

February 21, 2006

VIA ELECTRONIC MAIL

Mr. Lawrence Mansueti
Lawrence.Mansueti@hq.doe.gov
Permitting, Siting, and Analysis Division
Office of Electricity Delivery and Energy Reliability (OE-20)
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585-0119

Re: “Emergency Order to Resume Limited Operation at the Potomac River
Generating Station, Alexandria, VA, in Response to Electricity Reliability
Concerns in Washington, D.C.”

Dear Mr. Mansueti:

The Southern Environmental Law Center (“SELC”) submits these comments on behalf of itself and the American Lung Association of Virginia, in response to the Department of Energy’s (“DOE”) emergency order to resume operations at Mirant Corporation’s Potomac River Generating Station in Alexandria, Virginia. *See* 71 Fed Reg. 3279 (Jan. 20, 2006); DOE Order No. 202-05-03, *District of Columbia Public Service Commission*, Docket No. EO-05-01 (Dec. 20, 2005) (hereinafter “Emergency Order”). SELC, a non-profit, regional environmental organization dedicated to the protection of natural resources throughout the Southeast, has

worked extensively on air quality issues in Virginia, North Carolina, South Carolina, Georgia, Tennessee, and Alabama. The American Lung Association of Virginia, founded in 1909, is committed to promoting lung health and preventing lung disease.

For the reasons discussed below, we respectfully urge DOE to rescind its Emergency Order and allow federal and state regulators the discretion to enforce binding air pollution control laws. The closure of Mirant Corporation's Potomac River Generating Station, a predicted event that has been on the horizon for the last several years, fails to qualify as an "emergency" under Section 202(c) of the Federal Power Act ("FPA"). Moreover, there are no assurances that the facility could be operated without being in gross violation of the federal Clean Air Act and Virginia state air pollution control laws. Accordingly, we urge DOE to reject any course of action that would require the operation of this aging, outdated, and decrepit power plant. Instead, we respectfully request that DOE ensure electricity reliability by encouraging the rapid completion of two additional 230kV transmission lines that Pepco already intends to construct.

I. CLOSURE OF THE POTOMAC RIVER GENERATING STATION FAILS TO QUALIFY AS AN "EMERGENCY" UNDER SECTION 202(c) OF THE FPA.

Section 202(c) of the FPA gives the Secretary of the Department of Energy the authority to "require by order such *temporary* connections of facilities and such generation ... of electric energy" when "the [Secretary] determines an emergency *exists* ..." 16 U.S.C. § 824a(c) (emphasis added). The plain meaning of the congressional language is apparent. Section 202(c) may be invoked only during the course of an ongoing emergency. The Secretary's authority is

triggered when an emergency actually “exists” – not when one might be predicted. The requirement of an actual emergency is emphasized by the fact that the Secretary may order solely “temporary connections.” When the crisis is complete and the emergency situation has passed, the Secretary’s power under Section 202(c) expires.

This limitation on the reach of Section 202(c) has been apparent for more than a quarter century. In the wake of the 1973-74 oil embargo, Northeastern utilities operating oil-fired electric generating units petitioned the Federal Energy Regulatory Commission to invoke its Section 202(c) powers to order coal-fired operators to supply electricity to New England through the mandatory continuation of the “coal-by-wire” program. *See Richmond Power & Light v. FERC*, 574 F.2d 610 (D.C. Cir. 1978).¹ The Northeastern suppliers feared a return of the embargo and, noting the “high cost and uncertain supply of foreign oil,” requested that the Commission declare the situation an ongoing emergency. *Id.* at 614-15. The Commission refused and the D.C. Circuit “encounter[ed] little difficulty” in affirming that decision. *Id.* The court explained that Section 202(c) “speaks of ‘temporary’ emergencies, epitomized by wartime disturbances” to the electricity supply. *Id.* at 615. The potential crisis of an embargo, while no doubt serious, was not an “emergency” under the FPA.

