RELIABILITY TECHNICAL CONFERENCE

Docket No. AD12-1-000

(November 29, 2011)

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INTRODUCTION

The tension between reliability needs and environmental rules has long existed, but the potential for conflict has recently been highlighted by increasingly stringent environmental restrictions and cybersecurity initiatives. As a general matter, there may be ways to resolve the conflict in situations where there is sufficient advance notice. For example, in some cases, a generator may be able to work with the Environmental Protection Agency ("EPA") and other environmental authorities to adjust permit restrictions so that units known to be needed for reliability can continue operating, or to obtain a consent decree so that the generator operating to preserve reliability is relieved from liability for violations of such restrictions. Any such solution must have a solid legal basis, and there must be adequate time to allow for the process to work. In a true emergency, however, there may not be enough time for a generator to go through the procedural and other steps required to obtain adequate assurances that it will not be subject to significant penalties and liability if it violates environmental restrictions in the course of operating to maintain reliability. Such uncertainty could impede a company's ability or willingness to operate at the time when reliability is most threatened.

Some have argued that conflicts between reliability needs and environmental rules could ultimately be addressed through Section 202(c) of the Federal Power Act (the "FPA"), which gives the Department of Energy ("DOE") authority to direct the operation of electric generation plants in order to maintain the reliability of the bulk power system during an emergency. These parties claim that Section 202(c) allows DOE to "override Clean Air Act [(the "CAA")] control requirements in limited emergency circumstances where there is a finding that an electric emergency exists."[1] Unfortunately, neither DOE nor any of the relevant environmental authorities has taken the position that authority

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[1] *Impacts of EPA Regulations on Electric System Reliability: Hearing Before the U.S. House of Representatives Comm. on Energy and Commerce, Subcomm. on Energy and Power* (Sept. 14, 2011) (Testimony of Susan F. Tierney, Ph.D., Managing Principal, Analysis Group, Boston at 30), *available at* http://republicans.energycommerce.house.gov/Media/file/Hearings/Energy/091411/Tierney.pdf. *See also* Paul J. Miller, Northeast States for Coordinated Air Use Management, *A Primer on Pending Environmental Regulations and Their Potential Impacts on Electric System Reliability* at 22 (Sept. 19, 2011) (claiming that DOE "can override [CAA] requirements under section 202(c) of the [FPA] in limited emergency circumstances"), *available at* http://www.nescaum.org/documents/primer-on-epa-reg-impacts-20110919-update.pdf; Letter from John R. Norris, Commissioner, Federal Energy Regulatory Commission to Lisa A. Murkowski, United States Senate at 3 (Oct. 7, 2011) (asserting that DOE's Section 202(c) authority will allow it "to order a plant to continue operating in the unlikely event of a reliability emergency precipitated by compliance with environmental rules"), *available at* http://energy.senate.gov/public/_files/100711CommissionerNorrisResponse.pdf.

under Section 202(c) of the FPA trumps environmental law. Nor is there any express statutory language in the FPA, the CAA or other environmental laws, or judicial precedent, supporting such a position. Indeed, as explained below, two cases – both involving the predecessor to GenOn Energy, Inc. ("GenOn"), Mirant Corporation ("Mirant") – demonstrate the difficulties that a generator may face when operating to maintain reliability in a true emergency when such operation conflicts with applicable environmental restrictions.

STATUTORY BACKGROUND

Section 202(c) of the FPA gives DOE authority to order the operation of generation facilities for reliability reasons. Specifically, Section 202(c) provides:

> During the continuance of any war in which the United States is engaged, or ***whenever the Commission determines that an emergency exists*** by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, ***the Commission shall have authority,*** either upon its own motion or upon complaint, with or without notice, hearing, or report, ***to require by order*** such temporary connections of facilities and ***such generation***, delivery, interchange, or transmission ***of electric energy as in its judgment will best meet the emergency and serve the public interest.*** If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.[2]

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[2] 16 U.S.C. § 824a(c) (2006) (emphasis added). Although the text of Section 202(c) refers to "the Commission," authority under that provision resides with the Secretary of Energy, rather than the Federal Energy Regulatory Commission ("FERC"). Under Section 301(d) of the Department of Energy Organization Act (the "DOE Act"), 42 U.S.C. § 7151(b) (2006), the powers previously vested in the Federal Power Commission under the FPA (and other statutes) and not expressly reserved to FERC were transferred to, and vested in, the Secretary of Energy. Although the DOE Act reserved to FERC powers to require interconnection of electric facilities under Section 202(b) of the FPA and DOE has since delegated certain other powers, including those provided by Section 202(a), to FERC, Section 202(c) authority remains with the Secretary of Energy.

FERC could potentially order relief similar to that available under Section 202(c) of the FPA by exercising some combination of its authority under Sections 207 and 309 of the FPA. Section 207 provides that, if FERC determines, "upon complaint of a State commission," that "any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation . . . ." 16 U.S.C. § 824f (2006). Section 309 authorizes FERC "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and

At the same time, various environmental laws impose limitations on a generation facility's operations. For example, Section 109 of the CAA directs EPA to promulgate National Ambient Air Quality Standards ("NAAQS") to protect the public health and welfare.[3] Section 110 of the CAA, in turn, requires each state to adopt a State Implementation Plan ("SIP") to achieve the NAAQS within such state.[4] Upon EPA's approval of a SIP, "its requirements become federal law and are fully enforceable in federal court."[5] EPA is authorized to enforce its NAAQS through administrative, civil, or criminal actions.[6] In addition, a state "may enforce its regulations through state proceedings,"[7] and a citizen has the authority to bring a civil action against any person in violation of emissions standards or limitations.[8]

EXAMPLES OF CONFLICTS

Potrero Power Plant (2001)

In 2001, beginning at the height of the California energy crisis, Mirant's Potrero Power Plant in the San Francisco area was dispatched by the California Independent System Operator (the "CAISO") at a relatively high rate to maintain reliability.[9] Because the Potrero Power Plant had a relatively low annual operating limit of 877 hours, Mirant became concerned that it would be unable to operate as needed by the CAISO while remaining within its operating limit. In order to ensure that the plant could operate as needed to preserve reliability, Mirant worked to obtain written approvals from local and federal regulators – the Bay Area Air Quality Management District ("BAAQMD") and

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regulations as it may find necessary or appropriate to carry out the provisions of [the FPA]." 16 U.S.C. § 825h (2006). To date, orders compelling generation in emergencies have been issued under Section 202(c), not Sections 207 and 309. *Cf. DC Pub. Serv. Comm'n*, 114 FERC ¶ 61,017 at P 2 (2006) (the "FERC Potomac River Order") (order issued under Section 207 of the FPA requiring long-term plan to maintain adequate reliability where DOE had already ordered a facility to operate).

3 *See* 42 U.S.C. § 7409 (2006).

4 *See* 42 U.S.C. § 7410 (2006).

5 *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989). *See also, e.g., Union Elec. Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975).

6 *See* 42 U.S.C. § 7413 (2006).

7 *Union Elec.*, 515 F.2d at 211. *See also, e.g., Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 567 (2007) ("States were obliged to implement and enforce" NAAQS).

8 42 U.S.C. § 7604 (2006).

9 DOE exercised its authority under Section 202(c) of the FPA to compel operation of generation facilities during the California energy crisis, ordering certain generators to make energy available to the CAISO for a period of approximately two months. *See Notice of Issuance of Emergency Orders Under Section 202(c) of the Federal Power Act*, 65 Fed. Reg. 82,989 (Dec. 29, 2000).

EPA, respectively – allowing the plant to operate for more than 877 hours.[10] Nonetheless, Mirant was subjected to a citizen lawsuit by the City of San Francisco and environmental groups for exceedance of the 877 hour operating limit,[11] and was forced to settle the lawsuit at significant expense.

Potomac River Generating Station

On August 24, 2005, Mirant's Potomac River Generating Station (the "Potomac River Plant") was shut down to comply with orders of the Virginia Department of Environmental Quality (the "Virginia DEQ") in response to modeled, localized NAAQS exceedances. On that same day, the District of Columbia Public Service Commission (the "DC PSC") filed petitions with DOE under Section 202(c) of the FPA and with FERC under Sections 207 and 309 of the FPA requesting that Mirant be compelled to operate the Potomac River Plant to maintain reliability.

In response, the Virginia DEQ argued to FERC that because "there is no express authority granted to the Commission pursuant to FPA §§ 207 or 309 – or for that matter any other section of the FPA – to issue an order that would contravene the CAA," the Commission had "no discretion to issue any order with respect to generation of electrical power at the Potomac River Plant unless that order complies with the CAA."[12] Similarly, the Virginia DEQ objected before DOE that:

> Congress has not given the [FPA] primacy over the [CAA]. Nowhere in the [FPA] – § 202(c) or elsewhere – is there language providing that reliability concerns take precedence over federal and state environmental laws. Further, § 201(a) of the [FPA] expressly preserves state jurisdiction over electric generation. The [FPA] also does not preempt Virginia law or the Director's authority pursuant to Virginia law, because obligations

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[10] *See* Compliance and Mitigation Agreement between Mirant Potrero, LLC and the Bay Area Air Quality Management District at § 2.1 (Mar. 29, 2001) (provided as Attachment A); *Mirant Potrero LLC*, R9-2001-04, Administrative Order on Consent at § IV.4 (Apr. 6, 2001), *available at* http://www.epa.gov/region9/energy/generators/r9200104mirant.pdf.

[11] *See* Rachel Gordon, *Potrero Hill power plant operator sued/S.F., groups seek pollution controls*, San Francisco Chronicle (June 19, 2001), *available at* http://articles.sfgate.com/2001-06-19/news/17605126_1_mirant-corporation-pollution-clean-air-act; First Amended Complaint for Injunctive and Other Relief and Demand for Jury Trial, City & County of San Francisco v. Mirant Potrero, LLC, No. C-01-2356 PJH (N.D. Cal. Aug. 20, 2001) (provided as Attachment B); First Amended Complaint, Bayview Hunters Point Community Advocates v. Mirant Potrero, LLC, No. C-01-02348-PJH (N.D. Cal. Aug. 20, 2001) (provided as Attachment C).

[12] Motion of Robert G. Burnley, Director, The Commonwealth of Virginia Department of Environmental Quality to Deny the District of Columbia Public Service Commission's Petition on the Grounds that the Commission May Not Grant the Requested Relief; or, in the Alternative, to Defer Action Pending Further Analysis of Environmental Impacts of Requested Relief at 6, Docket No. EL05-145-000 (filed Oct. 11, 2005).

> arising under the federally approved [SIP] are a matter of both state and federal law.[13]

On December 20, 2005, DOE ordered Mirant to resume operating the Potomac River Plant under Section 202(c) in order to maintain the electric supply to Washington, D.C.[14] The 2005 DOE Order stated that "[o]rdering action that may result in even local exceedances of the NAAQS is not a step to be taken lightly. . . ."[15] DOE did not, however, provide any assurance to Mirant that compliance with the order would not subject it to liability for those exceedances. Instead, the order said only that DOE had "sought to harmonize those interests to the extent reasonable and feasible by ordering Mirant to operate in a manner that provides reasonable electric reliability, but that also minimizes any adverse environmental consequences from operation of the Plant."[16]

After the Potomac River Plant resumed operating in compliance with the DOE order, the EPA issued an Administrative Compliance Order by Consent, which set forth certain operating standards "taking into account the seriousness of the modeled NAAQS exceedances and the concerns of DOE regarding electric reliability in the Central D.C. area,"[17] and required Mirant to operate the Potomac River Plant "as specified by PJM and in accordance with the [2005] DOE Order."[18] During its operations as directed by DOE, the Potomac River Plant was forced to exceed its 3-hour NAAQS limit on February 23, 2007. Accordingly, in 2007, the Virginia DEQ issued a Notice of Violation[19] and

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[13] Letter from Commonwealth of Virginia Department of Environmental Quality to Kevin Kolevar, Director, Office of Electricity Delivery and Energy Reliability, U.S. Dept. of Energy at 2, Docket No. EO-05-01 (Nov. 23, 2005) (citation omitted), *available at* http://www.gc.doe.gov/oe/downloads/letter-clarifying-position-director-virginia-department-environmental-quality-regarding.

[14] *See DC Pub. Serv. Comm'n*, DOE Order No. 202-05-3 (Dec. 20, 2005) (the "2005 DOE Order"), *available at* http://www.gc.doe.gov/oe/downloads/department-energy-order-no-202-05-3. Orders extending the 2005 DOE Order, as well as other documents relating to the DC PSC's petition before DOE are available at the DOE website. *See* http://www.gc.doe.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/emergency. *See also* FERC Potomac River Order, 114 FERC ¶ 61,017 at P 28 (2006) (addressing the DC PSC's petition under Section 207 of the FPA "in light of the immediate nature and short-term relief granted to the DC [PSC] by the Secretary of Energy").

[15] 2005 DOE Order at 8.

[16] *Id.* at 8-9. *See also id.* at 5 ("In response to the environmental concerns raised, this order seeks to minimize, to the extent reasonable, any adverse environmental impacts. Should EPA issue a compliance order directed to operation of the Plant, DOE will consider whether and how this order should [be] conformed to such order.").

[17] *See Mirant Potomac River LLC*, Administrative Compliance Order by Consent at 4, Docket No. CAA-03-2006-0163DA (June 1, 2006) (provided as Attachment D).

[18] *Id.* at 14.

[19] *See* Letter from Jeffery A. Steers, Regional Director, Commonwealth of Virginia, Department of Environmental Quality to Michael Stumpf, Group Leader – Plant Operations, Mirant Potomac River Generating Station, Notice of Violation Re: Mirant Potomac River

subsequently fined Mirant for NAAQS exceedances that were a result of Mirant's compliance with the DOE order to run for reliability. Had the Potomac River Plant been required to operate such that it would have violated a plant-specific environmental permit limit, Mirant would have faced significant additional penalties, including claims from citizen lawsuits under the CAA.

SOLUTION

As indicated above, there are various ways in which to resolve conflicts between reliability and environmental concerns. For example, when FERC imposed a "must offer" requirement obligating all non-hydroelectric generators in California to offer their available capacity during all hours,[20] it limited the scope of the requirement to make clear that "no generator will be required to run in violation of its certificate or applicable law."[21] FERC has also approved market rules that exempt generation facilities from must offer requirements to the extent necessary to comply with environmental limitations.[22]

Some have suggested that, given enough time, EPA could enter into a court-approved consent agreement that would ensure that a generator required for reliability is protected from liability for any CAA (or other environmental law) violations that may result. There is debate as to whether such an order would protect a generator from potential citizen lawsuit liability. But with enough time it may be possible to thread the needle so that a generator needed for reliability is not subject to environmental penalties or liability.

Generating Station, Facility Registration No. 70228 (Mar. 23, 2007) (provided as Attachment E). *See also* Letter from Michael Stumpf, Mirant Potomac River, LLC to Jeffrey A. Steers, Regional Director, Department of Environmental Quality, Northern Virginia Regional Office, Re: Response to March 23, 2007 Notice of Violation (May 11, 2007) (provided as Attachment F).

[20] *See San Diego Gas & Elec. Servs. v. Sellers of Energy & Ancillary Servs.*, 95 FERC ¶ 61,115, 61,355-57 (2001).

