Mr. Mansueti,

To lessen the potential for any confusion, I ask that you please enter the November 14, 2005 submission made to you by counsel for Robert G. Burnley, Director of the Virginia Department of Environmental Quality, into the official docket for Department of Energy docket no. EO-05-01. The November 14 submission includes the Director's November 10, 2005 Motion and Answer filed in the separate, but related, FERC proceeding. Please let us know if there are any additional requirements for making this submission with the Department of Energy.

Thank you for your assistance,

Matt Roussy

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November 14, 2005

VIA ELECTRONIC AND FIRST-CLASS MAIL

Mr. Lawrence Mansueti
Office of Electricity Delivery and Energy Reliability
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: Docket No. EO-05-01

Dear Mr. Mansueti:

Enclosed please find a Motion for Leave to File Consolidated Answer and Consolidated Answer of Robert G. Burnley, Director of the Commonwealth of Virginia Department of Environmental Quality, filed in Federal Energy Regulatory Commission ("FERC") Docket No. EL05-145. The Director's motion specifically references and otherwise relates to Department of Energy Docket No. EO-05-01.

All parties to this proceeding have been served with the motion and Consolidated Answer in the FERC proceeding.

Yours Truly,

Steven L. Humphreys

Enclosure
cc: D. Mathias Roussy, Jr., Esq.

NJ01/HUMPS/98879.1

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Emergency Petition and Complaint of District of Columbia Public Service Commission	)))	**Docket No. EL05-145-000**

MOTION FOR LEAVE TO FILE A CONSOLIDATED ANSWER AND CONSOLIDATED ANSWER OF ROBERT G. BURNLEY, DIRECTOR THE COMMONWEALTH OF VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

Robert G. Burnley, Director of the Virginia Department of Environmental Quality (the "Director"), does not take issue with the seriousness of the electric transmission reliability concerns raised in this proceeding. However, the Director does take great exception to the attempts by various parties to limit this proceeding to a case about only reliability. It is incumbent upon the Federal Energy Regulatory Commission ("Commission") and the Secretary of Energy to avoid potential serious consequences on the health and safety of Virginia's residents that would result from sanctioning the unrestrained operation of a power plant whose pollution would contribute to significant violations of federal and state environmental laws. Accordingly, pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, the Director hereby files this Motion for Leave to File a Consolidated Answer and Consolidated Answer to the October 13, 2005 Joint Answer of the Potomac Electric Power Company

("PEPCO") and PJM Interconnection LLC ("PJM") and the October 26, 2005 Answer of the Public Service Commission of the District of Columbia ("DC PSC") opposing the Director's motion (collectively, "Opposing Parties").

I. STATEMENT OF FACTS

The Director incorporates herein, by reference, the statement of facts filed in this proceeding in his October 11, 2005 Motion to Deny Relief or, in the Alternative, Defer Action.

II. STATEMENT OF ISSUES

The Director incorporates herein, by reference, the statement of issues filed in this proceeding in his October 11, 2005 Motion to Deny Relief or, in the Alternative, Defer Action. Pursuant to Commission Order No. 663, 70 Fed Reg. 55723, 55725 (Sept. 23, 2005)(to be codified at 18 C.F.R. pt. 385), the Director also submits the following additional issues:

1. If the Commission rejects the Director's October 11, 2005 Motion, whether the opportunity to file comments, interventions and/or protests with only three business days' notice, and before having access to critical information, is sufficient process to satisfy due process and Federal Power Act § 207.

2. Whether the Commission may exercise its discretion to accept the Director's Consolidated Answer. *See, e.g., Morgan Stanley Capital Group, Inc.*, 93 FERC ¶ 61,017 (2000).

3. Whether the Commission may properly decide issues of Virginia state law and/or federal law pertaining to the regulation of air pollution. *See* 16 U.S.C. § 824; *San*

Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service, 96 F.E.R.C. ¶ 61,117, Order Granting Emergency Motion for Clarification (July 25, 2001).

4. Whether PEPCO, PJM and/or the DC PSC have standing to challenge the Director's authority to act pursuant to Virginia state law and/or federal law to address emissions of pollutants from a particular source which the Director has determined would result in localized exceedences of National Ambient Air Quality Standards. *See* Code of Virginia § 10.1-1318B.

5. Whether the Director's exercise of his authority pursuant to Virginia state law and/or federal law to address emissions of pollutants from a particular source which the Director has concluded in his sound discretion would result in localized exceedences of National Ambient Air Quality Standards is entitled to deference by the Commission. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 152-153 (1991); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1983); *Building Trades Employers' Educ. Assoc. v. McGowan*, 311 F.3d 501, 507 (2d Cir. 2002); *Colorado Health Care Assoc. v. Colorado Dep't of Social Services*, 842 F.2d 1158, 1164-65 (10th Cir. 1988); *Hilliards v. Jackson*, 28 Va. App. 475, 479 (Va. Ct. App. 1998).

6. Whether the Director's action, pursuant to 9 VAC 5-20-180(I), requiring the Potomac River Generation Station Power Plant to prevent localized NAAQS exceedences, is preempted by the Commission's authority under the Federal Power Act. *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332 (9th Cir. 1989); *Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493 (1989).

III. MOTION FOR LEAVE TO FILE A CONSOLIDATED ANSWER

The Director seeks leave to file this Answer in order to respond to the arguments raised by the Opposing Parties in their Answers, which have mischaracterized both federal and state law pertaining to the control and abatement of air pollution, as well as the factual basis for the Director's statutorily authorized actions pursuant to the same. The Director is troubled by the dismissive tone of Opposing Parties' Answers in addressing a matter that is of vital concern to the Commonwealth – the health and safety of its citizens. These concerns are all the more heightened in view of the Opposing Parties' clamor for the Commission to wholly disregard arguments raised by the Director, which run not only to the paramount issue of the health and safety of Virginia's citizens but also to legal authority of the Commission to grant the relief requested by the DC PSC.

The Commission has exercised its discretion in certain instances to allow answers to answers, protests and requests for rehearing, all of which are otherwise prohibited by the same Commission Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2). The Commission has previously allowed such answers where they assist the Commission's decision-making process or clarify issues or the record. *See, e.g., Morgan Stanley Capital Group, Inc.*, 93 FERC ¶ 61,017 (2000) (allowing answer to answer where helpful to developing the record); *Carolina Power & Light Co.*, 94 FERC ¶ 61,165 (2001) (allowing answers to rehearing request where they help to clarify parties' positions); *Aquila, Inc.*, 112 FERC ¶ 61,307 (Sept. 19, 2005) (allowing answer to protest where it assisted the Commission's decision-making process). Due to the numerous inaccuracies and mischaracterizations of the issues and the Director's position found in the Answers of the Opposing Parties, the Director believes it is entirely appropriate in this proceeding for the Commission to

exercise its discretion to allow the Director's Answer in this proceeding. To do otherwise would leave the Commission with an inadequate record and invite uninformed decision-making.

IV. CONSOLIDATED ANSWER TO ANSWERS OF PEPCO, PJM AND DC PSC

A. The Director's Concerns Regarding the Health and Safety Impacts of Operating the Plant at Prior Levels Are Entitled to No Less Consideration Than the Electrical Reliability Concerns Raised by the Opposing Parties.

