at its own discretion, extend the deadline, and/or change locations, for installation and/or operation of one or all of the monitors and in the event that EPA determines that one of the preferred locations is impractical and authorizes use of an alternate location, Mirant shall have an additional 30 days in which to install that monitor.

d. **Operation, Maintenance, and Quality Assurance/Quality Control ("QA/QC") of monitors** - It shall be the responsibility of Mirant to ensure that the monitors are operated, maintained, and subject to the appropriate QA/QC provisions set forth at Appendix A to 40 C.F.R. Part 58.

e. **Follow-up modeling:** The data generated by the monitors shall be used at the end of the study to conduct a model evaluation. Until such time as all the ambient air monitors are installed in accordance with the Monitoring Plan and begin measuring and recording ambient air data, Mirant shall perform "follow up" computer modeling using actual weather conditions and Operating Parameters, and shall report the results to EPA and VaDEQ on a monthly basis, as described below. This "follow-up" modeling will be performed on the Monday following the previous week of operation.

9. Determination of Best Performing Model at Conclusion of Model Evaluation Study

At the conclusion of the MES, the performance of the applicable models will be evaluated in accordance with the document "Protocol for Determining the Best Performing Model." EPA-454/R-92-025, Sept. 1992, Comparing Computer Model-Predicted Air Concentrations to Actual Ambient Air Concentrations Measured by the Monitors. The information yielded by the comparison of model predictions to measured ambient concentrations will result in a determination by EPA and VaDEQ as to which model is best-performing. Thereafter, the best-performing model shall be used to conduct computer modeling to develop permanent emission limits at the PRGS.

10. Reporting

a. Throughout the period of the MES, Mirant shall deliver to EPA and VaDEQ monthly: (1) the modeled input files and results of the daily Predictive Modeling for the preceding month, including the hourly average heat input in MMBtu for each unit and the exit velocity (or exhaust volume) for each unit; (2) verification that the planned Operating Parameters utilized for Predictive Modeling in the preceding month were not exceeded, or if exceeded, documentation describing that exceedance; (3) the inputs and results of "follow-up" modeling for the preceding month (or portion thereof during which all Monitors were not in place), including the hourly average heat input in MMBtu for each unit and the exit velocity (or

exhaust volume) for each unit, but only until commencement of operation of all Monitors, and; (4) after installation of the Monitors, the data generated by the Monitors.

b. If at any time the "follow-up" modeling demonstrates a modeled exceedance of the NAAQS or the Monitors demonstrate an actual exceedance of the NAAQS, Mirant shall report such modeled or monitored exceedance to EPA and VaDEQ within 3 days of the modeled or monitored exceedance for a determination as to whether corrective action is required.

C. Operation During Line Outage Situations

1. During a Line Outage Situation, Mirant shall operate the PRGS to produce the amount of power needed to meet the load demand in the Central D.C. area, as specified by PJM and in accordance with the DOE Order. During such operations, Mirant shall take all reasonable steps to limit the emissions of PM10, NOX and SO2 from each boiler, including operating only the number of units necessary to meet PJM's directive and optimizing its use of Trona injection to minimize SO2 emissions. During a Line Outage Situation, Mirant shall achieve 80% reduction of SO2 emissions unless: 1) Mirant demonstrates, through predictive modeling or otherwise, that 80% reduction is not necessary to achieve compliance with the NAAQS; or 2) Mirant demonstrates that 80% reduction is not logistically feasible because of factors such as the quantity of available Trona and predicted duration of the outage. In the event that Mirant demonstrates that 80% reduction is not logistically feasible, it shall submit a plan to EPA for optimizing its use of Trona injection so as to maximize SO2 reduction and the plan shall propose control measures and removal efficiencies to be achieved during the Line Outage Situation. If Mirant has 30 days notice in advance of the Line Outage Situation, it shall submit the plan to EPA for approval 15 days before commencement of the Line Outage. If Mirant has less than 30 days advance notice of the Line Outage Situation, Mirant shall submit the plan to EPA for approval as promptly as reasonably possible under the circumstances. It is understood and acknowledged that the plan to be followed for an unscheduled Line Outage Situation will depend upon the specific circumstances at the time of the unscheduled Line Outage Situation. Nothing here shall diminish Mirant's obligation to produce the amount of power needed to meet the load demand in the Central D.C. area, as specified by PJM, and in accordance with DOE's Order.