[21] *Id.* at 61,357.

[22] For example, PJM Interconnection, L.L.C.'s tariff includes an exception to the capacity market must offer requirement where "[t]he Capacity Market Seller is involved in an ongoing regulatory proceeding (e.g. – regarding potential environmental restrictions) specific to the resource and has received an order, decision, final rule, opinion or other final directive from the regulatory authority that will result in the retirement of the resource." PJM Interconnection, L.L.C., Open Access Transmission Tariff, Attachment DD, § 6.6(g).C. *See also id.*, Attachment M – Appendix, § II.C.4.C (same). While ISO New England Inc.'s tariff allows a generator facing new environmental restrictions that could render a plant inoperable to submit a "Non-Price Retirement Request," that option is available only for "a binding request to retire the entire capacity of a Generating Capacity resource." ISO New England Inc. Transmission, Markets and Services Tariff, § III.13.1.2.3.1.5.1. Unless the generator is prepared to retire the entire facility, therefore, the tariff leaves the generator in the position of having its capacity automatically offered into the Forward Capacity Auction and then operating in violation of environmental restrictions.

In an emergency, however, electricity generators are unfairly forced to weigh the risks and costs of violating environmental permits against the risks and costs of non-compliance with a DOE emergency order to run, creating uncertainty at a time when stability is most needed. It is imperative that there be clear authority within the federal government to direct actions that can balance an emergency reliability need with binding environmental regulations.

Recognizing the need to balance the reliability of the electric grid with the implementation of environmental regulations, a number of Regional Transmission Organizations and Independent System Operators have urged EPA to include in proposed regulations a reliability "safety valve" such that a retiring generator that is needed for reliability would be granted an extension of time to comply with new rules proposed by EPA so that a reliability solution may be put in place.[23] Again, given enough time, EPA may be willing to negotiate a mechanism that would allow a generator to operate for reliability without liability or penalty, but there must be a solid legal basis to prevent the possibility of private citizen lawsuits – such as the one in the case of the Potrero Power Plant, which was brought despite the plant operating with EPA's and BAAQMD's express authorization.

A clear way to conclusively ensure that the tools needed to maintain the reliability of the grid are available in the face of conflicting environmental requirements is to amend the FPA to clarify that when a company is under an emergency directive to operate pursuant to Section 202(c) of the FPA by DOE, it will not be deemed in violation of environmental laws or subject to civil or criminal liability as a result of actions to comply with such emergency order. Specifically, Section 202(c) of the FPA should be amended to include something along the lines of the following language:

> No action taken to comply with an order [under Section 202(c) of the Federal Power Act] shall be deemed a violation of, or subject a person to regulation or additional regulation or civil or criminal liability under, any federal, state or local environmental laws or regulations. Any such order issued by the Commission shall require action only to the extent necessary to meet the emergency and serve the public interest.

Absent such amendment, without adequate time and even with full cooperation of reliability and environmental regulators, the reliability of the grid could be compromised in critical emergency situations as a result of even relatively minor environmental exceedances. GenOn urges FERC, as an agency that well understands the importance of maintaining grid reliability, to encourage the Congress to adopt such an amendment. To be clear, such an amendment need not – and, indeed, should not – be allowed to delay environmental or cybersecurity initiatives. Rather, reform of Section 202(c) of the FPA

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[23] *See* Joint Comments of the Electric Reliability Council of Texas, the Midwest Independent Transmission System Operator, the New York Independent System Operator, PJM Interconnection, L.L.C., and the Southwest Power Pool, Docket Nos. EPA-HQ-OAR-2009-0234, *et al.* (Oct. 21, 2011), *available at* http://pjm.com/~/media/documents/other-fed-state/20110804-epa-hq-oar-2009-0234-iso-rto.ashx.

should be pursued on a parallel track that ensures that the potential conflict between reliability and environmental concerns is resolved before the next emergency requiring DOE to exercise its authority under this provision.

Attachment A

COMPLIANCE AND MITGATION AGREEMENT

This Compliance and Mitigation Agreement ("Agreement") is dated as of March 29, 2001, for reference purposes only, and is entered into between Mirant Potrero, LLC, formerly known as Southern Energy Potrero, LLC ("Mirant") and the BAY AREA AIR QUALITY MANAGEMENT DISTRICT ("Bay Area AQMD").

This Agreement is made by Mirant and the Bay Area AQMD (collectively, the "Parties") on behalf of, and is binding upon, their respective officers, directors, employees, agents, shareholders, subsidiaries and partners. This Agreement shall become binding and effective upon execution by each of the Parties (the "Effective Date").

ARTICLE 1
RECITALS

1.1 WHEREAS, the Bay Area AQMD is the local agency with primary responsibility for regulating stationary source air pollution in the San Francisco Bay Area Air Basin in the State of California; and

1.2 WHEREAS, Mirant is a Delaware limited liability corporation that owns and operates six non-gaseous fuel fired combustion turbines at Mirant's Potrero Power Plant in San Francisco, California, within the jurisdiction of the Bay Area AQMD. These six combustion turbines are identified by the Bay Area AQMD as Permitted Source Nos. 10, 11, 12, 13, 14, and 15, in Bay Area AQMD Major Facility Permit for Plant No. 26 (the "Permit") and power three generation units commonly known as Potrero Units 4, 5, and 6 (the "Potrero Peaking Turbines"). Each of Potrero Units 4, 5, and 6 has a nameplate capacity of 52 megawatts; and

1.3 WHEREAS, the prior owner and operator of the Potrero Peaking Turbines voluntarily requested and accepted an 877-hour annual operating limit set forth in Permit Condition No. 15816 in the Permit; and

1.4 WHEREAS, Bay Area AQMD Regulation 9, Rule 9, Section 302 ("Regulation 9-9-302"), limits NOx emissions from combustion turbines rated at 4.0 MW or greater and operating less than 877 hours per year to 65 parts per million (volume) ("ppmv") at fifteen percent (15%) O2 (dry basis) when firing with non-gaseous fuel; and

1.5 WHEREAS, the most recent source test for the Potrero Peaking Turbines reflects that NOx emissions were less than or equal to 65 ppmv at 15% O2 dry basis; and

1.6 WHEREAS, Mirant has been and is currently operating the Potrero Peaking Turbines in compliance with Regulation 9-9-302 and Permit Condition No 15816; and

1.7 WHEREAS, Mirant operates the Potrero Peaking Turbines pursuant to the terms of applicable California Independent System Operator ("ISO") tariffs, a Reliability Must Run Agreement ("RMR Agreement") with the ISO, and a Participating Generator

Agreement with the ISO, all of which are on file with the Federal Energy Regulatory Commission ("FERC"). All of these agreements are referred to collectively throughout the remainder of this Agreement as the ISO Generating Agreements; and

1.8 WHEREAS, Mirant supplies electrical energy from the Potrero Peaking Turbines, among other electrical generation facilities owned and operated by Mirant, to the California Department of Water Resources ("DWR") pursuant to the terms of a contract or contracts with the DWR; and

1.9 WHEREAS, due to the electrical energy shortage in the State of California, on January 17, 2001, California Governor Gray Davis declared a State of Emergency; and

1.10 WHEREAS, on February 8, 2001, pursuant to that State of Emergency, California Governor Gray Davis issued Executive Order D-24-01 requiring, in its first ordering paragraph that "local air pollution control and air quality management districts []shall modify emissions limits that limit the hours of operation in air quality permits as necessary to ensure that power generation facilities that provide power under contract to the [California] Department of Water Resources are not restricted in their ability to operate;" and

1.11 WHEREAS, the first ordering paragraph of California Governor Gray Davis' Executive Order D-24-01 further requires that "[t]he districts shall require a mitigation fee for all applicable emissions in excess of the previous limits in the air quality permits;" and

1.12 WHEREAS, on March 7, 2001, pursuant to the State of Emergency, California Governor Gray Davis issued Executive Order D-28-01, the fourth ordering paragraph of which provides "that the authority provided to local air pollution control and air quality management districts (hereinafter "districts") and the Air Resources Board in the first ordering paragraph of Executive Order D-24-01 shall also apply to any power generating facility, including any previously permitted existing power generating facility that is not currently operating, as necessary to ensure reliability of the grid and delivery of power in the State. No permit modification (or reinstatement and modification) under Executive Order D-24-01 or this Order shall be valid for a period of more than 3 years from the date of this Order. The authority to modify permits for the purposes identified above shall also include the authority to modify other applicable conditions for those purposes. In exercising the powers to modify (or reinstate and modify) permits and other applicable conditions, districts shall not be required to comply with the notice and hearing requirements of Division 26 of the Health and Safety Code;" and

1.13 WHEREAS, the Potrero Peaking Turbines are a crucial electric generation facility within the local San Francisco generation and transmission system which have historically been operated only during periods of peak electrical energy demand and in emergency circumstances to avoid load shedding and provide generation and transmission support to the local San Francisco Bay Area transmission network and for substantially fewer hours per year than the 877-hour operating limit; and

1.14 WHEREAS, although Mirant was never required to operate any of the Potrero Peaking Turbines in excess of the 877-hour annual operating limit, in December 2000, due to the electrical energy shortage in the State of California, Mirant and the ISO discussed with the Bay Area AQMD possible use of the Potrero Peaking Turbines beyond the 877-hour annual permit limit under limited emergency conditions for the remainder of calendar year 2000 to maintain local San Francisco transmission system reliability and as a system resource to avert and/or reduce the magnitude of firm load shedding. The result of those joint discussions is memorialized in a letter dated December 22, 2000, from Ellen Garvey, Executive Officer of the Bay Area AQMD to Anne Cleary, Chief Executive Officer of Southern Energy Potrero LLC; and

1.15 WHEREAS, due to the electrical energy shortage in the State of California, in calendar year 2001, Mirant has already been required under the ISO Generating Agreements to operate the Potrero Peaking Turbines substantially in excess of their historic operating hours. As of March 29, 2001, at 6:00 a.m. PST, the Potrero Peaking Turbines had the following hours remaining before they reach their 877-hour annual operating limits: Potrero 4: 330.9 hours; Potrero 5: 213 hours; Potrero 6: 198.9 hours; and

1.16 WHEREAS, the ISO has informed Mirant, and Mirant expects, that due to the electrical energy shortage in the State of California and the limited availability of electric generating capacity in the San Francisco Bay Area, the Potrero Peaking Turbines will be required by the ISO to operate for additional hours, which may result in the Potrero Peaking Turbines exceeding the applicable 877-hour per year operating limit set forth in Regulation 9-9-302 and Permit Condition No. 15816; and

1.17 WHEREAS, an immediate circumstance that may require Mirant to operate the Potrero Peaking Turbines in excess of the 877-hour annual operating limit is that the ISO has scheduled an outage beginning on or about March 27, 2001, for Mirant to perform maintenance work deemed necessary by Mirant and the ISO on the utility boiler electrical generating unit at Mirant's Potrero Power Plant. This maintenance outage is expected by Mirant and the ISO to overlap for several days with a scheduled outage at the Hunter's Point Power Plant to perform certain maintenance work on the Hunter's Point utility boiler electrical generating unit and to last for several additional weeks. Due to the nature of the local San Francisco electrical transmitting and generating system, Mirant and the ISO believe that the Potrero Peaking Turbines will be required by the ISO to generate electricity beyond their historic peaking generation usage; and

1.18 WHEREAS, the United States Environmental Protection Agency is expected to issue an Administrative Order in accordance with the federal Clean Air Act (42 U.S.C. § 7413) to Mirant regarding operation of the Potrero Peaking Turbines in excess of the 877-hour annual operating limit; and

1.19 WHEREAS, Mirant is entering into this Agreement for the purpose of obtaining additional operating hours for the Potrero Peaking Turbines to meet expected operating demand from the ISO, DWR, and other California Load Serving Entities (as defined in

Attachment A to this Agreement) pursuant to Executive Orders D-24-01 and D-28-01; and

1.20 WHEREAS, the Bay Area AQMD is entering into this Agreement to execute Executive Orders D-24-01 and D-28-01 as ordered by California Governor Gray Davis to provide Mirant additional operating hours for the Potrero Peaking Turbines and to require Mirant to pay a mitigation fee to the local air quality management district for all excess emissions from such operations;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Mirant and the Bay Area AQMD do hereby agree as follows:

ARTICLE 2
POTRERO PEAKING TURBINE OPERATION

2.1 In accordance with Executive Orders D-24-01 and D-28-01 identified in paragraphs 1.10 and 1.12, above, Mirant may operate each of the Potrero Peaking Turbines for more than 877 hours per calendar year for the term of this Agreement and remains subject to the 65 ppmv NOx emission limit in Rule 9-9-302, subject to the terms and conditions of this Agreement.

2.2 Operation of the Potrero Peaking Turbines beyond the 877-hour annual operating limit in accordance with the terms of this Agreement shall be allowed only until the earlier of (1) unless amended by further written agreement in accordance with paragraph 4.13, below, a period of one year from the Effective Date of this agreement; or (2) a declaration by the Governor of California rescinding or otherwise terminating the declaration of a State of Emergency due to the energy shortage in the State of California made by California Governor Gray Davis on January 17, 2001. Either of these occurrences is referred to in the remainder of this Agreement as the "Terminating Event." Unless by the date of the Terminating Event, Mirant has sought and obtained a modification to the Major Facility Review Permit for Plant No. 26 to allow operations of the Potrero Peaking Turbines for more than 877 hours per year, operation of the Potrero Peaking Turbines shall revert to operations under the 877-hour per year operating limit. If, at the time of the Terminating Event, any of the Potrero Peaking Turbines have already operated for more than 877 hours in the then-current calendar year, Mirant shall immediately cease operations of that Potrero Peaking Turbine until the next January 1st. All operations in excess of the 877-hour operating limit in the same calendar year as the Terminating Event shall be deemed to have occurred under the terms of this Agreement.

2.3 The Potrero Peaking Turbines shall be operated by Mirant only under the terms and conditions set forth in Attachment A to this Agreement ("Operating Criteria for the Utilization of Combustion Turbines at Potrero Power Plant"). The Bay Area AQMD understands that the ISO has committed to dispatch the Potrero Peaking Turbines only under the conditions set forth in Attachment A and to provide corroborating evidence of

such dispatch to Mirant and the Bay Area AQMD. Failure of the ISO to comply with the operating criteria in Attachment A or to satisfy any other requirement, duty, or obligation under this Agreement shall not constitute a breach of the Agreement by Mirant or the Bay Area AQMD. Mirant shall provide to the Bay Area AQMD any information or reports specified in this Agreement. If Mirant does not have such information, Mirant shall undertake all reasonable efforts to obtain such information and to provide such information promptly to the Bay Area AQMD. Mirant shall make all reasonable efforts to obtain the ISO's compliance with the terms of this Agreement.

2.4 Mirant shall complete and provide to the Bay Area AQMD by September 1, 2001, an engineering and cost study of all available retrofit emission controls for reducing NOx emissions from the Potrero Peaking Turbines, including, but not limited to, the options of use of low-sulfur and/or low-nitrogen fuel, combustion modifications, converting to natural gas or dual-fuel firing, and installing low-NOx combustors and selective catalytic reduction.