Contrary to the assertions made by the DC PSC, the Director does not take issue with the seriousness of the electric transmission reliability concerns raised in this proceeding. However, the Director does take great exception to the attempts by various parties to limit this proceeding to a case only about reliability.[1] It is incumbent upon the Commission and the Secretary of Energy to avoid potential serious consequences to the health and safety of Virginia's residents that would result from sanctioning the unrestrained operation of a power plant whose pollution would contribute to significant violations of federal and state environmental laws.[2]

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1 As discussed below, the Director filed his Motion only after obtaining access to, and thoroughly and responsibly analyzing, the Critical Energy Infrastructure Information ("CEII") which discusses the reliability concerns at issue in this proceeding. The Commission's CEII protections were implemented to address national security concerns.

2 The Director notes that the DC PSC has suggested in its Answer that whatever consequences the Commission's action may have for the health and safety of Virginia's residents due to localized exceedences of the National Ambient Air Quality Standards ("NAAQS") for SO_2, NO_2 and PM-10, the Commission should essentially disregard those consequences based on the potential impacts of loss of power to the Blue Plains sewage treatment facility. (DC PSC Answer at 17-18). Assuming that the DC PSC's concerns are realistic (*i.e.*, that no means of providing emergency power generation for the Blue Plains facility is available), the DC PSC cites no authority for trading off the health and safety of Virginia's residents in such a manner.

B. Whatever Bodies Rule on These Important Issues Must Have Before Them a Fully Developed and Dependable Record.

In asking the Commission to disregard the Director's Motion, the Opposing Parties appear to believe that three business days are sufficient process in this proceeding. (PEPCO and PJM Answer at 6-7; DC PSC Answer at 8-9.) While Director Burnley recognizes the advantage for some parties if the Commission hears only one side of the story, the statutory language and process requirements[3] raised by the Director should not be disregarded in the interest of expediency. Whatever bodies, administrative and judicial, rule on these important issues must have before them a fully developed record. Such a record cannot exist if parties are strictly required to formulate positions prior to obtaining access to the very information on which a petitioning party relies for support.

Furthermore, not only was the Director's Motion authorized under the Commission's rules of procedure,[4] but rejection of the Director's motion would serve only to deprive the Director, and the citizens of Virginia, of their bedrock right to due process in this proceeding. The Secretary's August 25, 2005 Notice of Filing ("Notice of Filing") established a comment date of August 29, 2005 for parties to file interventions

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3 Namely those found in FPA § 207.

4 Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212, provides that unless otherwise provided, a motion may be filed "at any time" by a person who has filed a timely motion to intervene which has not been denied. The Director timely filed a motion to intervene which has not been denied and the Commission has issued no order barring the filing of further motions. Moreover, in view of the novel nature of this proceeding, which is unusual both in terms of the scope of relief requested and the issues of first impression for the Commission to decide, it would be inappropriate to shoehorn it into a truncated procedure normally used for less complex matters that are traditionally considered by the Commission.

and protests. Yet, it was not until September 29, 2005, exactly one month later, before counsel for Director Burnley was allowed access to the Critical Energy Infrastructure Information ("CEII") necessary to analyze the reliability concerns raised by the DC PSC. Indeed, the Director's August 29, 2005 Protest underscored the Director's need to access this key information and reserved the right to further comment and raise legal arguments in this proceeding. (Director's Protest at 4-5.) The resolution of these significant issues is not served by requiring the formulation of positions blind to the facts. To that end, the Director worked diligently to obtain the CEII information and, after thoroughly reviewing and analyzing the CEII information, the Director promptly and properly filed his Motion.[5]

C. Rejection of the Director's Motion Would Serve to Circumvent the Process Requirements Mandated by the FPA.

The DC PSC Petition seeks "immediate relief" from both the Secretary and FERC while only requesting that a hearing be "institute[d]." (DC PSC Petition at 2, 9.) The DC PSC then asserts in its Answer that a hearing is not required until after the Commission has acted. (DC PSC Answer at 12.) The Director disagrees. The Federal Power Act ("FPA") requires an "opportunity for a hearing" *prior* to Commission action under FPA §

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5 The DC PSC also argues that "nothing prevented the VDEQ from making any and all of these legal argument at the time its Protest was due" because the Director's motion did not address any of the factual matters identified in the CEII. (DC PSC Answer at 7-8.) This argument is premised on the logical fallacy that the Director was in a position to know, without having first examined the CEII, that he would be able to formulate his final position wholly without consideration of the CEII. It also incorrectly assumes that the Director either did not consider the CEII or that it was irrelevant to the Director in formulating his position. Notwithstanding the DC PSC's argument, the Director did review the CEII and the CEII was both necessary and useful to the Director in formulating his position. Furthermore, it is unclear how the DC PSC's Petition could be deemed complete before vital parties to the proceeding obtained access to the CEII.

207, 16 U.S.C. § 824f. Immediate relief and the mere institution of a hearing after the fact alone do not satisfy the plain language of FPA § 207. Affected parties must have an opportunity to be heard in a meaningful fashion prior to Commission action.

In addition to the DC PSC's initial support for immediate relief and an after-the-fact hearing, the Director's concern over process is now compounded by the argument that the Secretary's Notice of Filing somehow precluded the Director from filing a proper motion because the Notice for Filing established a comment date of August 29, 2005 by which protests or interventions must be filed. (PEPCO and PJM Answer at 6-7; DC PSC Answer at 8-9.) The spirit of this argument stands in stark contrast to these same parties' support for federal and state laws to be disregarded in this proceeding. The Opposing Parties argue that the Commission's procedural rules should be applied inflexibly while asserting at the same time that federal and state laws aimed at safeguarding the public health and welfare must be disregarded in the face of reliability concerns, without an adequate opportunity for the Director to fully brief and be heard on these vitally important legal and factual issues.

D. The Opposing Parties Have Mischaracterized the Director's Jurisdictional Argument.

PEPCO and PJM erroneously state that "[the Director] asserts that the DC PSC's request is not properly before the Commission." (PEPCO and PJM Answer at 20.) In responding to what PEPCO and PJM mischaracterize as the Director's position, PEPCO and PJM then argue that both the Commission and DOE can concurrently consider the DC PSC's Petition. (*Id.* at 20-23.) To clarify, the issue that Director Burnley framed and then analyzed was: "whether it is within the Commission's jurisdiction to grant the immediate relief requested by the DC PSC under FPA §§ 207 and 309 to address an

alleged emergency without providing an opportunity for hearing." (*See* Motion at 4, 15-16.) The Director recognizes that the Commission has FPA § 207 jurisdiction to order the furnishing of adequate and sufficient service under certain circumstances. This authority is found in the plain text of FPA § 207. However, the Director questions whether that authority can be used to enter emergency relief, particularly without a fair hearing of the issues as some parties advocate and where the emergency relief requested will have serious consequences affecting the health and safety of Virginia residents. (*Id.* at 15-16.)

E. The Opposing Parties Have Mischaracterized Virginia State and Federal Law Pertaining to Air Pollution Control and Abatement.

The Opposing Parties argue that the Commission is free to grant the requested relief without considering the impact that the relief would have on the health and safety of Virginia's residents. In support of these arguments, the Opposing Parties have attempted to convince the Commission of the dubious proposition that ordering the Potomac River Generation Station Power Plant (the "Plant") to operate at a level which the Director has determined, in his sound discretion, will be injurious to human health and the environment in no way conflicts with state or federal law. This is, of course, not true.