2. Malfunctions of emission control devices, such as Trona injection, shall not be deemed a failure to limit the emissions during a line outage, provided that Mirant has made reasonable efforts to avoid the malfunction and to promptly correct the malfunction. All emissions during a Line Outage Situation count toward any other permit, statutory, or regulatory limits for the PRGS. Upon Mirant's request, EPA (after consultation with DOE) will provide contemporaneous written confirmation of the existence of a Line Outage Situation. If Mirant operates the PRGS in accordance with dispatch directions from PJM and the relevant terms of this Order during a Line Outage Situation, Mirant shall not be in violation of this Order; or 9 VAC 5-20-180(I), as incorporated into the Virginia SIP at 40 C.F.R. 52.2420(c); nor shall such operation be deemed to give a right for a cause of action for any alleged violation of the

NAAQS as a result of Mirant causing or contributing to any modeled or monitored exceedance of the NAAQS. This release shall only apply to alleged exceedances or violations occurring during the lifetime of the Order or the duration of the MES if the requirements of this Order have been incorporated into a state operating permit; shall only apply to laws in existence on the effective date of the Order; and shall not prevent Virginia from issuing an order under 9 VAC 5-20-180(I) or EPA from taking action under Section 303 of the Clean Air Act.

D. General Provisions

1. At all times, Mirant shall not emit more than 3700 tons of NOx per year and shall limit the emission rate of PM10 to 0.055 lbs/MMBtu.
2. Mirant's actions shall be consistent with all provisions of federal and state law, including but not limited to, the Clean Air Act, all federal regulations promulgated under the Clean Air Act, and any other applicable laws, including the Virginia State Implementation Plan.

E. Permitting Requirements

Within the 12 month period following entry of this Order, Mirant must cooperate with VaDEQ in the development of operating permit emission limits protective of all NAAQS. Mirant agrees that the obligations of this Order, to the extent they have not been completed, may become obligations in the operating permit issued by VaDEQ. Mirant further agrees that during the implementation of this Order, it will prepare and submit to EPA and VaDEQ an analysis of the applicability of NSR/PSD to the PRGS due to the installation of Trona injection and any additional fugitive emissions resulting from that installation.

V. PARTIES BOUND

This Order shall apply to and be binding upon Mirant, its agents, successors, and assigns and upon all persons, contractors and consultants acting under or for Mirant, or persons acting in concert with Mirant who have actual knowledge of this Order or any combination thereof with respect to matters addressed in this Order. No change in ownership or corporate or partnership status will in any way alter Mirant's responsibilities under this Order.

In the event of any change in ownership or control of the PRGS, Mirant shall notify the EPA in writing at least thirty (30) days in advance of such change and shall provide a copy of this Order to the transferee-in-interest of the PRGS, prior to any agreement for transfer.

VI. RESPONSES TO ORDER

Information required to be submitted to EPA under this Order must be sent to:

Chief, Air Enforcement Branch
Air Protection Division,

U.S. Environmental Protection Agency, Region 3
1650 Arch St.
Philadelphia, PA 19103

And

Douglas J. Snyder
Assistant Regional Counsel
Office of Regional Counsel (3RC10)
U.S. Environmental Protection Agency, Region 3
1650 Arch St.
Philadelphia, PA 19103

VII. EFFECT OF COMPLIANCE ORDER

As set forth in Section 113(a)(4) of the Act, 42 U.S.C. § 7413(a)(4), nothing in this Administrative Compliance Order by Consent shall prevent EPA from assessing any penalties, or otherwise affect or limit the United States' authority to enforce other provisions of the Act, or affect any person's obligations to comply with any Section of the Act or with any term or condition of any permit or applicable implementation plan promulgated or approved under the Act. Further, nothing in this Order shall limit or otherwise preclude the United States from taking criminal or additional civil judicial or administrative enforcement action against Mirant or any third parties with regard to the PRGS pursuant to any other federal or state law, regulation or permit condition, or for Mirant's failure to comply with any requirements of this Order. Nothing herein shall be construed to limit the authority of the EPA to undertake action against any person, including Mirant, in response to any condition that EPA determines may present an imminent and substantial endangerment to the public health, public welfare or the environment. EPA reserves any rights and remedies available to it to enforce the provisions of this Order, the Act and its implementing provisions, and of any other federal laws or regulations for which it has jurisdiction following the entry of this Order.

For the purposes of this proceeding only, Mirant hereby expressly waives its right to any appeal of this Order which it may have under Section 307(b) of the CAA, 42 U.S.C. § 7607(b), and waives the right to challenge the terms of this Order in any action taken to enforce this Order pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b).