2.5 Based on the results of the study referenced in paragraph 2.4, above, and in conjunction with the exercise of the Bay Area AQMD's discretion regarding the allocation of Mitigation Fees as set forth in paragraph 3.4, below, Mirant may request, and the Bay Area AQMD may in its sole discretion allocate, a certain portion of the Mitigation Fees set forth in paragraph 3.1, below, to fund installation of retrofit emission controls to reduce NOx emissions from the Potrero Peaking Turbines, pursuant to a Bay Area AQMD Authority to Construct. Upon the commencement of operation of, and demonstration to the satisfaction of the Bay Area AQMD of the actual emission level achieved with, any such retrofit emission controls, the excess NOx emission calculation procedure specified in paragraph 3.1, below, shall be amended to reflect the new NOx emission rate from the affected turbines.

2.6 Execution by Mirant of this Agreement and submission by Mirant to the Bay Area AQMD of the reports and information specified in this Agreement shall, with respect to Condition 15816 and Rule 9-9-302, be deemed to satisfy any and all requirements imposed pursuant to Title V of the Clean Air Act for prompt reporting of deviations from permit conditions.

ARTICLE 3
MITIGATION FEES

3.1 Mitigation Fee Payment. Mirant shall pay a mitigation fee to the Bay Area AQMD of $20,000.00 per ton or part of a ton of NOx emitted by any one or more of the Potrero Peaking Turbines resulting from operation of such turbine(s) after the 877th hour of operations for such turbine in calendar years 2001 and 2002. Tons of excess NOx emissions shall be calculated in accordance with the following formula:

[Emission Factor (65 ppm converted to pounds per mmbtu)] x [[fuel throughput] x [higher heating value (based on generic BAAQMD conversion factor for higher heating value of oil OR fuel-specific higher heating value data supplied by Mirant)]]

3.2 Mitigation Fee Deposit. Within ten (10) days of the execution of this Agreement, Mirant shall make a lump sum payment to the Bay Area AQMD of four hundred thousand dollars ($400,000.00) as a deposit on anticipated future mitigation fees. Mitigation fees owed by Mirant in accordance with this Agreement shall first be charged against the Mitigation Fee Deposit described in this paragraph. Incurred mitigation fees in excess of the Mitigation Fee Deposit shall then be made periodically in accordance with paragraph 3.3 of this Agreement, below.

3.3 Mitigation Fee Payments Schedule. Upon depletion of the mitigation fee deposit provided by Mirant pursuant to paragraph 3.2, above, Mirant shall pay the Bay Area AQMD the mitigation fee calculated in accordance with paragraph 3.1 of this Agreement, above, within fifteen (15) business days following the last day of each calendar quarter.

3.4 Mitigation Program. The Bay Area AQMD shall allocate any Mitigation Fees paid by Mirant in the Bay Area AQMD's sole discretion to projects that, in the Bay Area AQMD's sole judgment, will achieve reductions of NOx emissions comparable to the excess NOx emissions resulting from operation of the Potrero Peaking Turbines for which Mirant paid such fees to the Bay Area AQMD. Such NOx emission reduction projects may reduce emissions from mobile, portable, area-wide, or stationary sources.

3.5 Excess NOx Emissions Report. Within ten (10) business days of the end of each month, Mirant shall provide to the Bay Area AQMD a report for each of the Potrero Peaking Turbines, detailing operating hours and fuel usage during the month. Within ten (10) business days of the end of each calendar quarter, Mirant shall provide to the Bay Area AQMD a report in substantially the form set forth in Exhibit B to this Agreement that details operating hours and fuel usage for each of the Potrero Peaking Turbines and a calculation of the excess NOx emissions and of the Mitigation Fee owed to the Bay Area AQMD resulting from operation of such turbine(s) in accordance with paragraph 3.1.

ARTICLE 4
MISCELLANEOUS PROVISIONS

4.1 Scope of Agreement. This Agreement is binding upon Mirant and the Bay Area AQMD only with respect to the matters specifically addressed and does not otherwise bind Mirant and the Bay Area AQMD.

4.2 Notices. All notices required pursuant to this Agreement shall be in writing and shall be served either by personal delivery (including by overnight delivery service), by regular mail, postage prepaid, or facsimile, to Mirant and the Bay Area AQMD at the respective addresses set forth below.

To Mirant:

Ronald M. Kino
Environmental Health & Safety Manager
Mirant California, LLC
1350 Treat Boulevard, Suite 500
Walnut Creek, CA 94596
Telephone: (925) 287-3118
Facsimile: (925) 947-3001

David R. Farabee
Pillsbury Winthrop LLP
50 Fremont Street
San Francisco, CA 94105-2228
Telephone: (415) 983-1000
Facsimile: (415) 983-1200

To the Bay Area AQMD:

William DeBoisblanc
Director of Permit Services
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109
Telephone: (415) 749-4704
Facsimile: (415) 749-5030

Brian C. Bunger
Senior Assistant District Counsel
939 Ellis Street
San Francisco, CA 94109
Telephone: (415) 749-4920
Facsimile: (415) 749-5103

4.3 Payments. Any and all payments required under this Agreement shall be made to the Bay Area Air Quality Management District, c/o Brian C. Bunger, Senior Assistant District Counsel, Bay Area Air Quality Management District, 939 Ellis Street, San Francisco, CA 94109.

4.4 Headings. The title headings of the respective articles of this Agreement are inserted for convenience of reference only and shall not be deemed to be part of this Agreement.

4.5 Successors and Assigns. The terms of this Agreement shall inure to the benefit of and be binding upon the Parties and their respective predecessors, successors, subsidiaries, partners, limited partners, agents, principals, and assigns.

4.6 Severability. If any provision of this Agreement or the application of this Agreement to either Mirant or the Bay Area AQMD is held by any judicial authority to be invalid, the application of such provision to the other Party and the remainder of this Agreement shall remain in force and shall not be affected thereby, unless such holding materially changes the terms of this Agreement.

4.7 Authority to Bind. Each of the undersigned represents and warrants that he or she has read and understands and has full and complete lawful authority to grant, bargain, convey, and undertake the rights and duties contained in this Agreement, and that he or she has full and complete lawful authority to bind any respective principals, predecessors, successors, subsidiaries, partners, limited partners, agents and assigns to this Agreement. Each of the undersigned understands and agrees that this representation and warranty is a material term of this Agreement, without which it would not have been executed.

4.8 Understanding of Terms. Mirant and the Bay Area AQMD hereby affirm and acknowledge that they have read this Agreement, that they know and understand its terms, and that they have signed it voluntarily and on the advice of counsel of their own choosing. The Parties have had the opportunity to consult with their attorneys and any other consultant each deemed appropriate prior to executing this Agreement.

4.9 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

4.10 Entire Agreement. The mutual obligations and undertakings of Mirant, on the one hand, and the Bay Area AQMD, on the other hand, expressly set forth in this Agreement are the sole and only consideration of this Agreement and supersede and replace all prior negotiations and proposed agreements between Mirant and the Bay Area AQMD written or oral, on the specific matters addressed in this Agreement. Mirant and the Bay Area AQMD each acknowledges that no other party, nor the agents nor attorneys of any other party, has made any promise, representation or warranty whatsoever (express or implied), not contained herein, to induce the execution of this Agreement. This Agreement constitutes the full, complete and final statement of Mirant and the Bay Area AQMD on the matters addressed by this Agreement.

4.11 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall have the same force and effect as an original, but all of which together shall constitute one and the same instrument.

4.12 Jointly Drafted. Mirant and the Bay Area AQMD have jointly prepared this Agreement. This Agreement shall be deemed to have been jointly drafted by the Parties for the purpose of applying any rule of construction to the effect that ambiguities are to be construed against the party drafting the agreement.

4.13 Amendments. This Agreement may be amended and supplemented only by a written instrument signed by both Mirant and the Bay Area AQMD or their successors-

in-interest. However, such execution may be in counterparts and, when so executed, shall be deemed to constitute one and the same document.

4.14 Material Breach. Any material breach of this Agreement by either Party shall make the agreement subject to termination upon notice by the non-breaching Party.

4.15 Waiver. The waiver of any provision or term of this Agreement shall not be deemed as a waiver of any other provision or term of this Agreement. The mere passage of time, or failure to act upon a breach, shall not be deemed as a waiver of any provision or term of this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement on March 30, 2001.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT

By: Ellen Garvey
Title: Executive Officer/Air Pollution Control Officer

Approved as to form:

Brian C. Bunger
Senior Assistant Counsel

MIRANT POTRERO, LLC

By: Anne M. Cleary
Title: President of Mirant Potrero, LLC

Approved as to form:
Pillsbury Winthrop LLP

David R. Farabee
Counsel for Mirant Potrero, LLC

ATTACHMENT A

Operating Criteria for the Utilization of Combustion Turbines at Potrero Power Plant

Beginning on the Effective Date of this Agreement and terminating on December 31, 2001, then beginning again for each unit at such time as that unit's operating hours in 2002 exceed 877, and terminating on the occurrence of a Terminating Event as described in Paragraph 2.2 of this Agreement, the Potrero Power Plant ("Potrero") Units 4, 5, and 6 ("Potrero Peaking Turbines") may commence operation at any time the requirements specified in Condition 1 (operation to provide local area support), Condition 2 (operation to provide zonal area support) and/or Condition 3 (operation as a system resource) are satisfied.

For purposes of this Agreement, a California Load Serving Entity shall be defined as including the California Independent System Operator (ISO), California Department of Water Resources (DWR) or any California municipal agency, California irrigation district, California water district, California electric cooperative, California investor owned utility, or the Western Area Power Administration ("WAPA"), but only to the extent that the WAPA arranges for sale of the electricity within California.

Condition 1: Local Area Support

The Potrero Peaking Turbines may be used as the last resource committed to satisfy the ISO Operating Procedure for San Francisco under emergency transmission system conditions and to avert firm load shedding in the Greater San Francisco Bay Area ("Bay Area"). The operations of the Potrero Peaking Turbines for local reliability will be limited to conditions associated with the outage of transmission or generation facilities which affect the reliable operations of the transmission network necessary to serve the San Francisco Peninsula area or to avert firm load shedding in the Bay Area. Prior to coming on-line under this Condition, Mirant shall use its best efforts in such conditions to determine that the ISO has implemented the following unit commitment order (unless the action will have an adverse impact on the transmission grid):

1. Hunters Point Unit 4 (utility boiler) and Potrero Unit 3 (utility boiler);
2. Hunters Point Unit 1 (two combustion turbines);
3. Potrero Units 4, 5, and 6 (six combustion turbines).

For purposes of this Agreement, the Greater San Francisco Bay Area consists primarily of the counties of Alameda, Contra Costa, San Francisco, San Mateo and Santa Clara, as served primarily by the Vaca-Dixon, Tesla, Metcalf and Tracy 500/230kV substations

Condition 2: Zonal Area Support

The Potrero Peaking Turbines may be used to avert firm load curtailment in the Northern California area caused by a constraint on Western System Coordinating Council ("WSCC") transmission Path 15. This action will only be in response to a request by the ISO, and the Potrero Peaking Turbines will be called upon only after all available utility boilers in the Northern California area are operating at their maximum available output. Under dispatch from the ISO, Mirant will commit the Potrero Peaking Turbines for support of the North of Path 15 ("NP-15") zone subject to an Environmental Dispatch Procedure established by the ISO in conjunction with the California Air Resources Board ("ARB") and the Bay Area AQMD.

Condition 3: System Resource

The Potrero Peaking Turbines may be brought on line as a system resource only under one of the following conditions:

1. For sales to a California Load Serving Entity only after a) a declaration by the ISO that actual operating reserves have fallen below 4% and b) to the extent necessary to maintain system reserves at 4% and c) either firm load shedding is occurring or the ISO has given notice to Mirant of imminent interruption of firm load.

2. To replace some or all of the output of a unit at the Contra Costa, Pittsburg or Potrero Power plants operating under the ISO Participating Generator Agreement and which was committed and scheduled to a California Load Serving Entity, or to replace energy that Mirant had committed to supply from outside California and scheduled to a California Load Serving Entity. This provision may only be used for energy that is pre-scheduled with the ISO pursuant to the Western System Coordinating Council Interchange Scheduling and Accounting Subcommittee calendar or the ISO hour-ahead and real-time markets. Prior to the use of the Potrero Peaking Turbines, all other units at the specified power plants that are available to increase their generation will be employed. Operation of each Potrero Peaking Turbine pursuant to the criteria specified in this paragraph 2 shall not exceed 877 hours per calendar year, including for 2001 any hours a turbine has already operated under the conditions specified in this paragraph prior to the effective date of this Agreement. As of March 27, 2001, at 6:00 a.m. Pacific, the Potrero Peaking Turbines had the following hours remaining available for operation under this Condition: Unit 4: 833 hours; Unit 5: 798 hours; and Unit 6: 798 hours.

General Conditions

Compliance with Operating Conditions. Prior to coming on line under any of the above operating conditions, Mirant shall use its best efforts to determine that all applicable terms of the operating conditions are met. If Mirant determines that the ISO has not followed the operating criteria specified in this Attachment A, Mirant shall refuse subsequent requests by the ISO to operate the Potrero Peaking Turbines, unless a) the ISO commits in writing to Mirant and the Bay Area AQMD to conform to the operating criteria in this Attachment A, or b) at the time of a subsequent ISO request to operate, Mirant independently determines, on the basis of reasonable inquiry, that one or more of the operating conditions specified above are satisfied.

Daily Operation Reports. Operation of the Potrero Peaking Turbines beyond the respective 877-hour annual operating limits shall be reported by Mirant by 12:00 noon Pacific following each operating date (report on the operations of the Potrero Peaking Turbines over the weekend or on a holiday will be made on the first business day following the weekend or holiday) to the Bay Area AQMD.

Monthly Operation Reports. Commencing with the month of April 2001, and regardless of whether the 877-hour annual operating limit has been reached for any of the Potrero Peaking Turbines, Mirant shall provide to the Bay Area AQMD a comprehensive monthly summary of each instance (date, start time, end time, reason (specifying the applicable operating condition, above)) that the Potrero Peaking Turbines were operating on and after the effective date of this agreement. Mirant shall submit these monthly operating summaries within ten (10) business days of the end of any month in which such operations occurred.

Attachment B

6/19/01

LOUISE H. RENNE, State Bar #36508
City Attorney
JOANNE HOEPER, State Bar #114961
Chief Trial Attorney
THERESA MUELLER, State Bar #172681
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Attorneys for Plaintiffs
CITY AND COUNTY OF SAN FRANCISCO and
PEOPLE OF THE STATE OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and the PEOPLE OF THE STATE OF CALIFORNIA, by and through LOUISE H. RENNE, City Attorney for the CITY AND COUNTY OF SAN FRANCISCO, Plaintiffs, vs. MIRANT POTRERO, LLC, Defendant.	Case No. C-01-2356 PJH FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF DEMAND FOR JURY TRIAL

The City and County of San Francisco, a municipal corporation, (the "City") and the People of the State of California, (the "People") by and through San Francisco City Attorney Louise H. Renne, (collectively "Plaintiffs") for their Complaint against defendant Mirant Potrero, LLC, ("Mirant" or "Defendant") hereby allege as set forth below:

INTRODUCTION

1. Mirant (formerly known as Southern Energy Company) operates a power plant at 1201 Illinois Street, in the Potrero neighborhood in the City and County of San Francisco ("Potrero Power Plant"). Mirant operates one boiler unit at the Potrero Power Plant for the purposes of generating electricity. Mirant also operates, in a limited capacity, three 52-megawatt ("MW") peaker units ("Peakers") for the purposes of supplementing the electrical generation capacity of the Potrero Power Plant when necessary. Each Peaker has two diesel-fueled turbine engines, which emit air pollutants.