In seeking to have the Commission act without regard to legal authorities that bind both it and the Director, the Opposing Parties have argued variously in their Answer that: (1) the Director is not authorized pursuant to 9 Virginia Administrative Code ("VAC") 5-120-180(I) to order a shutdown of the Plant or, presumably, take any other type of action requiring the Plant to be operated in a manner that does not result in a violation of the National Ambient Air Quality Standards ("NAAQS") for nitrogen

dioxide ("NO_2"), sulfur dioxide ("SO_2") or particulate matter ("PM-10") (PEPCO and PJM Answer at 10, n.18; DC PSC Answer at 20 n.46); (2) the downwash modeling study provides an insufficient factual basis from which to conclude that the Plant's resumption of operations at prior levels would violate the NAAQS for NO_2, SO_2 or PM-10 (PEPCO and PJM Answer at 11-12; DC PSC Answer at 20-22); and (3) operation of the Plant at its prior levels would not violate any law because the Plant has been in compliance with specific emission limitations in its operating permit (PEPCO and PJM Answer at 8; DC PSC Answer at 18-20).

As demonstrated below, the Commission is not the proper body to hear these arguments. Moreover, the Opposing Parties mischaracterize federal and Virginia state law pertaining to air pollution control and abatement – namely, the authorities available to the Director pursuant to the Virginia Air Pollution Control Law ("Air Act"), Code of Virginia § 10.1-1300 *et seq.*, and the federal Clean Air Act ("CAA"), 42 USC § 7401 *et seq.* – and invite to the Commission to improperly ignore those laws by directing the Plant to operate in violation of them.

1. The Opposing Parties' Assertion That The Director Has No Authority To Act Under 9 VAC 5-20-180(I) With Regard to the Plant's Emissions of NO_2, SO_2 and PM-10 is Both Procedurally Defective and Erroneous.

The Opposing Parties erroneously assert that the Director had no authority under 9 VAC 5-20-180(I) to issue his August 19, 2005 request to Mirant, with which the Plant's owner/operator is required to comply, that the Plant's level of operations be reduced as necessary to prevent any NAAQS violation. Specifically, they argue that the the Director had no authority to take such an action in the first instance unless it is in response to exceedences resulting from an equipment malfunction or during maintenance

shutdowns or bypasses. (PEPCO and PJM Answer at 9-10 n.17; DC PSC Answer at 20 n.46.)

Besides being incorrect as a matter of law, the Opposing Parties' request that the Commission resolve their qualms regarding the propriety of the Director's action pursuant to Virginia law is procedurally defective because the Commission has neither the express statutory authority nor the expertise to decide such a matter.[6] The Commission has previously recognized the proper limits of its decision-making authority over transmission reliability intersected with Clean Air Act compliance. Indeed, when faced with similar circumstances, the Commission specifically has declined to decide issues of state and federal air pollution control requirements as not within its primary jurisdiction. *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service,* 96 F.E.R.C. ¶ 61,117, Order Granting Emergency Motion for Clarification (July 25, 2001) (hereinafter *San Diego Gas*).[7] Similarly, it has been in other cases where the

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6 Except with regard to actions the Commission is required to take in order to comply with federal environmental statutes, such as NEPA and Section 176(c)(1) of the CAA, the Commission has not been given specific statutory authority by Congress to interpret federal or state environmental laws, including environmental regulations promulgated by the Virginia Air Pollution Control Board. Indeed, the FPA limits FERC's authority to the regulation of the transmission and sales of electricity at wholesale and says nothing about the Commission's authority to interpret federal or state environmental regulations. *See* 16 U.S.C.A. § 824.

In addition, it is well established that where there are conflicting interpretations between agencies as to the meaning of a statute or regulation, deference is to be given to the agency that has been charged with the authority to promulgate rules or regulations pursuant to the statute in question. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 141- 42 (1976), *superceded by statute on other grounds, as cited in Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). *See also Division of Military and Naval Affairs, State of New York v. Federal Labor Relations Auth.*, 683 F.2d 45, 48 (2d Cir. 1982) ("No deference is due an agency interpretation of another agency's statute.")

7 In *San Diego Gas*, 96 F.E.R.C. ¶ 61,117, the Commission was asked to clarify whether the California Independent System Operator's reliability must-run regulations can require a generator to operate in a manner inconsistent with air

Commission lacks specific statutory authorization to decide questions of state law pertaining to contract interpretation, the Commission cannot or will do so. *See, e.g., Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 382 (5th Cir. 1981) (FERC has no independent section 101(b)(9) authority to interpret contracts"; interpretation of "existing intrastate contracts is clearly beyond FERC's NGA contract interpretation jurisdiction"); *Transocean Oil, Inc.*, 18 FERC ¶61,054, at p. 61,092 (1982) ("the Commission has no general contract interpretation authority under the NGPA "); and *National Fuel Gas Supply Corporation*, 27 FERC ¶63,074, at p. 65,298 (1984) (". . . contract interpretation was deemed to be more a function of the appropriate court than of the Commission").

Even if the Commission had the specific statutory authority and expertise to sit in judgment of the meaning, scope and applicability of 9 VAC 5-20-180(I), which it does not, the Director's determination that the Virginia Department of Environmental Quality ("Virginia DEQ") has the authority to act under that section in the manner that it has is entitled to substantial deference because the Virginia DEQ is the agency charged with administering and implementing Virginia's air pollution regulations, including 9 VAC 5-20-180(I), and has the requisite expertise to interpret it. *See generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (Courts should defer to an agency's reasonable interpretation of its own statutes.)*; Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 152-153 (1991) (finding that where significant expertise and the exercise of judgment grounded in policy concerns

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quality control regulations and permits. In that case, the Commission properly recognized that it "is not the appropriate forum for determining whether utilities are in violation of their Clean Air permits .... [I]ssues related to compliance with the Clean Air Act certificate are subject to either local, state or other federal agency jurisdiction." *Id. at* ¶61,448.

are required in order to interpret and apply regulations, the courts appropriately defer to the agency entrusted to make such determinations); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1983) ("The court is not empowered to substitute its judgment for that of the agency."); *Building Trades Employers' Educ. Assoc. v. McGowan*, 311 F.3d 501, 507 (2d Cir. 2002) ("We defer to a state agency's interpretation of its own regulations, unless the interpretation is arbitrary and capricious."); *Colorado Health Care Assoc. v. Colorado Dep't of Social Services*, 842 F.2d 1158, 1164-65 (10th Cir. 1988) ("A presumption of validity attaches to the agency and the burden of proof rests with the appellants who challenge such action. . . . The same presumption of validity applies to a state agency as to a federal agency.") (citations omitted); *Hilliards v. Jackson*, 28 Va.App. 475, 479 (Va. Ct. App. 1998) ("We accord great deference to an administrative agency's interpretation of the regulations it is responsible for enforcing.").