VIII. ENFORCEMENT

Failure to comply with this Order may result in a judicial or administrative action for appropriate relief, including civil penalties, as provided in Section 113 of the Act, 42 U.S.C. § 7413. EPA retains full authority to enforce the requirements of the Clean Air Act, 42 U.S.C. §§ 7401-7642, and nothing in this Order shall be construed to limit that authority except as otherwise provided herein.

IX. CERTIFICATION OF REPORTS

Any notice, report, certification, data presentation, or other document submitted by Mirant under or pursuant to this Order, which discusses, describes, demonstrates, or supports any finding or makes any representation concerning Mirant's compliance or non-compliance with any requirement(s) of this Order, shall be certified by a responsible corporate official of Mirant. The term "responsible corporate official" means (a) the Chairman or Chief Operating Officer of Mirant, or (b) Vice President of Operations for PRGS.

23. The certification required by the preceding paragraph of this Order shall be in the following form:

Except as provided below, I certify that the information contained in or accompanying this (type of submission) is true, accurate, and complete. As to (the/those) portion(s) of this (type of submission) for which I cannot personally verify (its/their) accuracy, I certify under the penalty of law that this (type of submission) and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature: _____
Name(print): _____

X. EFFECTIVE DATE AND OPPORTUNITY FOR CONFERENCE

24. By signing this Order, Mirant agrees that it has had an opportunity to confer on the terms of this Order with EPA and thereby waives its opportunity pursuant to Section 113(a)(4) to confer further with EPA concerning the violation(s) alleged in the above Order before the Order takes effect. Therefore, this Order shall be effective upon Mirant's receipt of a copy of the Order signed by the Director of the Air Protection Division, Region 3, or her designee. This Order shall expire one year after execution of the Order, in accordance with Section 113(a)(4) of the CAA, unless it is terminated sooner by EPA.

XI. FAILURE TO PERFORM

25. In the event of an inability or anticipated inability on the part of Mirant to perform any of the actions or work required by this Order in the time and manner required herein, Mirant shall notify EPA orally within twenty-four (24) hours of such event (or, if the event occurs on a Friday

or Saturday, Sunday, or legal holiday, no later than the following business day) and in writing as soon as possible, but in no event more than three (3) days after such event. Such notice shall set forth the reason(s) for, and the expected duration of, the inability to perform; the actions taken and to be taken by Mirant to avoid and mitigate the impact of such inability to perform; and the proposed schedule for completing such actions. Such notification shall not relieve Mirant of any obligation of this Order. Mirant shall take all reasonable actions to prevent and minimize any delay.

XII. BUSINESS CONFIDENTIALITY

26. Mirant is entitled to assert a claim of business confidentiality covering all or part of any requested information, in the manner described in 40 C.F.R. § 2.203(b), unless such information is "emission data" as defined in 40 C.F.R. § 2.301(a)(2). Information subject to a claim of business confidentiality will be made available to the public only in accordance with the procedures set forth in 40 C.F.R. Part 2, Subpart B. Unless a confidentiality claim is asserted at the time requested information is provided, EPA may make this information available to the public without further notice to you.

XIII. COPIES OF ADMINISTRATIVE COMPLIANCE ORDER BY CONSENT

A copy of this Order will be sent to James Sydnor, Virginia Department of Environmental Quality.

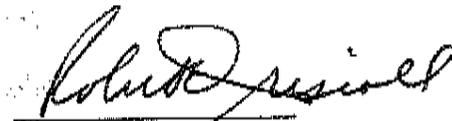
Dated: June 1, 2006



Judith Katz, Director
Air Protection Division
U.S. Environmental Protection Agency
Region III

The undersigned represents that he or she is a duly authorized representative of Mirant Potomac River, LLC for the purpose of signing this Order, and that Mirant agrees to the terms of this Order.

Dated: June 1, 2006



Robert Driscoll
Chief Operating Officer

Attachment E



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

NORTHERN VIRGINIA REGIONAL OFFICE
13901 Crown Court, Woodbridge, Virginia 22193
(703) 583-3800 Fax (703) 583-3801
www.deq.virginia.gov

L. Preston Bryant, Jr.
Secretary of Natural Resources

David K. Paylor
Director

Jeffery A. Steers
Regional Director

March 23, 2007

CERTIFIED MAIL
Return Receipt Requested

Mr. Michael Stumpf
Group Leader-Plant Operations
Mirant Potomac River Generating Station
1400 North Royal Street
Alexandria, Virginia 22314

NOTICE OF VIOLATION

RE: Mirant Potomac River Generating Station, Facility Registration No. 70228

Dear Mr. Stumpf:

This letter notifies you of information upon which the Department of Environmental Quality ("Department" or "DEQ") may rely in order to institute an administrative or judicial enforcement action. Based on this information, DEQ has reason to believe that the Mirant Potomac Power Generating Station may be in violation of the Air Pollution Control Law and Regulations.