2. Mirant's permit to operate the Peakers, issued pursuant to Federal and State laws, limits the operation of their six diesel turbine engines to 877 hours per year, or approximately one-tenth of the year, because of the amount of air pollutants that they emit. Because of this limitation in the operational hours for these turbine engines, Mirant was not required to install state of the art pollution control equipment that would otherwise have been required under the Clean Air Act ("the Act"), 42 U.S.C. §§ 7401 – 7671q, to reduce the amount of air pollutants emitted by these turbine engines.

3. Now, Mirant has obtained an agreement from the Bay Area Air Quality Management District ("BAAQMD") that allows the turbine engines to run without any limits on the hours of operation. Mirant failed to follow the proper procedures that would entitle them to increase their operations in this manner. While the City supports increased electric generation, Mirant has not obtained permits, installed additional pollution control equipment, or satisfied emission offsets, as required by the Act.

4. Operation of the Peakers beyond the permitted limit, without additional pollution control equipment and emission offsets, will result in increased emissions of oxides of nitrogen ("NOx"), particulate matter, sulfur dioxide and carbon monoxide, as well as cancer-causing chemicals such as benzene, formaldehyde, dioxin, and hexavalent chromium and other toxins, such as mercury, nickel, and lead. These pollutants cause serious harm to human health.

5. Through its agreement with BAAQMD, Mirant circumvented provisions of the Act that protect the health and safety of communities in which power plants are located. Over

99,000 residents of San Francisco live within a two-mile radius of the Potrero Power Plant and there are 70 schools within a three-mile radius. Those residents and schoolchildren are already exposed to air in the Bay Area that does not meet the national standards for ozone. Mirant's excess emissions of NOx will further contribute to Bay Area's ozone problem because NOx is an ozone precursor.

6. While the existence of an energy crisis in California may justify extraordinary measures such as temporarily modifying operational limits for power plants such as those contained in the permit for Mirant's Peakers, such modifications must be made consistent with the law and in a manner that protects the health of the residents of the Potrero community. The Agreement between Mirant and BAAQMD provides Mirant a financial incentive to operate its most polluting turbine engines and fails to mitigate the harm to the Potrero community.

7. Plaintiffs seek a declaration from the Court that Mirant is in violation of the Act and California Business and Professions Code for failing to obtain the required permits allowing it to operate the six turbine engines in excess of 877 hours in the calendar year 2001, for exceeding an emission standard or limitation under the Act, and that the agreement with BAAQMD does not excuse such violations. Plaintiffs also seek injunctive relief to require Mirant to obtain the required permits that would allow it to operate the turbine engines beyond the 877-hour permit limitation. Finally, Plaintiffs seek civil penalties.

JURISDICTION

8. This Court has jurisdiction over the subject matter of this action pursuant to Section 304 of the Clean Air Act ("the Act"), 42 U.S.C. § 7604, and 28 U.S.C. §§ 1331 (federal question), 1367 (supplemental jurisdiction), 2201 (declaratory relief), 2202 (injunctive relief).

9. Section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1), authorizes citizen suits against "any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of . . . an emission standard or limitation under [the Act.]"

10. On June 19, 2001, Plaintiffs gave notice to Mirant, BAAQMD, EPA and the State of California of Plaintiffs' intent to file suit against Mirant for violations of emissions standards

and limitations under the Act. A copy of the notice of intent to file suit against Mirant is attached hereto as Exhibit A. Copies of the certified mail receipts are attached hereto as Exhibit B.

11. More than sixty days have passed since Plaintiffs provided notice of their intent to file suit, and neither the EPA nor the State of California has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the emission standards and limitations.

12. Section 304(a)(3) of the Act, 42 U.S.C. § 7604(a)(3), authorizes citizen suits against "any person who proposes to construct or constructs any new or modified major emitting facility" without the permits required by the New Source Review and Prevention of Significant Deterioration provisions of the Act.

VENUE

13. Venue is proper in this judicial district pursuant to section 304 of the Act, 42 U.S.C. § 7604, and 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claim occurred within this district, and Plaintiffs and Defendant reside in this district.

INTRADISTRICT ASSIGNMENT

14. Assignment of this action to the San Francisco or Oakland Division is proper pursuant to Local Rule 3-2(c) and (d) because a substantial part of the events or omissions giving rise to the claim occurred in the City and County of San Francisco.

PARTIES AND SUBJECT PROPERTY

15. Plaintiff the City and County of San Francisco ("the City") is a municipal corporation with a population in excess of 750,000 organized and existing under and by virtue of the laws of the State of California. The City is organized to improve the quality of urban life and to meet the needs of its residents. See San Francisco Charter, Preamble.

16. Plaintiffs are representatives of the residents of San Francisco who live, work, recreate, and breathe the air into which Mirant emits pollutants. Many citizens live in the

immediate vicinity of Potrero Power Plant. Interests of the residents of San Francisco have been and continue to be harmed by Mirant's violations of the Act.

17. Defendant Mirant is a Delaware limited liability corporation with its principle place of business in Georgia.

18. Defendant Mirant owns and operates the Potrero Power Plant, at 1201 Illinois Street, San Francisco, California.

19. Plaintiff the City brings this action pursuant to §§ 304(a)(1) and (3) of the Act, 42 U.S.C. §§ 7604(a)(1) and (3). Plaintiff People of the State of California ("the People") brings this action pursuant to California Business and Professions Code § 17204.

GENERAL ALLEGATIONS

Harm Caused by Air Pollutants

20. Ozone, the principal element of smog, is a secondary pollutant produced when two precursor air pollutants - volatile organic compounds and NOx - react in sunlight.

21. Children, the elderly, and those with respiratory conditions exacerbated by ozone are suffering as a result of exposure to high levels of ozone in the environment. Rates of hospitalization for asthmatics are sky-high in the Bay Area's most populous counties of Santa Clara, Alameda, Contra Costa and San Francisco.

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

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

66 Fed. Reg. 5002, 5012 (Jan. 18, 2001). Moreover, ozone strikes the most vulnerable segments of our population the hardest: children, the elderly, and people with respiratory ailments. Id. Children are at greater risk because their lung capacity is still developing, because they spend significantly more time outdoors than adults – especially in the summertime when ozone levels

are the highest, and because they are generally engaged in relatively intense physical activity that causes them to breathe more ozone pollution. Id.

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

> [A]sthma is one of the most common and costly diseases in the United States. . . . Today, more than 5 percent of the US population has asthma [and] [o]n average ***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 5012-5013 (emphasis added). The health and societal costs of asthma are wreaking havoc 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 asthma attacks were so severe. Asthma is now the leading cause of hospital admissions of young children in California. Id. In addition to very real human suffering, asthma hospitalizations impose a huge financial drain upon the State's and the City's health care system. The most recent data indicate that the statewide financial cost of these hospitalizations was nearly $350,000,000, with nearly a third of the bill paid by the State Medi-Cal program. Id. at 4.

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

25. While asthmatics, children, the elderly, and persons with respiratory illnesses are particularly vulnerable, even healthy adults who exercise or work vigorously outdoors are susceptible to adverse health effects from ozone exposure.

26. Carbon monoxide ("CO") is a colorless, odorless, poisonous gas. If inhaled, CO enters the bloodstream and reduces oxygen delivery to the body's organs and tissues. The health threat from CO is most serious to those who suffer from cardiovascular disease. At high levels of exposure, healthy individuals are also affected.

27. Particulate matter less than 10 microns ("PM_{10}") could cause negative effects on respiratory systems, aggravation of existing respiratory and cardiovascular disease, alteration of the body's defense systems against foreign materials, damage to lung tissue, carcinogenesis and premature death. The elderly, children, and people with chronic obstructive pulmonary or cardiovascular disease, influenza or asthma are especially sensitive to the effects of PM_{10}. It could also serve as a carrier for a variety of toxic metals and compounds.

28. Exposure to high concentrations of sulfur dioxide ("SO_2") could adversely affect breathing and respiratory and cardiovascular systems. Major subgroups of the population that are most sensitive to SO_2 include asthmatics and individuals with cardiovascular disease or chronic lung disease as well as children and the elderly.

Operations at Potrero Power Plant

29. On September 14, 1998, Mirant's predecessor, Southern Energy California, obtained a Major Facility Review Permit ("Permit") to operate the Potrero Power Plant pursuant to Subchapter V of the Act, 42 U.S.C. §§ 7661-7661f.

30. As part of the permit process, Southern Energy requested and received Condition #15816 of the Permit, which limits the hours of operation of the six turbine engines of the Peakers to no more than 877 hours per year. Because of Condition #15816, the turbine engines are allowed to operate without state-of-the-art pollution control equipment and without provisions for emission offsets.

31. On December 12, 2000, the California Independent System Operator issued a letter to Mirant requesting it to apply for a "variance" to its permit regarding the restriction on the operation of its Peakers.

32. Instead of applying for such a modification to its permit, on March 30, 2001, Mirant entered into a Compliance and Mitigation Agreement ("Agreement") with BAAQMD. The Agreement allows Mirant to operate the six turbine engines in excess of 877 hours per year without installing state-of-the-art pollution control equipment or providing for emission offsets. The Agreement does not specify a maximum number of hours that Mirant may run these turbine engines.

33. Under the Agreement, Mirant is required to pay a "Mitigation Fee Payment" based on the amount of NOx emissions. But the Agreement does not require that the payment be used for mitigation of the harm caused to local residents. Moreover, the penalty provision of the Agreement is arbitrary and bears no relation to Mirant's costs or revenues from operating the Peakers. Thus, Mirant has a financial incentive to operate the Peakers without limit and pollute the air.

34. Mirant and BAAQMD entered into the Agreement without any notice to or participation or input from residents of the Potrero neighborhood or the citizens or officials of San Francisco.

35. Mirant exceeded the 877-hour limit for Potrero Turbine Engine 5A, Source No. 26-12, on: May 31, 2001, June 2, 2001, and June 10, 2001.

36. Mirant exceeded the 877-hour limit for Potrero Turbine Engine 5B, Source No. 26-13, on: May 19, 2001, May 20, 2001, May 21, 2001, May 22, 2001, May 23, 2001, May 25, 2001, May 26, 2001, May 27, 2001, May 28, 2001, May 30, 2001, May 31, 2001, June 2, 2001, and June 10, 2001.

37. Mirant exceeded the 877-hour limit for Potrero Turbine Engine 6A, Source No. 26-14, on: May 10, 2001, May 11, 2001, May 14, 2001, May 15, 2001, May 16, 2001, May 19, 2001, May 20, 2001, May 21, 2001, May 22, 2001, May 23, 2001, May 25, 2001, May 26, 2001, May 30, 2001, May 31, 2001, and June 2, 2001.

38. Mirant exceeded the 877-hour limit for Potrero Turbine Engine 6B, Source No. 26-15, on: May 20, 2001, May 21, 2001, May 22, 2001, May 23, 2001, May 25, 2001, May 26, 2001, May 30, 2001, May 31, 2001, and June 2, 2001.

39. As of July 31, 2001, Mirant has operated the Peakers for 313.3 hours in excess of their permitted limits, resulting in the emission of approximately 13 tons of NOx into the environment.

Background and Purpose of the Clean Air Act

40. In 1970, Congress enacted the Act, 42 U.S.C. §§ 7401-7671q, requiring that the health-threatening smog afflicting our major metropolitan areas be cleaned up by 1975. Today, 30 years later, unsafe levels of ozone, or smog, persist in the Bay Area.

41. The Act establishes a comprehensive program to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). This program is founded on shared federal and state responsibility.

42. Sections 108 and 109 of the Act require the United States Environmental Protection Agency ("EPA") to establish, review, and revise nationally applicable standards for air pollutants having an adverse impact on public health or welfare, called the National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. §§ 7408, 7409. The NAAQS establish permissible concentrations of those pollutants in the "ambient," or outside, air.

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

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

New Source Review ("NSR") Requirements for Nonattainment Areas

45. Part D of Title I of the Act requires SIPs to include a permit program for the construction and operation of new or modified major stationary sources of an air pollutant in any area that has not attained the NAAQS for that pollutant ("nonattainment area"). 42 U.S.C. §§ 7410(a)(2)(C); 7502(c)(5). This Part imposes more stringent regulatory requirements for such new or modified sources. Part D of Title I of the Act, 42 U.S.C. §§ 7501-7508.

46. The purpose of these NSR provisions is to ensure that air pollution control districts 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). NSR permits may only be issued, for example, if "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).

47. One of the NAAQS that EPA sets for protection of public health is the maximum acceptable limits for ozone, a derivative product of NOx emissions. See 40 C.F.R. § 81.305.

48. In 1998, EPA re-designated the Bay Area as a nonattainment area for ozone. 63 Fed. Reg. 37258 (July 10, 1999); see 40 CFR § 81.305 (1999).

49. Because the Bay Area is in a nonattainment area for federal ozone standards, any new significant emission of ozone or one of its precursors requires the source to undergo preconstruction review pursuant to the Bay Area SIP implementing the NSR program. See 64 Fed. Reg. 3,850 (Jan. 26, 1999); 40 C.F.R. § 52.220(c)(199)(i)(A)(8).

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

51. Under Rule 2-2, a "major modification" is defined 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 emissions by [40 tons of NOx per year]." SIP Rule 2-2-221. Under Rule 1-1, a "modification" is "[a]ny physical change in existing plant or change in the method which results or may result in [] an increase in emission of any air pollutant subject to [BAAQMD] control." This includes an increase in the hours of operation where the hours are limited by permit conditions. SIP Rules 1-1-217, 1-1-217.2; see also, SIP Rule 2-2-223.

52. 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"). SIP Rules 2-1-301 and 2-1-402

53. 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"). SIP Rules 2-1-302 and 2-1-402.

54. A modified major source is required to apply the Best Available Control Technology ("BACT") if the modification results in an increase of certain air pollutants, including NOx, in excess of 10 pounds per highest day or a cumulative increase since April 5, 1991 of 10 pounds per highest day. SIP 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 exceed certain annual and/or daily amounts. Id. BACT is set to be equivalent to the lowest achievable emission rate ("LAER") required by the Act to be achieved by modified major sources. SIP Rule 2-2-206.

55. A modified major source is also required to provide emission offsets for the emission from the modified source. SIP Rule 2-2-302.

Prevention of Significant Deterioration ("PSD") Requirements for Attainment Areas

56. Part C of Title I of the Act requires a preconstruction permit process for major sources or major modifications resulting in significant emissions of pollutants for which the NAAQS have been attained in the area. Part C of Title I of the Act, 42 U.S.C. §§ 7470-7479. (An area can be in attainment for one or more pollutants for which the NAAQS have been established and in non-attainment for other such pollutants.) The purpose of PSD provisions is to prevent degradation of air that meets the national standards. 42 U.S.C. §§ 7470 and 7475(a).