In this case, both the Director and the U.S. Environmental Protection Agency ("EPA") are already actively working to determine the appropriate level of operation by the Plant that will ensure against further NAAQS violations. The Commission should not intervene in that ongoing review and regulatory action by second-guessing the Director's statutory and regulatory authority to respond to this situation, which is ultimately best decided by the agencies invested with expertise in such matters – Virginia DEQ and the EPA.[8]

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[8] In a letter dated October 21, 2005, to Congressman James P. Moran (attached hereto as Exhibit C), EPA Region III Administrator Donald S. Welsh stated that "EPA will not support any continued full or partial operation of the Potomac River plant without verification from EPA experts that there will not be any modeled exceedences of the NAAQS caused by emissions from the plant." Mr. Welsh also noted in this letter that EPA "has been actively engaged in providing technical support to the VADEQ during their evaluation of the air dispersion modeling conducted by Mirant, including ongoing reduced operational scenarios currently being evaluated by Mirant engineers and modelers."

Furthermore, the normal route for challenging the Director's authority to act under 9 VAC 5-20-180(I) in this matter, to the extent that the Director's action may be subject to appeal or judicial review, would be to timely appeal the Director's August 19th binding request to the Board (*see* 9 VAC 5-170-200), or to seek judicial review, in accordance with the Virginia Administrative Process Act, Code of Virginia § 2.2-4000 *et seq*. However, the Opposing Parties themselves lack any standing to bring such a challenge. *See* Code of Virginia § 10.1-1318B.

Assuming *arguendo* that the Opposing Parties' complaints about the Director's authority to act pursuant to 9 VAC 5-20-180(I) were properly before the Commission, and assuming further that the Opposing Parties had the requisite standing to be heard on such a matter, their assertion that the Director's action was not authorized under 9 VAC 5-20-180(I) is incorrect in any event. For example, while the Opposing Parties correctly note that subsection 180(A) states that section 180 applies in the main to exceedences caused by equipment failures and maintenance shutdowns or bypasses, that is not the case for section 180(I). The prefatory language of section 180(I) plainly states that it applies "[r]egardless of any other provision of this section" (*e.g.*, the limitation in subsection 180(A)) ***and*** specifically states that it applies instead to "any facility subject to the Regulations for the Control and Abatement of Air Pollution."

PEPCO and PJM also cite 9 VAC 5, ch. 70, Table VII-C(II)(A) for the proposition that even in the case of an air pollution emergency, owners of coal-fired electric power generating facilities are not required to "shut down" in the event of an air pollution emergency. (PEPCO and PJM Answer at 10 n.19.)[9] However, PEPCO and

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9 As noted previously, the Director did not order the Plant to shut down, but rather requested pursuant to 9 VAC 5-20-180(I) that it take whatever steps were

PJM's reliance on this provision is misplaced, as it in no way precludes the Director from taking action pursuant to his various other authorities under Virginia law, including 9 VAC 5-20-180(I), to require a facility to take whatever action necessary to prevent localized NAAQS exceedences from the facility – up to and including facility shut down.[10]

In fact, 9 VAC 5, ch. 70, Table VII-C(II)(A) is intended to impose immediate self-implementing obligations on the owners of coal-fired electric generating facilities in order to ameliorate air pollutant conditions by implementing a pre-prepared air pollution episode plan when the Board determines that the air quality has the potential of reaching levels that could cause significant harm to public health. *See* 9 VAC 5-70-20(C) and 30. Nothing in 9 VAC 5, ch. 70, Table VII-C(II)(A) suggests that it is the ***exclusive*** means available to the Director of ensuring that air pollution sources operate in a manner that is protective of human health. Indeed, PEPCO and PJM even recognize themselves that this section does not apply to a situation such as this, which involves a localized

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necessary, including reduction in level of operation, to prevent the NAAQS exceedences.

10 In addition to 9 VAC 5-20-180(I), the Director has ample authority to order an electric generating facility to reduce its level of operation or shut down completely pursuant to Title 10.1 of the Code of Virginia, which grants to the Air Pollution Control Board (and to the Director as its designee) plenary authority to require a facility found to be causing air pollution to cease and desist from such pollution.

For example, the Board is empowered to not only "cause to be made, such investigations and inspections" as necessary to carry out it duties to control and prevent further air pollution (Code of Virginia § 10.1-1306), but also to "enter orders diminishing or abating the causes of air pollution and orders to enforce its regulations" (Code of Virginia § 10.1-1307.D(ii)) and to require "owners who are permitting or causing air pollution as defined by § 10.1-1300, to cease and desist from such pollution." Code of Virginia § 10.1-1309.A(i). "Air pollution" is defined by the Code of Virginia as "the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people of life or property." Code of Virginia § 10.1-1300.

exceedence of NAAQS caused by a single facility. Rather, as PEPCO/PJM point out, 9 VAC 5, ch. 70, Table VII-C(II)(A) applies only in situations where there is an actual monitored exceedence at a monitoring site. (PEPCO and PJM Answer at 9, n.17.)

Thus, PEPCO/PJM would have the Commission substitute its own judgment for that of the Director in a matter over which the Commission has no specific statutory authority or expertise, conclude erroneously that the Director has no legal authority to address localized exceedences of NAAQS under 9 VAC 5-20-180(I), and then order the Plant to be operated at any level of output regardless of its consequences to the health and safety of Virginia's residents.

2. **The Director's Decision to Act Pursuant to 9 VAC 5-20-180(I) on the Basis of the Downwash Study is Not Reviewable by the Commission, is Entitled to Substantial Deference, and is, In Any Case, Appropriate.**

The Opposing Parties' attempt to have the Commission substitute its own judgment for that of the Director in determining whether the downwash study performed by Mirant is a sufficient basis from which to find that the Plant was exceeding the NAAQS for SO_2, NO_2 and/or PM-10 is likewise procedurally defective and, in any event, erroneous. (*See* PEPCO and PJM Answer at 10-13; DC PSC Answer at 20-22.) Not only is the Commission without specific statutory authority or the requisite expertise to decide such an issue, but the issue of the appropriateness of the downwash model has already been decided and waived by the only party who has the requisite standing to raise it – Mirant.

Pursuant to an administrative Order on Consent (the "Order"), dated September 23, 2005 (attached hereto as Exhibit A), Mirant specifically waived any rights it had to assert any legal challenge to the use of the downwash study as the appropriate measure of localized NAAQS exceedences. In Section D of the Order, Mirant agreed to perform the

downwash modeling study as directed in the Order and, if the study "indicates that emission from the facility may cause exceedences of the NAAQS for SO_2, NO_2, CO_2 or PM-10 . . . in the area immediately surrounding the facility," to then submit and comply with a schedule for eliminating and preventing the exceedences on a timely basis. Furthermore, in Section E(4) of the Order, Mirant specifically waived "the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein." In the wake of this waiver, it would be most inappropriate for the Opposing Parties, who lack standing in the first instance to mount such a challenge, to be heard by the Commission in an effort to collaterally attack the underlying premise of a duly issued Consent Order between the Director and Mirant in a forum without specific statutory authority or the appropriate expertise to hear such a challenge.