This letter addresses conditions at the facility named above, and also cites compliance requirements of the Air Pollution Control Law and Regulations. Pursuant to Va. Code § 10.1-1309 (A) (vi), this letter is not a case decision under the Virginia Administrative Process Act, Va. Code § 2.2-4000 *et seq.* The Department requests that you respond **within 10 days of the date of this letter.**

OBSERVATIONS AND LEGAL REQUIREMENTS

On February 27, 2007, the Virginia Department of Environmental Quality (DEQ), Northern Virginia Regional Office (NVRO) requested information regarding operation of the Mirant Potomac River Generating Station (plant) and the reported February 23, 2007, monitored exceedance of the National Ambient Air Quality Standard (NAAQS) for sulfur oxides (24-hour

standard) at the plant's southeast fence-line ambient sulfur dioxide (SO₂) monitor. Subsequent to that request, on March 14, 2007, DEQ staff conducted an on-site interview with plant staff at the facility in Alexandria, Virginia to discuss: 1) the plant's general operating procedures when not operating under U.S. Department of Energy (DOE) order; 2) the plant's standard operating procedures in preparation for, and for the duration of, line outage situations; and 3) specific DEQ questions pertaining to the aforementioned February 23, 2007, incident. The following describe information obtained and provided to DEQ staff and identify the applicable legal requirements.

1. *Observations:* On February 23, 2007, the plant's southeast perimeter ambient air monitor recorded an exceedance of the 24-hour SO₂ NAAQS.

***Legal Requirements:* Virginia Regulations to Control and Abate Air Pollution 9 VAC 5-30-30.A.2 states that the primary ambient air quality standards for Sulfur oxides (sulfur dioxide) are as follows: 365 micrograms per cubic meter (.014 parts per million) – maximum 24-hour concentration not to be exceeded more than once per calendar year. The 24-hr averages shall be determined from successive nonoverlapping 24-hr blocks starting at midnight each calendar day.**

2. *Observations:* On February 23, 2007, the plant was operating under direction of PJM in accordance with DOE Order 202-05-03, to ensure reliability of electric generation into central Washington D.C. during a scheduled line outage. Plant officials and operators were aware of the following critical factors prior to February 23, 2007, but apparently did not authorize and implement appropriate actions to minimize SO₂ emissions, subsequently causing or significantly contributing to the February 23, 2007, exceedance of the 24-hour SO₂ NAAQS:
 - a. Predictive modeling indicated an exceedance of the SO₂ 24-hour NAAQS on February 23, 2007, while factoring in maximum Trona injection to control emissions from each unit at 0.24 pounds of SO₂ per million British thermal units (lbs/MMBTU) in the model.
 - b. Knowledge that the current Trona injection systems could not sustain a 0.24 lbs/MMBTU SO₂ emission rate for an extended period of time.
 - c. Trona injection problems existed on Unit 1, consequently and significantly reducing its effectiveness to control SO₂ emissions from that unit.
 - d. An alarm signaled the plant's control room at approximately 10 p.m. on February 22, 2007, to report that SO₂ emissions at the southeast perimeter ambient air monitor were at 80% of the NAAQS.

***Legal Requirements:* Virginia Regulations to Control and Abate Air Pollution 9 VAC 5-40-20.E states that "At all times, including periods of startup, shutdown, soot blowing and malfunction, owners shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with air pollution control practices for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the board, which may include, but not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source."**

3. *Observations:* The plant's Group Leader of Operations informed DEQ staff during the March 14, 2007, interview, that plant operators are responsible for making decisions regarding the operation of the five units during line outage situations; and that operators understand that matching load demand is a priority, with minimizing SO₂ emissions at their discretion; however, the plant did not have the following to assure air quality, operator consistency, and facility awareness:
 - a. Written procedures, protocol, and/or policy to operate while minimizing emissions from the plant when operating under a line outage situation to the extent practicable, and
 - b. Training records of operators regarding the operation of the plant under DOE Order to minimize emissions.