57. A PSD permit, which must be obtained before a major modification, must require application of BACT for pollutants for which the modification would result in a significant net emissions increase. 42 U.S.C. § 7475(a)(4); 40 C.F.R. §§ 52.21(i), 52.21(j)(3).

58. For such pollutants, the permit applicant must also perform an analysis of ambient air quality impacts in the area before a PSD permit can be obtained. 42 U.S.C. § 7475(a)(6); 40 C.F.R. § 52.21(m).

59. BAAQMD is in an area in which the NAAQS for NOx, CO, PM_{10} and SO_2 have been deemed attained. 40 C.F.R. § 81.305. Sources within the jurisdiction of BAAQMD therefore must comply with PSD provisions of the Act, as set forth in 40 C.F.R. §§ 52.21(b)-(w); 52.270(a), for any major modifications affecting those pollutants.

60. A major modification of a major facility includes an increase in production or increased hours of operation where the production and hours are limited by permit conditions, and which will result in an increase in NOx emissions of 40 tons per year ("tpy") or more; CO emissions of 100 tpy or more; PM_{10} emissions of 15 tpy or more; and SO_2 emissions of 40 tpy or more. 40 C.F.R. § 52.21(b)(2)(i); SIP Rules 1-1-217.2; 2-2-221; 2-2-223.

SIP Requirements, Title V Permit Terms and Conditions

61. The operation of a stationary gas turbine is governed by BAAQMD Regulation ("Rule") 9-9, entitled "Nitrogen Oxides from Stationary Gas Turbines." Rule 9-9 was approved by the EPA and incorporated into the SIP in 1997 and is federally enforceable as a SIP requirement. See 63 Fed. Reg. 65,611 (1997); 40 C.F.R. § 52.220(c)(239)(i)(E)(1).

62. Pursuant to Rule 9-9, any stationary gas turbine rated at or above 10 MW and that emits between 15 parts per million (volume) ("ppmv") and 65 ppmv of NOx, corrected to 15 percent oxygen (dry basis), when in operation, shall operate less than 877 hours per year. Rules 9-9-301.2; 9-9-302. Without the limit on the hours of operation, a stationary gas turbine would be governed by the more stringent limit of 15 ppmv set forth in Rule 9-9-301.2, with limited exceptions not applicable here.

63. Each Peaker turbine engine is a stationary gas turbine rated at 26 MW and is therefore governed by Rule 9-9.

64. The Peakers cannot achieve the more stringent emission limit of 15 ppmv of NOx without installing additional pollution controls and their operational hours are therefore limited to less than 877 hours per year pursuant to Rule 9-9-302.

65. Condition #15816 implements this SIP requirement by limiting the operation of the Peakers to 877 hours per year.

66. Condition #15816 is a term and condition set forth in the Potrero Power Plant's Major Facility Review Permit issued by BAAQMD on September 14, 1998, pursuant to Subchapter V of the Act.

67. 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. 42 U.S.C. § 7604(f)(1), (3), (4).

Citizen Suits Provisions

68. Section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1), authorizes any "person" to sue "any [other] person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of . . . an emission standard or limitation under [the Act.]"

69. Section 304(a)(3) of the Act authorizes any "person" to sue "any [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 of air quality) or part D of subchapter I of [the Act] (relating to nonattainment)." 42 U.S.C. 7604(a)(3).

70. Each Plaintiff is a "person" as defined in section 302(e) of the Act, 42 U.S.C. 7602(e) and a "person" within the meaning of section 304(a) of the Act, 42 U.S.C. § 7604(a).

71. Mirant is a "person" as defined in section 302(e) of the Act, 42 U.S.C. § 7602(e) and a "person" within the meaning of section 304(a) of the Act, 42 U.S.C. § 7604(a).

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

73. The environmental and economic interests, including the aesthetic interests in the Bay Area environment, as well as health, wellbeing and enjoyment of the residents of San Francisco have been, and continue to be, threatened by Mirant's proposal to operate and operation of its Peakers in violation of the Act. The residents of San Francisco are harmed by the increased emissions of air pollutants caused by the operation of the Peakers in excess of permit limits without additional pollution controls. Specifically, San Franciscans are harmed by increased health risks and increased health care costs.

74. In addition, because Mirant failed to apply for and obtain the necessary permits under the Clean Air Act, the residents of San Francisco living, working and breathing the air in the Bay Area, as well as the City and County of San Francisco, were denied their right to participate fully and meaningfully in the permitting process for the Peakers. As a direct result of Mirant's failure to comply with the permitting process, Mirant is emitting and will continue to emit pollutants in excess of the allowed levels, without installing pollution control equipment and without providing for required emission offsets.

75. The interests Plaintiffs seek to further in this action under the Act, namely, the protection and improvement of air quality, are within the purposes and goals of the City to improve the quality of urban life for its residents. The City brings the Clean Air Act claims in this action on behalf of its residents who would have standing to sue in their own right. Their individual participation, however, is not necessary for a just resolution of this case.

76. Should the Court grant the injunctive and declaratory relief requested by Plaintiffs against Mirant in the present action, the harm to Plaintiffs' interests will be redressed because, among other things, Mirant will not be allowed to emit excess pollution without additional pollution controls.

77. An assessment of civil penalties for Mirant's Clean Air Act violations alleged in this complaint will also redress the harms to Plaintiffs' interests by deterring Mirant, and others, from future violations of the Act.

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FIRST CLAIM
FAILURE TO OBTAIN PERMIT REQUIRED BY NEW SOURCE REVIEW PROVISIONS BEFORE MODIFYING FACILITY TO INCREASE OZONE LEVELS
(42 U.S.C. §§7501-7508)

78. Plaintiff hereby incorporates by reference paragraphs 1 through 77 as though fully set forth herein.

79. Allowing Mirant to modify sources by operating the Peakers without any limitation on the hours of operation is a major modification within the meaning of the NSR provisions, Part D of subchapter I of the Act, because such operation will cause an increase of the emissions of a major existing facility of at least 40 tons of NOx per year.

80. Mirant failed to apply for a permit pursuant to the NSR rules.

81. The Agreement does not require Mirant to reduce the amount of air pollutants emitted as a result of the modification or provide for any emission offsets. Therefore, Mirant does not meet the BACT, LAER, or emissions offsets requirements.

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

SECOND CLAIM
FAILURE TO OBTAIN PERMIT REQUIRED BY PREVENTION OF SIGNIFICANT DETERIORATION PROVISIONS BEFORE MODIFYING FACILITY TO SIGNIFICANTLY INCREASE NOx EMISSIONS
(42 U.S.C. §§7470-7479)

83. Plaintiff hereby incorporates by reference paragraphs 1 through 77 as though fully set forth herein.

84. Allowing Mirant to modify sources by operating the Peakers without any limitation on the hours of operation is a major modification within the meaning of the PSD provisions, Part C of subchapter I of the Clean Air Act, because such operation will result in a major modification with a net emissions increase at a major existing facility of at least 40 tons of NOx per year.

85. Mirant failed to obtain a permit pursuant to PSD rules prior to constructing the major modification of its facility.

86. Mirant does not meet the BACT requirements and has not been subject to an air quality impact analysis.

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

THIRD CLAIM
FAILURE TO OBTAIN PERMIT REQUIRED BY PREVENTION OF SIGNIFICANT DETERIORATION PROVISIONS BEFORE MODIFYING FACILITY TO SIGNIFICANTLY INCREASE CO EMISSIONS
(42 U.S.C. §§7470-7479)

88. Plaintiff hereby incorporates by reference paragraphs 1 through 77 as though fully set forth herein.

89. Allowing Mirant to modify sources by operating the Peakers without any limitation on the hours of operation is a major modification within the meaning of the PSD provisions, Part C of subchapter I of the Act, because such operation will result in a major modification with a net emissions increase at a major existing facility of at least 100 tons of CO per year.

90. Mirant failed to obtain a permit pursuant to PSD rules prior to constructing the major modification of its facility.

91. Mirant does not meet the BACT requirements and has not been subject to an air quality impact analysis.

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

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FOURTH CLAIM
FAILURE TO OBTAIN PERMIT REQUIRED BY PREVENTION OF SIGNIFICANT DETERIORATION PROVISIONS BEFORE MODIFYING FACILITY TO SIGNIFICANTLY INCREASE PM_{10} EMISSIONS
(42 U.S.C. §§7470-7479)

93. Plaintiff hereby incorporates by reference paragraphs 1 through 77 as though fully set forth herein.

94. Allowing Mirant to modify sources by operating the Peakers without any limitation on the hours of operation is a major modification within the meaning of the PSD provisions, Part C of subchapter I of the Act, because such operation will result in a major modification with a net emissions increase at a major existing facility of at least 15 tons of PM_{10} per year.

95. Mirant failed to obtain a permit pursuant to PSD rules prior to constructing the major modification of its facility.

96. Mirant does not meet the BACT requirements and has not been subject to an air quality impact analysis.

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

FIFTH CLAIM
FAILURE TO OBTAIN PERMIT REQUIRED BY PREVENTION OF SIGNIFICANT DETERIORATION PROVISIONS BEFORE MODIFYING FACILITY TO SIGNIFICANTLY INCREASE SO_2 EMISSIONS
(42 U.S.C. §§7470-7479)

98. Plaintiff hereby incorporates by reference paragraphs 1 through 77 as though fully set forth herein.

99. Allowing Mirant to modify sources by operating the Peakers without any limitation on the hours of operation is a major modification within the meaning of the PSD provisions, Part C of subchapter I of the Act, because such operation will result in a major modification with a net emissions increase at a major existing facility of at least 40 tons of SO_2 per year.

100. Mirant failed to obtain a permit pursuant to PSD rules prior to constructing the major modification of its facility.

101. Mirant does not meet the BACT requirements and has not been subject to an air quality impact analysis.

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

SIXTH CLAIM
EXCEEDING EMISSION STANDARD OR LIMITATION FOR POTRERO TURBINE ENGINE 5A, SOURCE NO. 26-12
(42 U.S.C. §§7401-7431; 7661-7661f)

103. Plaintiff hereby incorporates by reference paragraphs 1 through 77 as though fully set forth herein.

104. Mirant operated Potrero Turbine Engine 5A, Source No. 26-12, in excess of the 877-hour limit on at least three days.

105. Each time Mirant operates Engine 5A in excess of 877 hours Mirant exceeds an emission standard or limitation under the Act because such operation violates a condition of its permit issued under subchapter V of the Act and the requirements of Rule 9-9.

106. Unless enjoined by this Court, Mirant will continue to violate Condition #15816 of the Permit by operating Potrero Turbine Engine 5A in excess of the 877-hour limit.

SEVENTH CLAIM
EXCEEDING EMISSION STANDARD OR LIMITATION FOR POTRERO TURBINE ENGINE 5B, SOURCE NO. 26-13
(42 U.S.C. §§7401-7431; 7661-7661f)

107. Plaintiff hereby incorporates by reference paragraphs 1 through 77 as though fully set forth herein.

108. Mirant operated Potrero Turbine Engine 5B, Source No. 26-13, in excess of the 877-hour limit on at least thirteen days.

109. Each time Mirant operates Engine 5B in excess of 877 hours Mirant exceeds an emission standard or limitation under the Act because such operation violates a condition of its permit issued under subchapter V of the Act and the requirements of Rule 9-9.

110. Unless enjoined by this Court, Mirant will continue to violate Condition #15816 of the Permit by operating Potrero Turbine Engine 5B in excess of the 877-hour limit.

EIGHTH CLAIM
EXCEEDING EMISSION STANDARD OR LIMITATION FOR POTRERO TURBINE ENGINE 6A, SOURCE NO. 26-14
(42 U.S.C. §§7401-7431; 7661-7661f)

111. Plaintiff hereby incorporates by reference paragraphs 1 through 77 as though fully set forth herein.

112. Mirant operated Potrero Turbine Engine 6A, Source No. 26-14, in excess of the 877-hour limit on at least fifteen days.

113. Each time Mirant operates Engine 6A in excess of 877 hours Mirant exceeds an emission standard or limitation under the Act because such operation violates a condition of its permit issued under subchapter V of the Act and the requirements of Rule 9-9.

114. Unless enjoined by this Court, Mirant will continue to violate Condition #15816 of the Permit by operating Potrero Turbine Engine 6A in excess of the 877-hour limit.

NINTH CLAIM
EXCEEDING EMISSION STANDARD OR LIMITATION FOR POTRERO TURBINE ENGINE 6B, SOURCE NO. 26-15
(42 U.S.C. §§7401-7431; 7661-7661f)

115. Plaintiff hereby incorporates by reference paragraphs 1 through 77 as though fully set forth herein.

116. Mirant operated Potrero Turbine Engine 6B, Source No. 26-15, in excess of the 877-hour limit on at least nine days.

117. Each time Mirant operates Engine 6B in excess of 877 hours Mirant exceeds an emission standard or limitation under the Act because such operation violates a condition of its permit issued under subchapter V of the Act and the requirements of Rule 9-9.

118. Unless enjoined by this Court, Mirant will continue to violate Condition #15816 of the Permit by operating Potrero Turbine Engine 6B in excess of the 877-hour limit.

TENTH CLAIM
UNFAIR BUSINESS PRACTICES BROUGHT BY PLAINTIFF THE PEOPLE OF CALIFORNIA AGAINST DEFENDANT MIRANT
(BUSINESS AND PROFESSIONS CODE SECTIONS 17200-17210)

119. Plaintiff hereby incorporates by reference paragraphs 1 through 118 as though fully set forth herein.

120. Plaintiff brings this cause of action in the public interest in the name of the People of the State of California, pursuant to Business and Professions Code Sections 17200-17210, in order to protect the health and safety of the community, from the unlawful and unfair business practices committed by Defendant Mirant in the commercial use of the Property and operation of the Potrero Power Plant in violation of the Act, as set forth in the first through ninth claims.

121. Defendant transacts business within the City and County of San Francisco, State of California, and is profiting from operating the Potrero Power Plant in violation of the Act. Each violation of the Act constitutes an unfair and unlawful business practice.

122. As the operator of the Potrero Power Plant, Defendant is required to comply with the Act. Defendant has failed to comply with the Act.

123. Defendant has further maintained and operated the Potrero Power Plant in violation of: (1) the NSR provisions of the Act by increasing the hours of operation of the Peakers which will cause an increase in NOx emissions, a precursor to ozone formation, in excess of 40 tpy without applying for the necessary permit and without applying the necessary control measures and emission offsets to reduce the amount of NOx emitted by such change; (2) the PSD provisions of the Act by increasing the hours of operation of the Peakers which will cause an increase in NOx emission in excess of 40 tpy without applying for the necessary permit and without applying the necessary control measures to reduce the amount and effects of NOx emitted by such change; (3) the PSD provisions of the Act by increasing the hours of operation of the Peakers which will cause an increase in CO emission in excess of 100 tpy without applying for the necessary permit and without applying the necessary control measures to reduce

the amount and affects of CO emitted by such change; (4) the PSD provisions of the Act by increasing the hours of operation of the Peakers which will cause an increase in PM_{10} emission in excess of 15 tpy without applying for the necessary permit and without applying the necessary control measures to reduce the amount and affects of PM_{10} emitted by such change; (5) the PSD provisions of the Act by increasing the hours of operation of the Peakers which will cause an increase in SO_2 emission in excess of 40 tpy without applying for the necessary permit and without applying the necessary control measures to reduce the amount and affects of SO_2 emitted by such change; and (6) the emissions standards and limitations of the Act by operating the Peakers in excess of 877 hours. These actions constitute unfair business practices and unfair competition as prohibited by Business and Professions Code Section 17200-17210.