Nonetheless, assuming *arguendo* that the Commission is the appropriate body to hear such a challenge, and assuming that the Opposing Parties had standing to bring it, the Opposing Parties' argument nonetheless is without merit. As noted above, the Director (acting for the Board) is authorized to issue various types of orders (including a binding request pursuant to 9 VAC 5-20-180(I) to reduce operations at a facility) as necessary to prevent a violation of any primary NAAQS, in the case of section 180(I), or other air pollution which the Director deems injurious to human health. Code of Virginia §§ 10.1-1307D, 10.1-1309. In making a determination of what evidence is sufficient to indicate an exceedence of NAAQS or other injurious air pollutant emission, the Director is entitled to substantial deference by any appropriate reviewing body. *See generally Chevron*, 467 U.S. at 865; *Martin*, 499 U.S. at 152-153; *McGowan*, 311 F.3d at 507;

Hilliards v. Jackson, 28 Va.App. at 479; *Colorado Health Care Association*, 842 F.2d at 1164-65. Clearly, it cannot be said the Director's conclusion that the downwash study prepared by Mirant was a sufficient predictor of actual exceedences of the NAAQS for SO_2, NO_2 and PM-10 was arbitrary and capricious – which is the required standard necessary to overrule the Director's finding in a properly filed appeal of a final agency action before an appropriate tribunal. *See McGowan*, 311 F.3d at 507; *Hilliards v. Jackson*, 28 Va.App. at 479.

Air modeling is a well-recognized tool used by regulators to determine whether particular emissions would result in adverse impacts on human health or the environment, or cause NAAQS exceedences. Air quality modeling has been widely used as a management tool for air quality assessment since air quality monitoring networks cannot in reality measure air quality everywhere, as the personnel and resources for such encompassing networks are much too costly to fund. Indeed, notwithstanding the Opposing Parties' assertion that the modeling protocol used by Mirant contravenes EPA guidance, the fact is that EPA has specifically endorsed the model used in this protocol as being the superior method for determining whether a localized exceedence of a NAAQS is occurring. (*See* Letter from Donald S. Welsh, EPA Region III Administrator, to John M. Daniel, Jr., Director of VDEQ's Air Division, dated November 9, 2004, attached hereto as Exhibit B.) Contrary to the Opposing Parties' assertion that use of the AERMOD model is at odds with EPA modeling guidelines as set forth at 40 C.F.R. Part 51, Appendix W, EPA Region III specifically stated in its November 9, 2004, letter that

the model "is based on the requirements of 40 CFR Part 51 Appendix W Section 3.2." (Exhibit C at 1.)[11]

Finally, the Opposing Parties' argument that there have been no measured exceedences of NAAQS for SO_2, NO_2 or PM-10 in the ambient air monitors closest to the plant is likewise without merit because it belies the very purpose of the downwash study, which was to determine ***localized*** effects of these pollutants being emitted by the Plant. The closest such air monitoring station is located approximately 1.5 miles (or 2.4 kilometers) away from the Plant and therefore naturally would not be expected to register an exceedence caused by the Plant's emissions.

3. **The PSC's Assertion That There Can Be No Violation of Virginia Law or the CAA Unless the Facility is in Violation of a Permitted Limitation is Both Out of Order and Erroneous.**

The Opposing Parties also argue that unless the Plant has violated a specific emissions limitation under its operating permit, it cannot be found to be in violation of the Virginia Air Act or the CAA. (PEPCO and PJM Answer at 8; DC PSC Answer at 18-2.) Again, the Commission is not empowered to decide such a question. In any event, this argument likewise is a mischaracterization of both state and federal law, as it is plainly contradicted by the plenary authority granted to the Air Pollution Control Board to control and prevent air pollution, including exceedences of the NAAQS, discussed above.[12]

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11 Moreover, since the Opposing Parties filed their Answers, EPA has promulgated a rule adopting the AERMOD model. *See* Revision to the Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions, 70 Fed. Reg. 68218 (Nov. 9, 2005).

12 The Opposing Parties also erroneously state that the Plant would be in full compliance with the Virginia SIP if the Commission ordered it to be operated at the previous levels. Obviously, this argument ignores the fact that the Director's

F. **The Federal Power Act Does Not Preempt Virginia's Air Act or the Director's Actions Pursuant to 9 VAC 5-20-180(I).**

The DC PSC further argues that any authority that the Director or the Commonwealth may have to require the Plant to reduce its level of operation to prevent localized NAAQS exceedences of SO_2, NO_2 and PM-10 is preempted by the Commission's authorities under the FPA. This argument is without merit for two reasons. First, as previously noted, 9 VAC 5-20-180(I) is incorporated into Virginia's federally approved State Implementation Plan ("SIP") and it is well-recognized that any obligation arising under a SIP is a matter not only of state law but also federal law under the CAA.[13] *See, e.g., Her Majesty the Queen v. City of Detroit*, 874 F.2d 332 (9th Cir. 1989) (holding that once a SIP is approved by the EPA, its requirements become federal law and are fully enforceable in federal court); *Unitek Envtl. Servs. v. Hawaiian Cement*, 1997 U.S. Dist. LEXIS 19261, *19-20 (D. Haw. 1997) (same). The DC PSC makes no argument that the FPA "preempts" the CAA, presumably because the preemption doctrine (and the Supremacy Clause to the Constitution, which the DC PSC cites) applies

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August 19th request to take whatever steps are necessary to prevent violations of the NAAQS for SO_2, NO_2 and PM-10, which Mirant is legally bound to comply with pursuant to 9 VAC 5-20-180(I), ***is*** a requirement of the SIP because 9 VAC 5-20-180(I) is incorporated into the SIP as one of the mechanisms available to the Director to control emissions that would otherwise result in violations of the NAAQS.

13 Importantly, Section 9 VAC 5-20-180(I) was incorporated into the Virginia SIP in order to conform with Section 119(a)(2)(E) of the CAA, 42 U.S.C. § 7410(1)(2)(E), which requires that a state's SIP contain "enforceable emissions limitations and ***and other control measures***" (emphasis added) to ensure that the state meet their obligations to ensure that the NAAQS are not exceeded. If a state fails to take appropriate control measures as set forth in the SIP to prevent NAAQS exceedences, it can face a variety of sanctions – including the loss of federal highway funding. *See* CAA Section 179(a), 42 U.S.C.§ 7509(a). Thus, there can be no question that the Director's obligation to respond to localized NAAQS exceedences caused by an individual facility pursuant to its enforcement authorities as set forth in the SIP is federally enforceable. *See* Letter from EPA Region III Administrator Donald Welsh to Congressman James P. Moran, dated October 21, 2005. (Exhibit C.)

only where state law conflicts with federal law requirements – not to federal laws *inter se*. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993).

The DC PSC also does not cite to any express provision in the FPA stating that any state environmental laws are preempted in any way by the authorities granted to the Commission, and makes no argument at all that would support the conclusion that the FPA impliedly preempts Virginia's authorities pertaining to the control and abatement of air pollution, such as 9 VAC 5-20-180(I). Given the absence of any express language providing for the preemption[14] of state environmental laws, the FPA cannot be said to expressly preempt Virginia's Air Act, including 9 VAC 5-20-180(I). Indeed, there is not even any express language preempting state regulation of electricity production.

Furthermore, with respect to implied preemption,[15] the FPA is not so pervasive that Congress did not leave any room for the states to adopt environmental regulations of the type at issue here. In fact, the FPA specifically recognizes that there are areas in which the states retain authority to regulate notwithstanding the Commission's authorities under the FPA, and expressly provides that the FPA does not apply to any area in which the states have regulated. *See, e.g.,* Section 201(a) of FPA, 16 U.S.C. § 824 (stating that the FPA does not extend any matters that are "subject to regulation by the States").