***Legal Requirements:* Virginia Regulations to Control and Abate Air Pollution 9 VAC 5-40-20.E states that "At all times, including periods of startup, shutdown, soot blowing and malfunction, owners shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with air pollution control practices for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the board, which may include, but not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source."**

ENFORCEMENT AUTHORITY

Va. Code § 10.1-1316 of the Air Pollution Control Law provides for an injunction for any violation of the Air Pollution Control Law, the Air Board regulations, an order, or permit condition, and provides for a civil penalty up to \$32,500 per day of each violation of the Air Pollution Control Law, regulation, order, or permit condition. In addition, Va. Code §§ 10.1-1307 and 10.1-1309 authorizes the Air Pollution Control Board to issue orders to any person to comply with the Air Pollution Control Law and regulations, including the imposition of a civil penalty for violations of up to \$100,000. Also, Va. Code § 10.1-1186 authorizes the Director of DEQ to issue special orders to any person to comply with the Air Pollution Control Law and regulations, and to impose a civil penalty of not more than \$10,000. Va. Code §§ 10.1-1320 and 10.1-1309.1 provide for other additional penalties.

The Court has the inherent authority to enforce its injunction, and is authorized to award the Commonwealth its attorneys' fees and costs.

FUTURE ACTIONS

DEQ staff wishes to discuss all aspects of their observations with you, including any actions needed to ensure compliance with state law and regulations, any relevant or related measures you plan to take or have taken, and a schedule, as needed, for further activities. In addition, please advise us if you dispute any of the observations recited herein or if there is other information of which DEQ should be aware. In order to avoid adversarial enforcement proceedings, Mirant Potomac River Generating Station may be asked to enter into a Consent

Order with the Department to formalize a plan and schedule of corrective action and to settle any outstanding issues regarding this matter, including the assessment of civil charges.

In the event that discussions with staff do not lead to a satisfactory conclusion concerning the contents of this letter, you may elect to participate in DEQ's Process for Early Dispute Resolution. If you complete the Process for Early Dispute Resolution and are not satisfied with the resolution, you may request in writing that DEQ take all necessary steps to issue a case decision where appropriate. For further information on the Process for Early Dispute Resolution, please visit the Department's website under "Laws & Regulations" and "DEQ regulations" at: http://www.deq.virginia.gov/regulations/pdf/Process_for_Early_Dispute_Resolution_8260532.pdf or ask the DEQ contact listed below.

Please contact me at (703) 583-3810 or jasteers@deq.virginia.gov **within 10 days of the date of this letter** to discuss this matter and arrange a meeting.

Sincerely,

A handwritten signature in black ink that reads "Jeffery A. Steers". The signature is written in a cursive style with a large, sweeping initial "J".

Jeffery A. Steers
Regional Director

Attachment F

May 11, 2007

Mr. Jeffrey A. Steers
Regional Director
Department of Environmental Quality
Northern Virginia Regional Office
13901 Crown Court
Woodbridge, Virginia 22193



Re: Response to March 23, 2007 Notice of Violation

Dear Mr. Steers:

This letter responds to the March 23, 2007 Notice of Violation ("NOV") and follows up on a April 27, 2007 meeting between Mirant Potomac River, LLC ("Mirant") and the Department of Environmental Quality ("DEQ") at the Northern Virginia Regional Office. Mirant appreciates the opportunity to provide additional information and to respond to the March 23, 2007 notice.

Mirant is committed to fully resolving the NOV and any other outstanding questions about its operations. Mirant does not dispute the majority of observations presented in the NOV. Specifically, Mirant agrees that:

- On February 23, 2007, Mirant's on-site monitor recorded SO₂ concentrations that were higher than the 24-hour SO₂ NAAQS, while the plant was operating under DOE Order 202-05-03 to ensure reliability of electric generation into central Washington D.C. during a scheduled line outage situation.
- Plant officials and operators were aware that (1) based on predictive modeling, concentrations above the 24-hour NAAQS were predicted to occur on that date; (2) the Trona injection system could not provide sufficient control of the SO₂ emissions, due to problems with both Unit 1 and Unit 5's trona injection system; and (3) an alarm on February 22, 2007 reported that SO₂ emissions at the southeast perimeter air monitor were at 80% of the NAAQS.
- Other than two emails from December 2006 sent to Operations Department supervisors describing the desired operation during Pepco Line Outages, Mirant did not have more formal written procedures describing how to minimize

emissions from the plant while operating under a line outage situation. Mirant did not have written records available detailing the training of operators to minimize emissions while operating the plant under DOE Order.

Mirant disagrees, however, with the conclusion in Observation Number 2 that plant officials and operators "apparently did not authorize and implement appropriate actions to minimize SO₂ emissions."

The actions of our plant officials and operators in addressing the February 23, 2007 exceedance complied and our on-going efforts since February 23, 2007 continue to comply with the 9 VAC 5-40-20.E requirement that "[a]t all times, including periods of startup, shutdown, soot blowing and malfunction, owners shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with air pollution control practices for minimizing emissions." Mirant will first describe the efforts of plant officials and operators in addressing the February 23, 2007 exceedance. Then, we will detail our efforts to minimize emissions going forward.