124. Defendant is engaged in a pattern and practice of conduct constituting an unfair business practice and unfair competition in violation of Business and Professions Code Section 17200.

125. The manner in which Defendant conducts its business is an unfair and unlawful business practice because profits are derived from a commercial establishment that unlawfully emits pollutants in excess of permitted levels. The actions and conduct of Defendant in sustaining this unlawful and unfair business practice violate the laws and public policies of the City and County of San Francisco, the State of California, and the United States and is inimical to the rights, interest and general welfare of the public.

126. Defendant's unfair business practices subject Defendant to civil penalties in the amount of $2,500 per violation as authorized by Business and Professions Code Section 17206.

127. Defendant's unfair business practices that are perpetrated against senior citizens or disabled persons subject Defendant to civil penalties in the amount of $2,500 per violation as authorized by Business and Professions Code Section 17206.1.

128. Unless Defendant is restrained by an order from this Court, it will continue to use, occupy, maintain, allow the use, occupation and maintenance of the Potrero Power Plant for the unlawful activities alleged in the complaint and in violation of the Business and Professions Code Section 17200.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray:

1. that the Court declare that Defendant violated the Clean Air Act by failing to obtain permits pursuant to Parts C and D of subchapter I of the Clean Air Act prior to operating the Peakers in excess of 877 hours for the year 2001, and that the Agreement with BAAQMD does not excuse these violations;

2. that the Court declare that Defendant has violated the Clean Air Act by violating Condition #15816 of the Permit issued under subchapter V of the Act.

3. that the Court declare that Defendant violated Business and Professions Code §17200 by failing to obtain permits pursuant to Parts C and D of subchapter I of the Clean Air Act prior to operating the Peakers in excess of 877 hours for the year 2001;

4. that the Court declare that Defendant violated Business and Professions Code §17200 by operating Potrero Turbine Engine 5A in excess of 877 hours for the year 2001;

5. that the Court declare that Defendant violated Business and Professions Code §17200 by operating Potrero Turbine Engine 5B in excess of 877 hours for the year 2001;

6. that the Court declare that Defendant violated Business and Professions Code §17200 by operating Potrero Turbine Engine 6A in excess of 877 hours for the year 2001;

7. that the Court declare that Defendant violated Business and Professions Code §17200 by operating Potrero Turbine Engine 6B in excess of 877 hours for the year 2001;

8. pursuant to Parts C and D of subchapter I of the Clean Air Act, the Court enter a preliminary and permanent injunction directing Mirant to cease all operation that would cause it to exceed its current permit limits on the hours of operations of the Peakers, until after it applies for and obtains the permits required by the Clean Air Act and comply with the requirements of such permits;

9. pursuant to California Business and Professions Code § 17203, the Court enter a preliminary and permanent injunction directing Mirant to cease all operation that would cause it to exceed its current permit limits on the hours of operations of the Peakers, until after it applies

for and obtains the permits required by the Clean Air Act and comply with the requirements of such permits;

10. pursuant to section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a), the Court order Mirant to pay appropriate civil penalties up to $27,500 per day for each violation of the Clean Air Act, and order that up to $100,000 be used in beneficial mitigation projects which are consistent with the Clean Air Act and enhance the public health or the environment;

11. pursuant to Business and Professions Code Section 17206, the Court order Defendant to pay a civil penalty of $2,500 for each act of unfair competition in violation of Business and Professions Code § 17200;

12. pursuant to Business and Professions Code Section 17206.1, the Court order Defendant to pay a civil penalty of $2,500 for each act of unfair competition in violation of Business and Professions Code § 17200 that is perpetrated against a senior citizen or disabled person;

13. that, pursuant to Business and Professions Code Section 17203, Defendant be ordered to disgorge all profits obtained through their unfair and unlawful business practices in violation of Business and Professions Code § 17200;

14. that Plaintiffs recover the costs of suit, including attorneys fees, costs of investigation and discovery from Defendant, its successors and assigns, as provided by Section 304(d) of the Act, 42 U.S.C. § 7604(d);

15. that Plaintiffs recover the costs of suit from Defendant, its successors and assigns, as provided by Code of Civil Procedure Section 1032; and

16. that Plaintiffs shall have such further and other relief as the court deems just.

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

Dated:

LOUISE H. RENNE
City Attorney
JOANNE HOEPER
Chief Trial Attorney
THERESA MUELLER
WILLIAM CHAN
ROSE-ELLEN HEINZ
Deputy City Attorneys

By:_____
ROSE-ELLEN HEINZ

Attorneys for Plaintiffs
CITY AND COUNTY OF SAN FRANCISCO and
PEOPLE OF THE STATE OF CALIFORNIA

INDEX TO EXHIBITS

Exhibit	Description
A	Notice of Intent to File Suit Under the Clean Air Act, dated June 19, 2001
B	Certified Mail Receipts, dated June 19, 2001

CITY AND COUNTY OF SAN FRANCISCO

LOUISE H. RENNE
City Attorney

OFFICE OF THE CITY ATTORNEY

WILLIAM CHAN
Deputy City Attorney

DIRECT DIAL: (415) 554-4691
E-MAIL: william_chan@ci.sf.ca.us

June 19, 2001

Via 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 & Messrs. Lyons and Gouveia:

The Clean Air Act (the "Act") requires that citizens give sixty (60) days' notice of their intent to file suit under section 304(a)(1) of the Act, 42 U.S.C. § 7604(a). Section 304(b)(1) of the Act, 42 U.S.C. § 7604(b)(1). Accordingly, the City and County of San Francisco ("the City") hereby provide notices 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 violations occurred and will continue to occur.

The City intends to file suit under the Act after expiration of sixty (60) days from the date of this letter. The lawsuit will be filed 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 electrical generation facility located at 1201 Illinois Street, in the Potrero neighborhood of San Francisco, CA 94107 ("Potrero plant"). On September 14, 1998, the Bay Area Air Quality Management District ("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 turbine engines (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 engine in any calendar year. Permit, p. 28. Because of the limit on the hours of operation, the Peakers are each governed by the NOx emission limit set forth in BAAQMD Regulation ("Rule") 9-9-302, of 65 parts per million (volume) ("ppmv") for non-gaseous fuel. Without the limit on the hours of operation, the Peaker Turbines would be governed by the more stringent limit of 15 ppmv set forth in Rule 9-9-301.2, 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 29, 2001, BAAQMD and Mirant entered into a Compliance and Mitigation Agreement ("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 first exceeded the 877-hour limit for the following turbine engine on the hours of operation at its Peakers on the following dates:

Turbine Engine 5A (Source No. 12)	May 30, 2001
Turbine Engine 5B (Source No. 13)	May 19, 2001
Turbine Engine 6A (Source No. 14)	May 10, 2001
Turbine Engine 6B (Source No. 15)	May 20, 2001

See "BAAQMD Gas Turbine Hours Compliance Report" for May 2001, submitted by Mirant to BAAQMD on June 11, 2001. Mirant's violations of the Act have continued each and every day since May 10, 2001, and will continue until Mirant is ordered to comply with the requirements of the Act, including compliance 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." 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. 42 U.S.C. § 7604(f)(1), (3), (4).

Condition #15816 of Mirant's Title V Permit requires Mirant to operate each Peaking Turbine Engine 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). Id. 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. Id. § 7604(f)(4).[1]

Because Mirant has exceeded the 877-hour limit at the Peakers, as set forth in Section A above, Mirant has violated and will continue to violate the Act.

2. Mirant's Violation Arising from its Failure to Comply with Requirements of the Act for a Significant Modified Source in a Major Facility

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 7604(f)(3), and "any requirement to obtain a permit as a condition id. § 7604(f)(4), as well as any SIP condition or requirement, id. § 7604(f)(3). Mirant violated the Act by failing to comply with the emission requirements for major modifications at its Potrero plant 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 plant of at least 40 tons per year ("tpy"). Such an increase, arising from operational changes, constitutes a "major modification" under the NSR rules applicable to the Potrero plant.

In specific, Rule 2-2-221, which is federally approved and is a SIP rule, 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

[1] Alternatively, Mirant is in violation of Rule 9-9-301.2, which would prohibit operation of the Peakers unless NOx emissions from the turbines would 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).

per year]." 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; see also, Rule 1-1-217.

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 NOx. Because Mirant has operated and will continue to operate the Peakers in excess of the permitted limits without applying BACT and providing offsets, Mirant has violated and will continue to violate the Act.

b. PSD Violations for Excess Emissions of NOx, CO, PM_{10} and SO_2

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 NOx, 100 tpy of carbon monoxide ("CO"), 15 tpy of particulate matter whose aerodynamic size is less than or equal to 10 microns ("PM_{10}") and 40 tpy of sulfur dioxide ("SO_2"). 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. §

In particular, 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 NOx, 15 tpy of PM_{10}, or 40 tpy of SO_2. 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 NOx, 15 tpy of PM_{10}, and 40 tpy of SO_2.

Because Mirant has operated and will continue to operate the Peakers in excess of the permitted limits without applying BACT at the Peakers and without conducting an air quality impact analysis, Mirant has violated and will continue to violate the Act.

C. Potential Resolution of Issues During the Sixty Day Period

The entity giving this notice is the City and County of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA, 94102.

Legal counsel representing the City and County of San Francisco in this matter are as follows:

For the City and County of San Francisco

Louise H. Renne, City Attorney
Joanne Hoeper, Chief Trial Attorney
Theresa Mueller, Deputy City Attorney
William Chan, Deputy City Attorney
Rose-Ellen Heinz, Deputy City Attorney
City Attorney's Office
1 Dr. Carlton B. Goodlett Place, Room 234
San Francisco, CA 94102
Telephone: (415) 554-4691
Facsimile: (415) 554-4757

During the sixty (60) day notice period, the City is willing to discuss effective remedies for the violations of the Act at issue in this notice. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate them within the next 10 days with the City Attorney's Office 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 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 feel free to contact us for clarification.

We look forward to hearing from you.

Very truly yours,

LOUISE H. RENNE
City Attorney

WILLIAM CHAN
Deputy City Attorney

cc: Corporation Service Company
Registered Agent for Service of Process
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Sacramento, CA 95833
(Certified Mail/Return Receipt Requested)

Christine Todd Whitman, Administrator
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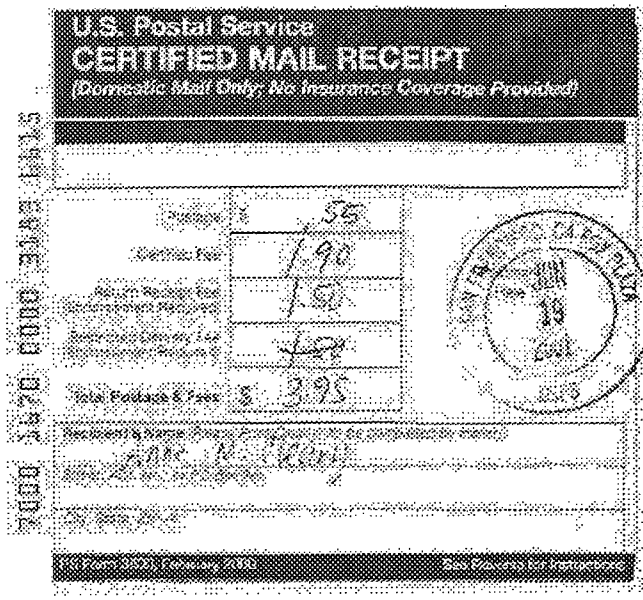
(Certified Mail/Return Receipt Requested)