Finally, the actions of the Director clearly do not stand as an obstacle to the accomplishment of federal law. To the contrary, the Board's actions are necessary for compliance with federal law, specifically the CAA, and the Director here is only

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14 State law may be deemed preempted where Congress has expressly stated that it intends to prohibit state regulation in an area. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

15 Congress may impliedly preempt state regulation of an area by so "occupying the field" of regulation that it leaves no room for state regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

attempting to regulate the air pollution created as a result of the production of electricity, which clearly is a matter of legitimate state concern.[16] Nor can the Director's action pursuant to 9 VAC 5-20-180(I) be said to conflict with any provision of the FPA, given that Section 201(a) of the FPA specifically provides that it does not extend any matters that are "subject to regulation by the States."

G. PEPCO and PJM's Argument That CAA Section 176(C)(1) Does Not Apply Is Without Merit.

PEPCO and PJM also argue that the Commission does not need to make a conformity determination under CAA Section 176(c)(1) because that requirement does not apply to this matter due to the fact that the Northern Virginia area has not been formally designated as a non-attainment area for NO_2, SO_2 and PM-10 (PEPCO and PJM Answer at 13.) However, PEPCO and PJM fail to point out that the Northern Virginia area, as well as the City of Alexandria itself, ***have*** been designated as being in non-attainment status for the 8-hour ozone NAAQS and the PM-2.5 NAAQS.[17] These standards trigger the applicability of Section 176(c)(1) in this case because NO_2 is one of

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16 *Compare Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (holding that state laws may be impliedly preempted if "it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress") *with Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493 (1989) (holding that notwithstanding fact that state regulation of natural gas suppliers would indirectly impact the price and availability of natural gas in interstate markets regulated by FERC, such regulation was not preempted because its purpose was to regulate production, which is subject to state regulation, and was plausibly related to matters of legitimate state concern).

17 *See generally* 40 C.F.R. § 81.347 (designating Northern Virginia as in non-attainment status for 8-hour ozone NAAQS); 69 Fed. Reg. 23,857, 23,942 (Apr. 30, 2004) (listing, in table, Alexandria as being in non-attainment status for 8-hour ozone NAAQS); 40 C.F.R. § 81.347 (designating Northern Virginia as in non-attainment status for PM-2.5); 70 Fed. Reg. 944, 1010 (Jan. 5, 2005) (listing, in table, Alexandria as being in non-attainment status for PM-2.5). It has been previously recognized that in areas classified as non-attainment areas for ozone, Section 176(c)(1) applies to the release of ozone pre-cursor pollutants. *See Conservation Law Found. v. Busey*, 79 F.3d 1250, 1263 (1st Cir. 1996).

the primary precursors to ozone,[18] which is not itself an emitted pollutant, but is instead created by the interaction of certain emitted pollutants – including NO_2 – in the atmosphere when exposed to sunlight. Indeed, EPA has specifically directed Virginia to take necessary measures to reduce ambient concentrations of nitrogen oxides ("NOx"), of which NO_2 is one type. Similarly, NO_2, as well as SO_2, are precursors to PM-2.5.[19] Therefore, NO_2 and SO_2 ***are*** in fact pollutants, albeit along with others, contributing to EPA's non-attainment designations in the Northern Virginia area. The fact that their emission in this case also would cause localized exceedences of NAAQS specifically relating to those pollutants at the prior operating levels of the Plant, which prompted the Director to take action to address those exceedences pursuant to 9 VAC 5-20-180(I), has no bearing on the Commission's obligation to comply with Section 176(c)(1). At least in the case of SO_2 and NO_2, the Commission is nonetheless required pursuant to CAA Section 176(c)(1) to determine whether its action would be in any way inconsistent with the purposes of Virginia's SIP – including the Director's efforts pursuant to 9 VAC 5-20-180(I), which is part of the SIP, to reduce the Plant's emissions of SO_2 and NO_2.

H. NEPA Applies to Completed Structures and Compliance With NEPA is Possible.

Finally, the Opposing Parties' contentions that NEPA doesn't apply to the Commission's action in this matter (i) because the plant is a completed structure and (ii) because it would be impossible to comply with NEPA under the present circumstances likewise are erroneous.

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18 *See* "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to NOx SIP call." 70 Fed. Reg. 25,162, 25,162 (May 12, 2005).

19 *See* 70 Fed. Reg. 25,162, 25,162.

In support of their argument that NEPA does not apply here because the Plant is a completed structure,[20] PEPCO and PJM cite a number of cases in which the courts concluded that the action at issue was not a "major federal action" within the meaning of NEPA because the actions were within the range contemplated by the project when it originally went through the NEPA process (*e.g.*, in the *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977) (holding that Bureau of Reclamation's decision to lower the level of water in a reservoir during a drought was not a "major federal action"). However, these cases are all distinguishable because in the present case, the previous operation of the Plant was not the result of federal action and was never subjected to the NEPA process. Any order requiring the Plant to resume operations under the present circumstances would necessarily constitute a major federal action because it would alter the status quo in a profound manner – operation of the Plant at levels that would result in substantial localized exceedences of the NAAQS for SO_2, NO_2 and PM-10.

The Opposing Parties' arguments that NEPA does not apply to the Commission's action as requested by the DC PSC because it would be "impossible" both to comply with NEPA and issue emergency relief are also without merit. While the DC PSC has requested that the Commission act on an emergency basis – even to the extent of proceeding without a fully developed record – in fact the Commission to date has proceeded in a more thoughtful and deliberate manner, which is entirely consistent with the weighty considerations that must be given to the significant consequences its decision

20 PEPCO and PJM's contention that a "major federal action" does not include "the continued operation of an existing facility" (PEPCO and PJM Answer at 18) is belied by the plain language of the NEPA's implementing regulations, which state, *inter alia*, that the term "actions" within "Major Federal Actions" includes "new ***and*** continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies . . ." 40 C.F.R. § 1508.18.

will have for the health and safety of Virginia's residents.[21] In view of that, there is no reason why the Commission cannot or should not perform a NEPA-type review of those considerations.[22]

V. CONCLUSION

For all the reasons discussed herein, the Director requests that the Commission exercise its discretion to grant the Director's motion for leave to file a consolidated answer so that the Director may clarify his position and assist the Commission in its decision-making process. The Director also requests that the Commission deny the attempts made by the DC PSC, PEPCO and PJM to limit the Commission's evaluation of this matter to the initial three day comment period. The Director again requests that the Commission deny the DC PSC's request for relief, as well as defer any further action

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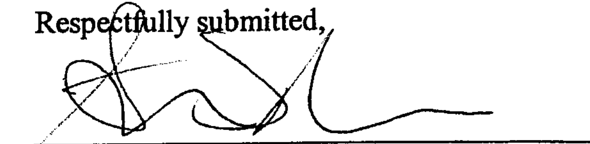
21 Indeed, it is apparent from the time that the Commission has taken to review the *entire* record to date, that it does not view the situation as an "emergency".