1. Efforts to Minimize Emissions on February 23, 2007.

On February 23, 2007, Mirant could not cease operations or reduce operations to a level that would not have exceeded the NAAQS for SO₂ without violating DOE Order 202-05-03. Faced with this difficult situation, our plant operators and engineers sought to minimize emissions to the best of their ability through operational controls, using well established but undocumented policies and procedures.

In order to reduce emissions on February 23, 2007, plant operations were scaled back to the extent possible without violating the DOE Order. The Trona injection system was not running properly on Units 1 or 5. The SO₂ impact of Unit 1 was minimized by making it the last unit to increase in load that morning and the first unit to decrease in load that evening. Unit 5 generation was kept below the other two baseload units (3 and 4) throughout the day and with the exception of four hours when it generated 95 mws, was kept at 80 mws or below to minimize SO₂ impacts. The DOE Order requires that if one unit is unexpectedly taken out of service, the Plant must be able to make up the difference and continue to follow load. In order to ensure the ability to satisfy this requirement, units must remain in operation at a certain percentage in order to preserve this ability to increase production rapidly if it became necessary in order to follow load. On February 23, 2007, Units 2 through 4 were operated at the highest level possible that still maintained this ability to increase power if necessary. Operating Units 2 through 4 at these high levels enabled operation of Units 1 and 5 to be minimized. Through these operational measures, our plant operators and engineers sought to the extent practicable to maintain and operate the facility, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emission while maintaining compliance with the DEQ Order.

Contrary to the statements in the NOV, our plant operators and engineers had guidance on how to minimize emissions on February 23, 2007, as well as on the days leading up to the

SO₂ exceedance. Management was involved in the decisions addressing the February 23, 2007 exceedance and in addition to the two December 2006 emails, ensured that orally communicated policies were in place. As soon as predictive modeling indicated that an exceedance of the 24-hour SO₂ NAAQS was likely to occur on February 23, 2007, management was notified. Due to the DOE Order's requirements, however, management could only direct plant operators and engineers to minimize emissions to the greatest extent possible within the parameters of the DOE Order.

Specifically, Plant management directed Plant operators to maintain Trona flow at the maximum rate possible. This included monitoring the Trona injection rate and the discharge pressure. When the flow rate drops or pressure deviates, this signals potential pluggage in the trona injection lines or plugged metering bin vent filters. The operators must then take steps to either unplug the Trona lines or replace the filters to reestablish trona flow. In addition, operators and maintenance personnel must monitor the valve packing on the Trona feeders and replace it as necessary and as circumstances allow. Finally, the operators and maintenance personnel must monitor the ash hopper. During line outages when operating and Trona injection rates are high, care must be taken to ensure that Trona/ash does not backup in the electrostatic precipitator hoppers in order to avoid opacity problems. These operating issues were addressed to minimize emissions on February 23, 2007. Trona flow interruptions were consistently documented in operating logs along with the corrective actions. The station's Plant Information (PI) system also recorded our response to these events and shows that action was being taken on every occurrence where trona flow was lost. Proactive actions were also taken on Unit 5 the day before to rectify a partially plugged trona injection line with the expectation of achieving better performance the following day. This is consistent with our obligation to maximize environmental protection to the extent possible while also maintaining compliance with the DOE Order.

The DEQ noted the importance of documented procedures to reduce emissions as a means for improving operations and providing a record of activities. These procedures identified above will be documented and provided to DEQ by May 31, 2007.

2. On-going Efforts to Minimize Emissions and Address DEQ Concerns

We are involved in on-going efforts to minimize emissions going forward. Through these efforts, we hope to avoid a re-occurrence of the February 23, 2007 exceedance to the extent possible while operating subject to the inflexible requirements of the DOE Order. We are also working to address DEQ's concern that there is insufficient written documentation of training, procedures, protocol and/or policy concerning operation and minimizing emissions during a line outage situation.

a. Trona Injection System

First, our efforts to minimize emissions going forward have been focused on improving the trona injection system. Since the trona injection system came on line in the Spring of 2006, certain issues have been identified as limiting the Plant from obtaining higher SO₂ removal

efficiencies. Below are problems we have identified through our operations of the trona system and the steps we have taken to address them.

1. **Problem: Pluggage at the Trona Injection Point.** Mirant has learned that operating the trona screw feeder in a manner required to achieve an 80% reduction will lead to line restrictions near the boiler injection point. These restrictions begin as a trona “caking” on the inside of the pipe and eventually result in plugging of the pipe entirely.