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)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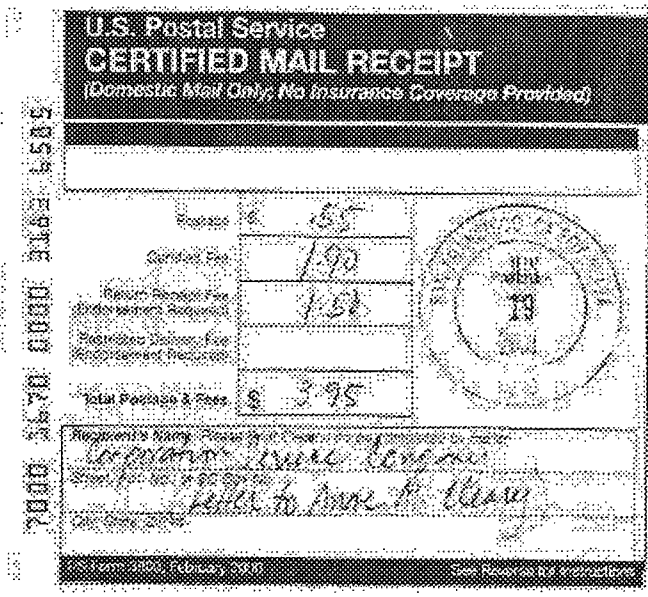
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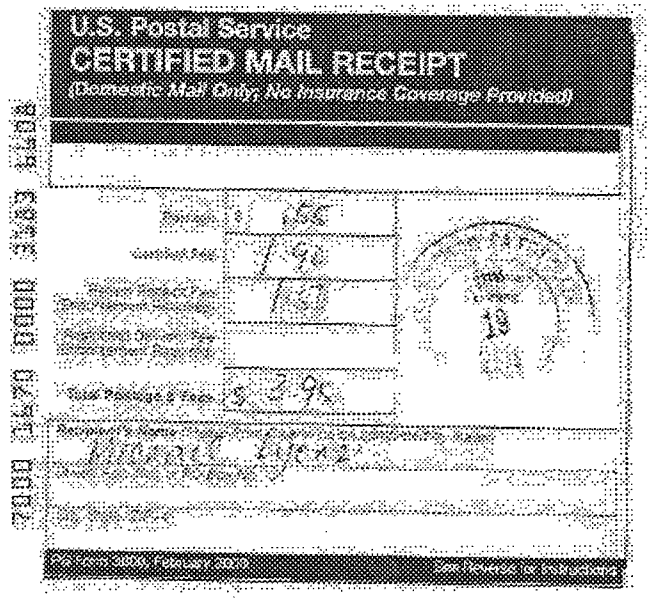
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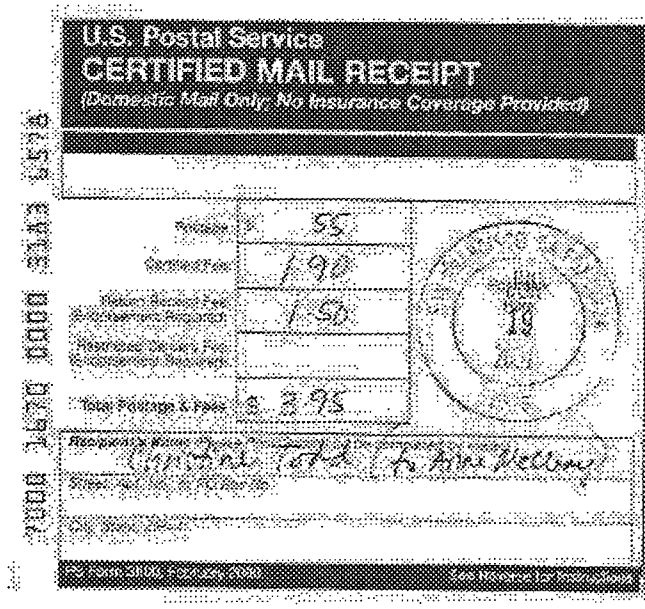
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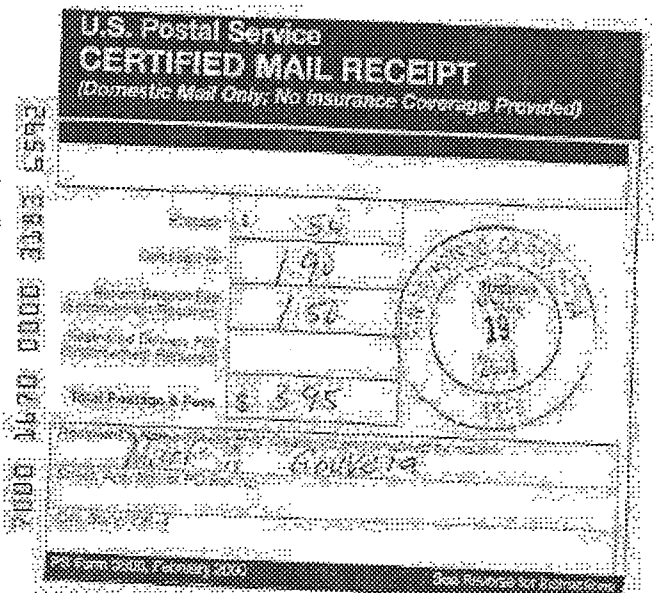
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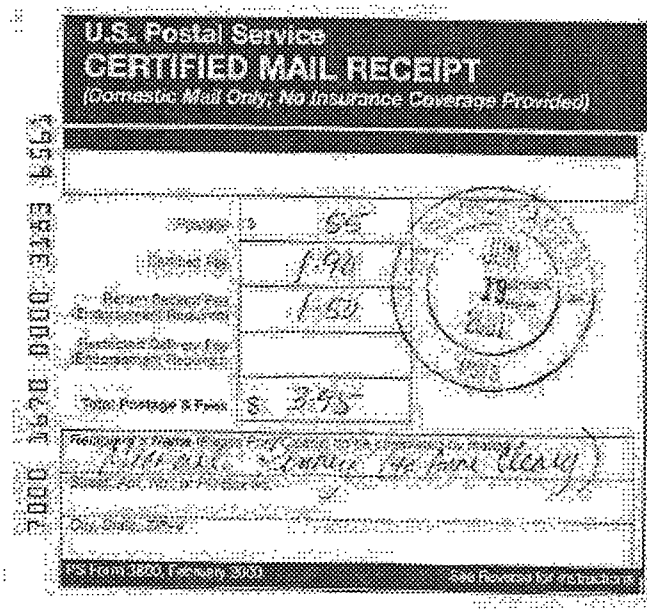
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Attachment C

8/20/01

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Attorneys for Plaintiff
COMMUNITIES FOR A BETTER ENVIRONMENT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

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

INTRODUCTION

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

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

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

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

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

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

JURISDICTION

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

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

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

VENUE

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

INTRADISTRICT ASSIGNMENT

10. Assignment of this action to the San Francisco or Oakland Division is proper pursuant to Local Rule 3-2(c) and (d) because a substantial part of the events or omissions giving rise to the claim occurred in the City and County of San Francisco.

PARTIES

11. Plaintiff Bayview Hunters Point Community Advocates is a non-profit corporation organized under the laws of the State of California whose principal place of business is San Francisco, California. The mission of Bayview Hunters Point Community Advocates is to work within the Bayview Hunters Point neighborhood in the Southeast area of San Francisco to ensure environmental justice, to promote economic alternatives that contribute to the development of environmentally safe neighborhoods and livelihoods and to secure the political, economic, cultural and social liberation of this community. Original and current board members of this group include many longtime activists from the Bayview Hunters Point neighborhood. Since its founding in the early 1990s, Bayview Hunters Point Community Advocates has successfully undertaken local projects to benefit the environment. Specific projects in which the group has been pivotal include working with San Francisco State University and students at George Washington Carver Elementary School to take air quality readings at several sites in the neighborhood pursuant to a grant from the United States Environmental Protection Agency ("U.S. EPA" or "EPA"). The group has also successfully applied for and received a grant to install solar panels on community businesses and residences to generate power for the community without adding pollution to an already polluted community. The Bayview Hunters Point neighborhood is adjacent to the Potrero neighborhood and within one mile of the Potrero Power Plant.

12. Plaintiff Communities for a Better Environment ("CBE") is a non-profit, statewide, multiracial and urban environmental health and justice organization headquartered in Oakland, California, with 20,000 members statewide, of whom over 2,500 reside in the San Francisco Bay Area ("Bay Area"). CBE has numerous members who live in close proximity to the Potrero Power Plant and who have been and will continue to be forced to breathe more polluted air as a result of Mirant's

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

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

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

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

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

16. A secondary impact of the Peakers operating beyond the 877 hour permit limit that may be even more serious from a public health standpoint are additional emissions of fine particulate matter, PM_{10}, and toxic chemicals. PM_{10} can cause negative effects on respiratory systems, aggravation of existing respiratory and cardiovascular disease, alteration of the body's defense systems against foreign materials, damage to lung tissue, carcinogenesis and premature death. The elderly, children and people with chronic obstructive pulmonary or cardiovascular disease, influenza or asthma are especially sensitive to the effects of PM_{10}. The Bayview Hunters Point neighborhood in Southeast area of San Francisco has the highest rate of childhood asthma hospitalization in the state of California. PM_{10} can also serve as a carrier for a variety of toxic metals and compounds.

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

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

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

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

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

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

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

23. Each Plaintiff is a "person" within the meaning of sections 304(a)(1) and 304(a)(3) of the Clean Air Act, 42 U.S.C. § 7604(a)(1) and (3).

24. Mirant is a "person" as defined in section 302(e) of the Clean Air Act, 42 U.S.C. § 7602(e) and a "person" within the meaning of sections 304(a)(1) and 304(a)(3) of the Act, 42 U.S.C. § 7604(a)(1) and (3).

25. BAAQMD is a "governmental instrumentality or agency" within the meaning of section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1). The APCO is a "person" within the meaning of section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1), and a representative of a "governmental instrumentality or agency" within the meaning of that section.

BACKGROUND

26. In 1970 Congress enacted the Clean Air Act requiring that the health-threatening smog afflicting our major metropolitan areas be cleaned up by 1975. Today, over 30 years later, unsafe levels of ozone (or "smog") persist in the Bay Area. Children, the elderly and those with respiratory conditions exacerbated by ozone, are suffering as a result. Rates of hospitalization for asthmatics are sky-high in the Bay Area's most populous counties of Santa Clara, Alameda, Contra Costa and San Francisco.

27. This is not the first time citizen enforcement has been required to enforce Clean Air Act obligations in the Bay Area. CBE was forced to resort to litigation in 1989 to compel BAAQMD and the Metropolitan Transit Commission ("MTC") to comply with the Act. In part, that litigation targeted BAAQMD's and MTC's failure to adopt additional control measures when it became clear the Bay Area was not making reasonable progress in reducing carbon monoxide and NOx emissions. See Citizens for a Better Environment v. Deukmejian, 731 F.Supp. 1448, 1459-60 (N.D. Cal. 1990). Those actions led to a court order forcing the agencies to adopt a set of additional control measures. Today, largely as a result of that litigation, Bay Area residents can breathe a little easier because the region is finally in compliance with the national carbon monoxide standard. See 60 Fed. Reg. 27028 (May 22, 1995). Unfortunately, the same is not true of ozone.

The Health and Societal Costs of Ozone Pollution

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

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

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

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

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

> [A]sthma is one of the most common and costly diseases in the United States. . . . Today, more than 5 percent of the US population has asthma [and] [o]n average ***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

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

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

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

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

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

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

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

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

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

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

Point Community Advocates *et. al* v. Whitman, No. C-01-0050 TEH (N.D. Cal. filed Jan. 8, 2001). After suit was filed, EPA published a proposed rulemaking doing exactly that. It has now entered into a proposed consent decree committing to a deadline to finalize the disapproval. 66 Fed. Reg. at 17381.

Clean Air Act – Statutory and Regulatory Background: General Provisions

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

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

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

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

Clean Air Act: Nonattainment Provisions

43. In addition to requiring all reasonably available control measures on existing sources, 42 U.S.C. § 7502(c)(1), the Act requires SIPs 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); 7502(c)(5). The Act imposes 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 or NSR

provisions is to ensure that air pollution control districts determine, prior to construction or modification, whether such activity will interfere with the attainment of the NAAQS. 42 U.S.C. §§ 7502(c)(4); 7503(a)(1)(A); 40 C.F.R. § 51.160(a), (b). New source permits may only be issued, for example, if "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).

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

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

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

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

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

49. 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"). Rules 2-1-301 and 2-1-402 (Permits – General Requirements) (received final limited approval as a SIP rule, 63 Fed. Reg. at 3,850).

50. 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.

51. A modified major source is required to apply the Best Available Control Technology ("BACT") if the modification results in an increase of certain air pollutants, including 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.

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

Clean Air Act: Prevention of Significant Deterioration Provisions

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

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

54. A "major modification" includes 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).

55. "Significant" means a rate of emissions that would equal or exceed 100 tons per year ("tpy") of carbon monoxide ("CO"), 40 tpy of nitrogen oxides, 15 tpy of particulate matter whose aerodynamic size is less than or equal to 10 microns ("PM_{10}"), or 40 tpy of sulfur dioxide ("SO_2").

56. BAAQMD is in an area in which the NAAQS for nitrogen dioxide, PM_{10}, sulfur dioxide and carbon monoxide have each been deemed attained. 40 C.F.R. § 81.305. Sources within the jurisdiction of BAAQMD therefore must comply with PSD provisions of the Act, as set forth in 40 C.F.R. § 52.21(b)-(w), id. § 52.270(a), for any major modifications affecting carbon monoxide, nitrogen oxides, PM_{10} or sulfur dioxide.

FIRST CLAIM

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

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

58. The citizen suit provision of the Clean Air Act authorizes any "person" to sue "any [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

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

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

60. Mirant proposes to construct or is constructing a major modification within the meaning of Part D of subchapter I of the Act because operating the Peakers, and each of them, without the 877 hour permit limit, will cause 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.

61. 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 apply BACT at the Peakers, for each day that it has failed to provide offsets for excess emissions of NOx from the Peakers, and for each day that it has failed to apply for and obtain the NSR permit as required by the Act, including failing to supply the information required in the permit application.

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

SECOND CLAIM

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

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

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

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

65. 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.

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

> Any person who, after July 1972, builds, erects, installs, **modifies**, alters or replaces any article, machine, equipment or other contrivance, the use of which may cause, reduce or control the emission of air contaminants, **shall first secure written authorization from the APCO in the form of an authority to 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.)

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

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

69. BAAQMD Rule 2-1-301 requires that BAAQMD issue an ATC 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 failing to require Mirant to follow the appropriate procedure before authorizing the operation of the Peakers, and each of them, BAAQMD is in violation of Rule 2-1-301, and thus the Clean Air Act pursuant to section 304(a)(1). 42 U.S.C. § 7604(a)(1).

70. In operating the Peakers, and each of them, without obtaining an ATC as required by Rule 2-1-301, Mirant has violated and is in violation of the Rule and thus the Clean Air Act pursuant to section 304(a)(1). Id.

71. 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 apply for and obtain the ATC. 42 U.S.C. § 7604(a). BAAQMD is also liable for civil penalties of up to $27,500 per day for each day that it has failed to require an ATC. Id.

72. Unless ordered by this Court, Mirant and BAAQMD will continue to violate Rule 2-1-301, and thus the Clean Air Act.

THIRD CLAIM

[Violation of SIP Provision: BAAQMD Rule 2-1-302, Permit to Operate - Against BAAQMD and Mirant]

73. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 72, as though fully alleged herein.

74. The operation of the Peakers, without the 877 hours 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.

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

> Before any person, as described in Section 2-1-401 ("any person who has secured an authority to construct shall secure a permit to operate"), uses or operates any article, machine, equipment or other contrivance, the use of which may **cause**, 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.)

76. BAAQMD Rule 2-1-301 requires that BAAQMD issue a 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 Mirant purportedly allowing Mirant to exceed the hours of operation of the Peakers. By failing to require Mirant to follow the appropriate procedure before authorizing the operation of the Peakers, and each of them, BAAQMD is in violation of Rule 2-1-302, and thus the Clean Air Act pursuant to section 304(a)(1). 42 U.S.C. § 7604(a)(1).

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

78. 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 apply for and obtain the PTO. 42 U.S.C. § 7604(a). BAAQMD is also liable for civil penalties of up to $27,500 per day for each day that it has failed to require a PTO. Id.

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

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 ant 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

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

86. 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 BAAQMD Rule 2-1-402. 42 U.S.C. § 7604(a). BAAQMD is also liable for civil penalties of up to $27,500 per day for each day that it has failed to require compliance with BAAQMD Rule 2-1-402. Id.

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

FIFTH CLAIM

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

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

89. 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.

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

> An applicant for an authority to construct or a permit to operate shall apply BACT to any new or modified source; (1) Which results in an increase in emissions from 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.

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

> the more stringent of (1) the most effective emission control device or technique which has been successfully utilized for the type of equipment comprising the source; or (2) the most stringent emission limitation achieved by an emission control device or technique... ; 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.

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

93. BAAQMD Rule 2-2-301 requires that BAAQMD require the implementation of BACT 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 permitted hours of operation of the Peakers. By failing to require Mirant to follow the appropriate procedure before authorizing the operation of the Peakers, and each of them, BAAQMD is in violation of Rule 2-2-302, and thus the Clean Air Act pursuant to section 304(a)(1). 42 U.S.C. § 7604(a)(1).

94. 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 install BACT. Id. at § 7604(a). BAAQMD is also liable for civil penalties of up to $27,500 per day for each day that it has failed to require BACT. Id.

95. Unless ordered by this Court, Mirant and BAAQMD will continue to violate Rule 2-2-301 and the Clean Air Act.

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

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

101. 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 failed to obtain sufficient emission offsets. Id. at § 7604(a). BAAQMD is also liable for civil penalties of up to $27,500 per day for each day that it has failed to require Mirant to obtain sufficient emission offsets. Id.

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

SEVENTH CLAIM

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

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

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

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

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

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

EIGHTH CLAIM

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

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

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

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

110. 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 apply BACT for excess emissions of CO from the Peakers and for each day that it has failed to apply for and obtain the PSD permit as required by the Act, including failing to supply the information required in the permit application.