22 *See State of Louisiana v. Federal Power Com'n*, 503 F.2d 844, 875 (5th Cir. 1974) (finding that unless there is a statutory impediment preventing NEPA compliance, that "some sort of impact statement must be drafted").

pending further examination, as required by the CAA and NEPA, of the consequences of any action and whether those actions may be taken in a manner that complies with Virginia and federal law.

Respectfully submitted,



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COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Dated: November 10, 2005

Exhibit A

COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

W. Tayloe Murphy, Jr.
Secretary of Natural Resources

Northern Virginia Regional Office
13901 Crown Court
Woodbridge, VA 22193-1453
(703) 583-3800 fax (703) 583-3801
www.deq.state.va.us

Robert G. Burnley
Director

Jeffery A. Steers
Regional Director

COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD

ORDER BY CONSENT

ISSUED TO

MIRANT POTOMAC RIVER, LLC
Registration No. 70228

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § § 10.1-1307D and 10.1-1307.1, between the Board and Mirant Potomac River, LLC for the purpose of ensuring compliance with ambient air quality standards incorporated at 9 VAC Chapter 30 and Va. Code § 10.1-1307.3(3) requiring certain emissions modeling and analysis related to the Potomac River Power Station located in Alexandria, Virginia.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meanings assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Air Pollution Control Board, a permanent collegial body of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1301 and 10.1-1184.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality.

5. "Order" means this document, also known as a Consent Order.

6. "Mirant," means Mirant Potomac River, LLC, a limited liability company qualified to do business in Virginia. Mirant Potomac River, LLC is owned Mirant Corporation and operated by Mirant Mid-Atlantic, LLC.

7. "Facility" means the Potomac River Generating Station owned and operated by Mirant located at 1400 North Royal Street, Alexandria, Virginia, 22314. The facility is a five unit, 488 MW coal-fired electric generating plant.

8. "NVRO" means the Northern Virginia Regional Office of DEQ, located in Woodbridge, Virginia.

9. "The Permit" means the Stationary Source Permit to Operate issued by DEQ to the facility on September 18, 2000, pursuant to 9 VAC 5-80-800, *et seq.*

10. "Marina Towers" means a multiple unit residential condominium building located at 501 Slaters Lane, Alexandria, Virginia, in close proximity to the facility.

11. "Downwash" means the effect that occurs when aerodynamic turbulence induced by nearby structures causes pollutants from an elevated source (such a smokestack) to be mixed rapidly toward the ground resulting in higher ground-level concentrations of pollutants.

12. "NAAQS" means the primary national ambient air quality standards established by the U.S. Environmental Protection Agency for certain pollutants, including sulfur dioxide (SO_2), nitrogen dioxide (NO_2), carbon monoxide (CO), ozone, and particulate matter (PM), pursuant to § 109 of the federal Clean Air Act, 42 USC § 7409, set forth at 40 CFR Part 50 and incorporated at 9 VAC Chapter 30. NAAQS are established at concentrations necessary to protect public health with an adequate margin of safety.

13. "NO_X" means oxides of nitrogen, which is a pollutant resulting from the combustion of fossil fuels and a precursor to the formation of ozone.

14. "PM_{10}" means particulate matter with an aerodynamic diameter less than or equal to 10 micrometers and is a pollutant resulting from, among other things, the combustion of fossil fuels.

SECTION C: Findings of Fact and Conclusions of Law

1. In order to ensure compliance with the Northern Virginia area's National Ambient Air Quality Standard (NAAQS) for ozone, the Department is in the process of revising the facility's Stationary Source Permit to Operate for the purpose of clarifying the facility's ozone season

(May 1 through September 30) emission requirements for NOx. A public hearing on the proposed permit revision was held in Alexandria, Virginia, on the evening of April 12, 2004.

2. Among the comments offered at the public hearing by Alexandria residents was that DEQ should require Mirant to perform comprehensive modeling to assess the impact of emissions from the facility on the area in the immediate vicinity of the facility.

3. At or about the time of the public hearing, certain residents of Alexandria, Virginia, provided the Department with a document entitled "Screening-Level Modeling Analysis of the Potomac River Power Plant Located in Alexandria, Virginia" prepared by Sullivan Environmental Consulting, Inc., dated March 29, 2004 (the Sullivan Screening). The Sullivan Screening was commissioned by, among others, certain residents of Marina Towers for the purpose of assessing whether emissions from the facility may cause exceedances of certain NAAQS at Marina Towers as a result of "downwash." The Sullivan Screening concluded that, "on average, meteorological conditions associated with plume impaction conditions on the Marina Towers condominium were screened to occur as often as 1,200 hours per year."

4. Although the Sullivan Screening does not establish conclusively that emissions from the facility result in exceedances of the NAAQS at Marina Towers, the Department believes that the results of the Sullivan Study warrant that further comprehensive analysis be conducted in accordance with DEQ and EPA approved modeling procedures in order to more fully determine the effect of emissions from the facility on the ambient air quality at Marina Towers and in the area in the immediate vicinity of the facility.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code §§ 10.1-1307 D and 10.1-1307.1 orders Mirant, and Mirant agrees, to perform the actions described in this section of the Order:

1. Mirant shall perform a refined modeling analysis to assess the effect of "downwash" from the facility on ambient concentrations of SO_2, NO_2, CO, and PM_{10} for comparison to the applicable NAAQS in the area immediately surrounding the facility. In addition, Mirant shall perform a refined modeling analysis to assess the effect of "downwash" from the facility on ambient concentrations of mercury for comparison to the applicable Standards of Performance for Toxic Pollutants set forth in 9 VAC 5-60-200, *et seq.*, in the area immediately surrounding the facility.

2. The protocol and methodology for the modeling analysis shall be in accordance with EPA and DEQ methods and shall be approved by DEQ prior to commencement of the modeling. Mirant shall submit a proposed modeling protocol and methodology to Kenneth L. McBee, DEQ Air Modeling Program Coordinator, 629 E. Main St., Richmond VA 23219, within twenty-one (21) days of the effective date of this Order.

3. Mirant shall perform the modeling analysis immediately upon receiving written approval of the modeling protocol and methodology from DEQ. Mirant shall submit the results of the modeling analysis to Mr. McBee and the Director of the Department's Northern Virginia Regional Office no later than sixty (60) days after Mirant receives written approval of the modeling protocol and methodology.

4. In the event the modeling analysis indicates that emissions from the facility may cause exceedances of the NAAQS for SO_2, NO_2, CO, or PM_{10}, or exceedances of the Standards of Performance for Toxic Pollutants for mercury in the area immediately surrounding the facility, DEQ shall require Mirant to submit to DEQ, within ninety (90) days of submitting the modeling analysis, a plan and schedule to eliminate and prevent such exceedances on a timely basis. Upon review and approval of that plan and schedule by DEQ, the approved plan and schedule shall be incorporated by reference into this Order.

5. Mirant agrees to waive any objections it may otherwise be entitled to assert under law should DEQ seek to incorporate the approved plan and schedule into the facility's permit.

Section E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Mirant for good cause shown by Mirant, or after a proceeding as required by the Administrative Process Act for a case decision.

2. This Order addresses only those issues specifically identified herein. This Order shall not preclude the Board or the Director from taking any action authorized by law, including, but not limited to seeking subsequent remediation of the facility as may be authorized by law and/or taking subsequent action to enforce the terms of this Order. This order shall not preclude appropriate enforcement actions by other federal, state or local regulatory agencies for matters not addressed herein.