Plan: Maintain trona injection on each unit at the maximum flow possible – up to the limitations of the system: blower discharge pressure and temperature, and feeder speed. Specifically, operating personnel monitor this condition by viewing the injection blower discharge pressure and decreasing the screw feeder speed when pressures start increasing. Operators monitor the discharge pressure in the injection point and schedule maintenance to clear the lines (*i.e.*, remove line obstructions) when that pressure reaches a critical pressure (approximately 8 psi). Mirant has found that high pressure water washing of the injection lines is the most effective cleaning technique. To that end, each unit had its injection lines cleaned during the recent spring maintenance outages and will utilize this cleaning technique every two weeks through June 2007 to reduce the likelihood of pluggage during the upcoming Pepco line outages.

2. **Problem: Inability to Sustain High Injection Rates.** Since portions of the injection system operate under pressure, filters are used in various locations to release air, but prevent the trona from escaping into the atmosphere. The highest trona injection rates are achievable when all venting filters and rotary feed valves are close to “as-new” condition. During normal operation, as venting filters become plugged and rotary feed valves wear, the trona screw feeder speed is increased to compensate until the desired SO₂ rate is achieved. As the system is pushed harder to remove more SO₂, the likelihood of a malfunction increases.

Plan: Continued parametric monitoring. Mirant has learned to monitor particular gauges and valves that help minimize the frequency of complete pluggages, which require the injection system be shut down entirely. Some of the parameters that are closely monitored to maximize SO₂ removal include: (1) SO₂ emissions rate on the unit; (2) calculated trona feed rate (#/hr) and screw feeder demand signal; (3) blower discharge pressure, discharge temperature and air flow; (4) other trona injection system instrumentation; and (5) unit load.

Perform preventative maintenance. Since the lower feed equipment replacement on Units 1 and 2 will not be completed before this critical period, all screw feeders and lower rotary air locks have been renewed in the past two weeks to ensure the best equipment performance. Spare screw feeders and rotary air locks are maintained on-hand to support timely repair should any failures of this equipment occur.

Additional personnel. When all five units are running at or near full load, additional personnel are required and used to maximize the operation of the trona injection system and the ash handling system, in turn removing as much SO₂ possible.

System improvements. Mirant has work completed or underway for two trona injection system improvements that will address trona feed issues. The first improvement involves replacing the originally designed ambient-pressure Trona silo baghouse filter with a negative-pressure baghouse filter. This improvement was installed on Unit 5 in January 2007 and has been successful at greatly reducing vent filter pluggage and the resultant trona flow interruption. Filter replacement on the remaining units was recently completed. The second improvement involves replacing the lower trona feed equipment (screw feeder and lower rotary air lock) with two erosion-resistant rotary feed valves. Other users of this new feed valve have reported exceptional performance and it is hoped that this project will greatly reduce the wear and sealing problems that exist with the present valves. Installation of the new lower feed equipment has been completed on units 3, 4 and 5. Materials for Units 1 and 2 are on-site and will be installed as soon as PJM allows the necessary 2-day outages on each unit.

3. **Problem: Precipitator Ash Removal.** The facility is designed with four individual ash handling systems, two systems that handle boiler bottom ash/cold precipitator ash and two systems that handle hot precipitator ash. Units 1, 2 and 3 share one of the boiler bottom ash/cold precipitator ash systems and Units 4 and 5 share the other. Similarly, Units 1, 2 and 3 share one of the hot precipitator ash systems and Units 4 and 5 share the other. The use of trona adds significantly to ash volume - approximately doubling the quantity of ash normally generated. When all five units are called upon to operate at or near full load, often during a line outage situation, the ash handling system cannot remove or keep up with the quantity of ash generated. This logistical infeasibility of removing ash creates a limit on the trona injection system. This problem may at some point require a reduction in the amount of trona that we use (during a line outage situation) or backing off of generation during a non-line outage situation.

Plan: Station additional operators on the hot precipitator ash systems to resolve ash pluggage problems and manually ensure ash is flowing properly. These individuals communicate via radio with the control room operators to ensure that all ash system equipment is operating as the control room computer displays indicate.

4. **Problem: Limited capacity of the ash silos.** The ash silos have limited capacity and will reach capacity if the rate of ash generation exceeds the rate of ash removal.

Plan: Extra ash trucks have been scheduled this week in advance of the Pepco line outages to ensure low silo ash levels at the start of this critical operating period. Extra ash trucks will remain on-site during line outages to handle the expected increase in ash generated. Schedule the ash storage site to extend its hours, allowing additional truck deliveries from Potomac River plant. We also have identified a second ash disposal site that will be utilized to support Saturday ash hauling if needed in an emergency.