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

NINTH CLAIM

[Violation of Prevention of Significant Deterioration Provisions of the Clean Air Act – Against Mirant for Excess Emissions of PM_{10}]

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

113. PM_{10} can cause negative effects on respiratory systems and aggravate existing respiratory and cardiovascular disease. The elderly, children and people with chronic obstructive pulmonary or cardiovascular disease, influenza or asthma are especially sensitive to the effects of PM_{10}. In the Bay Area, the asthma hospital discharge rate among African American children climbs almost ten times the national average. Plaintiffs' members are exposed to greater health risks resulting from Mirant's operation of the Peakers in excess of the 877 hour permit limit, because of the increased emissions of PM_{10}.

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

115. 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 apply BACT for excess emissions of PM_{10} from the Peakers and for each day that it has failed to apply for and obtain the PSD permit as required by the Act, including failing to supply the information required in the permit application.

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

TENTH CLAIM

[Violation of Prevention of Significant Deterioration Provisions of the Clean Air Act – Against Mirant for Excess Emissions of SO_2]

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

118. Exposure to high concentrations of SO_2 can adversely affect breathing and respiratory and cardiovascular systems. Major subgroups of the population that are most sensitive to SO_2 include

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

119. Mirant proposes to construct or is constructing a major modification within the meaning of Part C of subchapter I of the Clean Air Act because operating the Peakers, and each of them, without the 877 hour permit limit will result in a major modification with a net emissions increase at a major existing facility of at least 40 tons of SO_2 per year.

120. 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 apply BACT for excess emissions of SO_2 from the Peakers and for each day that it has failed to apply for and obtain the PSD permit as required by the Act, including failing to supply the information required in the permit application.

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

ELEVENTH CLAIM

[Violation of SIP Provisions Governing NOx Emissions – Against BAAQMD and Mirant]

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

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

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

concentrations, corrected to 15% O_2 (dry basis) do not exceed 15 ppmv, unless the turbine operates less than 877 hours per year, in which case the emission limit is higher. Rules 9-9-301.2 and 9-9-302.

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

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

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

128. Source 12 emits more than 15 ppmv of NOx, corrected to 15% O_2 (dry basis).

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

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

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

132. 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 9-9-301.2 at Source 12. BAAQMD is also liable for civil penalties of up to $27,500 per day for each day that it has failed to require Mirant to comply with the emission limit set forth in Rule 9-9-301.2 at Source 12.

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

TWELFTH CLAIM

[Violation of SIP Provisions Governing NOx Emissions – Against BAAQMD and Mirant]

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

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

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

137. Source 13 emits more than 15 ppmv of NOx, corrected to 15% O_2 (dry basis).

138. On May 19, 2001, Source 13 reached and exceeded a total of 877 hours of operation in 2001. Since then, Source 13 has exceeded the 877 hour limit on the hours of operation on May 20-23, May 25-28, May 30, May 31, June 2 and June 10.

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

140. By failing to require Mirant to follow the hour limitation in Rule 9-9-301.2 for Source 13, BAAQMD is in violation of Rule 9-9-301.2, and thus the Clean Air Act pursuant to section 304(a)(1).

141. 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 9-9-301.2 at Source 13. BAAQMD is also liable for civil penalties of up to $27,500 per day for each day that it has failed to require Mirant to comply with the emission limit set forth in Rule 9-9-301.2 at Source 13.

142. Unless ordered by this Court, Mirant and BAAQMD will continue to violate Rule 9-9-301.2 at Source 13.

THIRTEENTH CLAIM

[Violation of SIP Provisions Governing NOx Emissions – Against BAAQMD and Mirant]

143. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 142, as though fully alleged herein.

144. Source 14 lacks SCR, which is a type of pollution control equipment.

145. Source 14 is a stationary gas turbine governed by Rule 9-9-301.

146. Source 14 emits more than 15 ppmv of NOx, corrected to 15% O_2 (dry basis).

147. On May 10, 2001, Source 14 reached and exceeded a total of 877 hours of operation in 2001. Since then Source 14 has exceeded the 877 hour permit limit on May 11, May 14-16, May 19-23, May 25, May 26, May 30, May 31 and June 2.

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

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

150. 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 9-9-301.2 at the Peaker. BAAQMD is also liable for civil penalties of up to $27,500 per day for each day that it has failed to require Mirant to comply with the emission limit set forth in Rule 9-9-301.2 at Source 14.

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

FOURTEENTH CLAIM

[Violation of SIP Provisions Governing NOx Emissions – Against BAAQMD and Mirant]

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

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

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

155. Source 15 emits more than 15 ppmv of NOx, corrected to 15% O_2 (dry basis).

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

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

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

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-

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

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

FIFTEENTH CLAIM

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

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

162. 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 federal operating permit, commonly known as a Title V permit, is required to contain all applicable and enforceable air quality requirements, including SIP requirements. Id. § 7661c(a).

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

164. Pursuant to the federally approved program, BAAQMD issued Mirant a Title V permit 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.

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

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

167. 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 Condition 15816 of the Title V permit.

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

SIXTEENTH CLAIM

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

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

170. Pursuant to the federally approved program, BAAQMD issued Mirant a Title V permit 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 its Source No. 13 on the following dates in 2001: May 19–23, May 25 –28, May 30, May 31, June 2, and June 10.

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

172. 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 Condition 15816 of the Title V permit.

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

SEVENTEENTH CLAIM

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

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

175. Pursuant to the federally approved program, BAAQMD issued Mirant a Title V permit 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

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

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

177. 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 Condition 15816 of the Title V permit.

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

EIGHTEENTH CLAIM

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

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

180. Pursuant to the federally approved program, BAAQMD issued Mirant a Title V permit 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 its Source No. 15 on the following dates in 2001: May 20 – 23, May 25, May 26, May 30, May 31, and June 2.

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

182. 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 Condition 15816 of the Title V permit.

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

NINETEENTH CLAIM

[Violation of CEQA
– Against BAAQMD]

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

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

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

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

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

188. Section 15064.7 of the Guidelines allows each public agency

> to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects. A threshold of 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.

BAAQMD has established the thresholds for significance for NOx, PM_{10}, and reactive organic gas ("ROG") emissions by stationary sources as 15 tons per year, and 100 tons per year for CO.

189. After the agency determines that the project may have a significant effect on the environment and issues its environmental assessment (either as a draft EIR or a Negative Declaration), the next step in the CEQA process is providing the opportunity for public participation. Public review and comment on an agency's environmental assessment is "an essential part of the CEQA process." Guidelines § 15201. CEQA requires proper public notice, adequate time for public review and acceptance of public comments. Cal. Pub. Res. Code §§ 21091, 21092; Guidelines §§ 15087, 15105. The agency must consider alternatives to the project and require implementation of all feasible measures to mitigate adverse environmental impacts. Cal. Pub. Res. Code § 21002. Installation of BACT and requiring emission offsets would clearly constitute feasible mitigation measures. Further, CEQA requires the agency to make a finding that the project complies with other laws. Cal. Pub. Res. Code § 21002.1. Given the violations of the Clean Air Act here at issue, such a finding would be impossible.

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

191. This project will cause a significant impact on the environment because emissions from the Peakers operating in excess of the permitted hours will exceed the thresholds of significance for NOx, PM_{10}, ROG and CO.

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

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

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

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

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

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

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

TWENTIETH CLAIM

[California Unfair Business Practices Act – against Mirant]

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

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

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

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

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

204. The remedies authorized for violation of Section 17200 are cumulative to each other 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.

206. By committing the acts alleged above in violation of the Clean Air Act, Mirant has been and continues to be engaged in unlawful and unfair competition within the meaning of Section 17200.

207. Injunctive relief requiring Mirant to comply with the Clean Air Act would prevent harm to Plaintiffs' members.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Pursuant to Parts C and D of subchapter I of the Clean Air Act and pursuant to the SIP provisions, enter a preliminary and permanent injunction directing Mirant not to exceed its current permit limits on the hours of operations of the Peakers, until after it applies for and obtains the permits required by the Act;

2. Declare that exceedance of the permitted hours of operation, without the permits required by the Clean Air Act, constitutes a violation of Parts C and D of subchapter I of the Clean Air Act and the SIP provisions;

3. Pursuant to section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a), order Mirant to pay civil penalties in an amount sufficient to deter future violations of the Act, up to $27,500 per day for each violation of the Clean Air Act, and order that up to $100,000 of such penalties be used in beneficial mitigation projects consistent with section 304(g) of the Clean Air Act, 42 U.S.C. § 7604(g);

4. Declare 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 the Clean Air Act and declare the agreement illegal and void;

5. Enter a preliminary and permanent injunction directing BAAQMD to conduct a full CEQA review and to prepare an environmental impact report for the project allowing Mirant to operate its Peakers in excess of the permitted limit;

6. Pursuant to section 304(d) of the Act, 42 U.S.C. § 7604(d), California Code of Civil Procedure § 1021.5 and any other provision of law, order Mirant and BAAQMD to pay to Plaintiffs' costs of litigation, including reasonable attorney and expert witness fees;

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

Dated: August 20, 2001

ENVIRONMENTAL LAW AND JUSTICE CLINIC

By: _____
MARCELIN KEEVER
HELEN H. KANG

Attorneys for Plaintiffs
BAYVIEW HUNTERS POINT COMMUNITY ADVOCATES and OUR CHILDREN'S EARTH FOUNDATION

COMMUNITIES FOR A BETTER ENVIRONMENT

By: _____
WILLIAM B. ROSTOV

Attorneys for Plaintiff
COMMUNITIES FOR A BETTER ENVIRONMENT

Exhibit A

GOLDEN GATE UNIVERSITY

ENVIRONMENTAL LAW AND JUSTICE CLINIC • SCHOOL OF LAW

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.

MAILING ADDRESS: 536 MISSION STREET • SAN FRANCISCO, CA • 94105-2968
OFFICES AT: 62 FIRST STREET, SUITE 240 • SAN FRANCISCO, CA • PHONE: (415) 442-6647 • FAX: (415) 896-2450

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 NOx. Mirant's modification will also result in an increase in NOx 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 NOx, CO, PM_{10} and SO_2

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 NOx, 100 tpy of CO (carbon monoxide), 15 tpy of PM_{10} (particulate matter whose aerodynamic size is less than or equal to 10 microns) and 40 tpy of SO_2 (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 NOx, 15 tpy of PM_{10}, or 40 tpy of SO_2. 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 NOx, 15 tpy of PM_{10}, and 40 tpy of SO_2.

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.

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
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San Francisco, CA 94105-2968
Telephone: (415) 442-6693
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For CBE:
Richard Toshiyuki Drury
William B. Rostov
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1611 Telegraph Avenue
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Oakland, CA 94612
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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

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
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(Certified Mail/Return Receipt Requested)

Christine Todd Whitman, Administrator
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Michael P. Kenny
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California Air Resources Board
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Laura Yoshii, Acting Regional Administrator
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United States Environmental Protection Agency
Region 9
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(U.S. Mail)

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

Exhibit B

GOLDEN GATE UNIVERSITY

ENVIRONMENTAL LAW AND JUSTICE CLINIC • SCHOOL OF LAW

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.

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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.

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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]

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[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 O_2 (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% O_2 (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

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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).

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[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

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[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.

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[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.

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

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 C

GOLDEN GATE UNIVERSITY

ENVIRONMENTAL LAW AND JUSTICE CLINIC • SCHOOL OF LAW

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

MAILING ADDRESS: 536 MISSION STREET • SAN FRANCISCO, CA • 94105-2968
[illegible] 3RD STREET, SUITE 240 • SAN FRANCISCO, CA • PHONE: (415) 442-6647 • FAX: (415) 896-2450

Exhibit D

GOLDEN GATE UNIVERSITY

ENVIRONMENTAL LAW AND JUSTICE CLINIC • SCHOOL OF LAW

June 19, 2001

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

William B. Rostov
Staff Attorney

Environmental Law & Justice Clinic

Helen H. Kang

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

MAILING ADDRESS: 536 MISSION STREET • SAN FRANCISCO, CA • 94105-2968
DELIVERY ADDRESS: 902 FIRST STREET, SUITE 240 • SAN FRANCISCO, CA • PHONE: (415) 442-6647 • FAX: (415) 896-[illegible]

PROOF OF SERVICE BY HAND DELIVERY

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

I, Andrea Paterson, the undersigned, hereby declare:

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

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

David R. Farabee
Pillsbury Winthrop LLP
50 Fremont Street
San Francisco, CA 94105

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

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

Dated this 20th day of August, 2001

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 ("S02"), 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 SO2 Rate Lb/MBtu	3-Hr Rolling SO2 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 $\mu g/m^3$).

(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 $\mu g/m^3$, 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 $\mu g/m^3$.

(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 $\mu g/m^{3)}$.

(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 $\mu g/m^3$, 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 $\mu g/m^3$.

(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 $\mu g/m^3$, Mirant shall adjust its operations so that the annual, measured ambient concentration of SO2 does not exceed 80 $\mu g/m^3$.

(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 (SO_2) 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 SO_2 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 SO_2 emissions, subsequently causing or significantly contributing to the February 23, 2007, exceedance of the 24-hour SO_2 NAAQS:

   a. Predictive modeling indicated an exceedance of the SO_2 24-hour NAAQS on February 23, 2007, while factoring in maximum Trona injection to control emissions from each unit at 0.24 pounds of SO_2 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 SO_2 emission rate for an extended period of time.
   c. Trona injection problems existed on Unit 1, consequently and significantly reducing its effectiveness to control SO_2 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 SO_2 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 SO_2 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

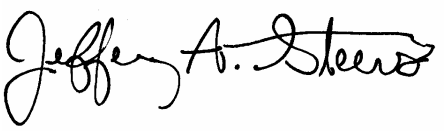
DEQ staff wishes to discuss all aspects of their observations with you, including any actions needed to ensure compliance with state law and regulations, any relevant or related measures you plan to take or have taken, and a schedule, as needed, for further activities. In addition, please advise us if 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,



Jeffery A. Steers
Regional Director

Attachment F

Mirant Potomac River, LLC
1400 N. Royal Street, Alexandria, VA 22314
T 703-838-3773 F 703-838-8272 U www.mirant.com

MIRANT™

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 SO_2 concentrations that were higher than the 24-hour SO_2 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 SO_2 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 SO_2 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 SO_2 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 SO_2 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 SO_2 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 SO_2 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

SO_2 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 SO_2 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 SO_2 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 SO_2 rate is achieved. As the system is pushed harder to remove more SO_2, 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 SO_2 removal include: (1) SO_2 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 SO_2 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 SO_2 rates to units with lower SO_2 rates, to the extent possible, to reduce overall SO_2 emissions. When unit loads ramp to follow demand, Mirant intends to bring the units with best SO_2 removal efficiency up first and down last to minimize overall SO_2 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.

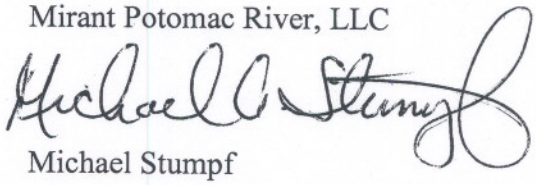
Conclusion.

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



Michael Stumpf