3. Solely for the purposes of the execution of this Order, for compliance with this Order, and for subsequent actions with respect to this Order, Mirant consents to the jurisdictional allegations and conclusions of law contained herein.

4. Mirant declares it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, and the Air Pollution Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order, or any subsequent deliverables required to be submitted by Mirant and approved by the Department, without the consent of Mirant.

5. Failure by Mirant to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or Director as a result of such violations.

6. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

7. Mirant shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or other such circumstance. Mirant must show that such circumstances resulting in noncompliance were beyond its control and not due to a lack of good faith or diligence on its part. Mirant shall notify the Director, NVRO, in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of this Order. Such notice shall set forth:

a. The reasons for the delay or noncompliance;

b. The projected duration of any such delay or noncompliance;

c. The measures taken and to be taken to prevent or minimize such delay or noncompliance; and

The timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Director, NVRO, in writing within 24 hours of learning of any condition above, which Mirant intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim of inability to comply with a requirement of this Order.

8. This Order is binding on the parties hereto, parent corporations, or their successors in interest, designees, assigns.

9. This Order shall become effective upon execution by both the Director of the Department of Environmental Quality or his designee and Mirant.

10. This Order shall continue in effect until:

a. Mirant petitions the Director or his designee to terminate the order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

b. The Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to Mirant.

Termination of this Order, or of any obligation imposed in this Order, shall not operate to relieve Mirant from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

AND IT IS ORDERED this 23rd day of September 2004.

By: Jeffrey A Steers for
Robert G. Burnley, Director
Department of Environmental Quality

Mirant Potomac River, LLC, voluntarily agrees to the issuance of this Order.

MIRANT POTOMAC RIVER, LLC

by: [signature]
Lisa D. Johnson, President

The foregoing instrument was signed and acknowledged before me on this 17th day of Sept. 2004 by Lisa D. Johnson of Mirant Potomac River, LLC, in the ~~City~~ County of Prince George, Commonwealth of Virginia.

[signature]
Notary Public

My Commission expires: 06/27/05

Exhibit B

KEN

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

NOV 9 2004

Mr. John M. Daniel, Jr., Director
Air Division
Department of Environmental Quality
P.O. Box 10009
Richmond, VA 23240

Dear Mr. Daniel: John

Thank you for your October 18, 2004 letter requesting approval of the use of an alternative dispersion model for the analysis of air quality impacts in support of a special downwash study pursuant to an Order By Consent by the Virginia State Air Pollution Control Board. The company, Mirant Potomac River, LLC (Mirant) has proposed to use an alternative model for the required analysis. The alternative model would be used to demonstrate protection of the national ambient air quality standards instead of the preferred model of Appendix W to 40 CFR Part 51, Guideline on Air Quality Models (GAQM).

As stated in your letter, air quality modeling for regulatory application must be based on the preferred models identified in the GAQM, except where the preferred model is inappropriate. The GAQM further specifies the conditions and procedures for selecting an alternative model and states that specific written approval of the Environmental Protection Agency (EPA) Regional Administrator to use the alternative model is required.

We have reviewed your rationale for using the American Meteorological Society (AMS)/EPA Regulatory Model (AERMOD). AERMOD was proposed at the Seventh Conference on Air Quality Modeling held in Washington, D.C. on June 28-29, 2000. The main purpose of the conference was to receive comments on EPA's proposal to add several new modeling techniques to Appendix W of 40 CFR Part 51. The conference was announced in the Federal Register on May 19, 2000 (Volume 65, Number 98). The review of the AERMOD model for the Seventh Modeling Conference has confirmed the theoretical applicability of the model for the type of application anticipated by Mirant. Furthermore, when compared with the GAQM-preferred Industrial Source Complex (ISCST3) model in comparative evaluations, the AERMOD model has been demonstrated not to be biased toward underprediction.

Our approval of AERMOD as an alternative model is based on the requirements of 40 CFR Part 51 Appendix W Section 3.2. This section states that alternative model approval will normally be granted if one of three conditions is satisfied. The condition that is relevant to your request, condition #2, states that, "... (2) if a statistical performance evaluation has been conducted using measured air quality data and the results of that evaluation indicate the alternative model performs better for the application than a comparable model in Appendix A",

then the model could be approved as an alternative. In the past, we have interpreted this provision as requiring a site-specific comparative model evaluation study. However, given the special circumstances of your request, we believe that a site-specific study is not necessary. You are requesting the use of a model which has been subjected to the rigor of a formal peer review and an extensive performance evaluation, and it has been proposed to replace the existing preferred model. Therefore, we are convinced that there is ample evidence to suggest that if a site-specific study were conducted for this application, AERMOD would exhibit superior performance over ISCST3.

Therefore, under the provision of Section 3.2. of the GAQM, the proposed use of the AERMOD model (version 02222) is hereby approved by EPA for the downwash study to be conducted by Mirant Potomac River, LLC at the Mirant Potomac River Power Plant in Alexandria, Virginia.

Please recognize that until such time as EPA has formally adopted AERMOD as a preferred model in the GAQM, any time the Department of Environmental Quality uses AERMOD results as a basis for a regulatory action, you are required to give public notice and to provide the opportunity for a public hearing on the use of this alternative model. This public notice and opportunity for a hearing may be conducted concurrently and as part of the public participation process for the particular regulatory action.

If you or your staff have any questions about this approval, please call Denis Lohman of the Air Protection Division at (215) 814-2192.

Sincerely,

Donald S. Welsh
Regional Administrator

Exhibit C

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

OCT 21 2005

Honorable James P. Moran
U. S. House of Representatives
Washington, D.C. 20515-4608

Dear Representative Moran:

Thank you for your letter dated September 29, 2005 to the U.S. Environmental Protection Agency (EPA) concerning air emissions from Mirant's Potomac River Power Plant located in Alexandria, Virginia.

EPA has been actively involved in the evaluation of the health and safety issues caused by the operation of the coal-fired boiler units at the Potomac River plant for some time. The results of a Downwash Modeling Study, first received by the Virginia Department of Environmental Quality (VADEQ) in late August 2005, indicated substantial modeled exceedances of the sulfur dioxide, nitrogen oxide, and PM10 National Ambient Air Quality Standards (NAAQS) have occurred. EPA realizes the complexity of the technical and air dispersion modeling evaluations would be significant, and has assigned appropriate qualified technical personnel to this effort. Subsequently, EPA has been actively engaged in providing technical support to the VADEQ during their evaluation of the air dispersion modeling conducted by Mirant, including ongoing reduced operational scenarios currently being evaluated by Mirant engineers and modelers.

EPA believes that the health and safety of the local residents near the Potomac River plant is of paramount concern, and I can assure you that EPA will not support any continued full or partial operation of the Potomac River plant without verification from EPA experts that there will not be any modeled exceedances of the NAAQS caused by emissions from the plant.

If you have any questions, please do not hesitate to contact me or have your staff contact Ms. Stephanie Branche, Virginia Liaison, at 215-814-5556.

Sincerely,

Donald S. Welsh

Donald S. Welsh
Regional Administrator

cc: Mr. Robert Burnley
Director, VADEQ

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Customer Service Hotline: 1-800-438-2474