5. **Problem: Variable removal efficiencies.** On any given day, some units might have better removal efficiencies than others depending upon some of the problems described above.

Plan: Mirant intends to shift load from units with higher SO₂ rates to units with lower SO₂ rates, to the extent possible, to reduce overall SO₂ emissions. When unit loads ramp to follow demand, Mirant intends to bring the units with best SO₂ removal efficiency up first and down last to minimize overall SO₂ emissions.

6. **Problem: Valve Packing Leaks.** The packing on the valves of the rotary feeders can leak and this can reduce trona injection rates.

Plan: Maintain an inventory of pre-cut valve packing and specialized valve repacking tools to ensure timely corrective action whenever valve packing leaks occur. Repair valves by replacing packing between line outages, schedule repacks when trona injection line is down during periods of low demand. If a leak occurs while it is operating, tighten up packing to minimize leak and then repack during lower demand periods. The Plant is also continuing to evaluate packing materials.

7. **Problem: Pressure Drop in Trona Splitter Lines.** There is a significant pressure drop in the splitter from the trona feed line, which is connected by a splitter box, to four injection lines. Mirant believes this pressure drop may be contributing to the pluggage of the trona injection lines.

Plan: A review of existing injection piping has identified pipe routing as a key contributor to this pressure drop. An engineering redesign is underway to reduce this pressure drop and Mirant plans to have fabrication under way by May 31, 2007.

8. **Problem: Trona Delivery Logistics.** The trona comes from a mine in Wyoming. From time to time there can be delivery problems associated with the railroad.

Plan: In advance of line outages, the Plant has arranged for delivery of trona cars to be stored in nearby offsite locations. We have also adjusted future delivery schedules to correspond with projected usage and track consumption and delivery closely to ensure an adequate trona supply.

9. **Problem: Trona Clumping.** If trona remains in the ESP hoppers more than 24 hours, it clumps as it absorbs moisture. This can slow down ash removal rates and is primarily a problem on the larger inlet row hoppers of the Unit 1, 2 and 3 hot precipitators.

Plan: Air cannons have been installed on 2 hoppers on Unit 1. We are also evaluating a plate rapper system on 2 other hoppers on Unit 1. Whichever equipment system is found most effective will be purchased and installed on the remaining inlet row hoppers of these 3 units. Due to the time required for evaluation, selection and delivery of equipment, this will not be completed before the Administrative Consent Order is terminated.

10. **Problem: Degradation of Vacuum System.** The ash removal depends upon a vacuum system to move ash. Its parts can degrade over time.

Plan: Station preventative maintenance work will be scheduled on a more frequent basis to maintain better system performance during this critical operating period. Additionally, contract mechanical maintenance resources are being scheduled to ensure timely resolution of system deficiencies. Spare parts inventory is being reviewed to support these timely repairs.

b. Documentation of Procedures.

In response to concerns expressed by DEQ in the NOV and during the April 27, 2007 meeting, we have and will continue to take several measures to increase written documentation concerning line outage situations. First, we have increased written documentation of plant operator and engineers' decision making processes, particularly during line outage situations. Second, we are working to develop policies and procedures that address line outage situations. As we discussed at the April 27, 2007 meeting, this effort is limited by restrictions on options due to the rather inflexible DOE Order and by the complicated technical nature of this decision making process. To the extent practicable, however, we will work to create this documentation. Third, in addition to ensuring operators and engineers are aware of the written policies and procedures being developed, records concerning training of operators to minimize emissions under the DOE Order will be maintained.

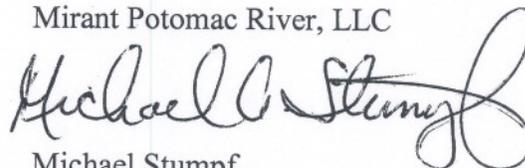
Conclusion.

In addressing the February 23, 2007 event and in our efforts since, Mirant has worked diligently to minimize emissions to the extent possible while complying with the DOE Order and to respond to DEQ concerns. Mirant believes that it has complied and continues to comply with 9 VAC 5-40-20.E at all times, while maintaining and operating the plant, including associated air pollution control equipment, in a manner consistent with air pollution control practices for minimizing emissions.

Please call me if you have any further questions.

Sincerely,

Mirant Potomac River, LLC

A handwritten signature in black ink, appearing to read "Michael A. Stumpf", written in a cursive style.

Michael Stumpf