In this case, the situation is even less critical. In its Petition for an Emergency Order, the District of Columbia Public Service Commission (“DCPSC”) conceded that no emergency existed and that “the shutdown of the Potomac River Plant would not in and of itself” cause any such emergency. *See* Emergency Petition and Complaint of DCPSC, at 3 (Aug. 24, 2005). Rather, DCPSC’s alleged emergency was purely conjectural. DCPSC imagined that *if* the

¹ The authority granted to the Commission under Section 202(c) was transferred to the Secretary of the Department of Energy in 1980 pursuant to the Department of Energy Organization Act, 42 U.S.C. §§ 7101 *et seq.*

Potomac River facility were to remain closed, and *if* an extreme weather event struck the Washington, D.C. area, and *if* that event was coupled with other losses in transmission capability, then it would theoretically be possible that electric service to the District of Columbia might be diminished.

Even DOE has recognized that there is no ongoing emergency which justifies the full-time operation of the Potomac River Generating Station. As explained in its Emergency Order, DOE states “that in order to maintain a minimally reliable electric power system, the Plant must be available to run *when one of the 230kV lines is out of service...*” Emergency Order, at 4 (Dec. 20, 2005) (emphasis added). Stated differently, an emergency under Section 202(c) does not presently exist, but would exist *only* when one of the two 230kV transmission lines are down.

Moreover, DCPSC further conceded in its Petition that there may actually be no loss of transmission capability at all because Pepco, the entity responsible for distribution service to the District of Columbia, has developed two, distinct contingency plans to replace electricity lost from the shutdown of the Potomac River facility. *See* Emergency Petition and Complaint of DCPSC, at 6. That Pepco has developed these backup protocols is not surprising. Given the age, poor condition, and disastrous environmental record of the Potomac River plant, it would have been irresponsible to rely on its continued operation.

DOE’s Emergency Order recognizes that Pepco intends to construct two additional 230kV transmission lines within eighteen months. Once completed, these new lines will wholly and undeniably eliminate any need for the Potomac River facility from an electricity reliability standpoint. The Emergency Order, unfortunately, may have the unintended effect of delaying installation of these new lines, as it sends the message that the Department intends to continue to rely on the operation of the Mirant power plant to ensure electricity reliability to Washington,

D.C. To the contrary, DOE should make clear that it expects the transmission-line improvements to be completed as soon as practicable, and that it does not intend to rely on the continued operation of an outdated, unreliable, and inefficient power plant in Alexandria.

II. BECAUSE THE POTOMAC RIVER PLANT CANNOT OPERATE WITHOUT VIOLATING FEDERAL AND STATE AIR POLLUTION CONTROL LAWS, THE DEPARTMENT OF ENERGY LACKS THE AUTHORITY TO COMPEL ITS OPERATION.

The Potomac River Generating Station was not shut down as a penalty for Mirant's past violations of the Clean Air Act. Rather, the plant was closed because it would be impossible for Mirant to operate the facility without continuing to be in gross violation of the Clean Air Act and state air pollution control restrictions. *See* Letter from Robert G. Burnley, Director, Virginia Department of Environmental Quality (DEQ), to Lisa D. Johnson, President, Mirant Potomac River, LLC (Aug. 19, 2005) (attached). The Department of Energy cannot do indirectly that which it lacks the authority to do directly. *See National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990); *Richmond Power & Light*, 574 F.2d at 620. Accordingly, there is substantial doubt as to whether, even in response to an emergency, the Secretary could require Mirant to breach its obligations under its consent decree with DEQ and violate the Clean Air Act.

The Clean Air Act tasks the U.S. Environmental Protection Agency ("EPA") with developing National Ambient Air Quality Standards ("NAAQS") – "the attainment and maintenance of which" are "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). Currently, air quality in the Washington, D.C. area fails to meet EPA's minimum health-based standards for both ground-level ozone and fine particulate matter (PM_{2.5}). *See* 69 Fed. Reg.

23858, 23893 (Apr. 30, 2004) (ozone designation); 70 Fed. Reg. 944, 963 (Jan. 5, 2005) (PM_{2.5} designation). Coal-fired electric utilities, such as the Potomac River Generating Station, are significant emitters of nitrogen oxides and sulfur dioxide, the primary precursors to ground-level ozone and fine particulate matter, respectively.

The significant contribution by the Potomac River facility to unhealthy air in the D.C. region is undeniable. A study conducted at the Harvard School of Public Health concluded that “the Potomac River plant is likely the single largest contributor to PM_{2.5} in Alexandria.” *See* Jonathan Levy, “Analysis of Particulate Matter Impacts for the City of Alexandria, Virginia,” (Apr. 2004) (excerpt attached). The Potomac River plant is also a major factor in ozone pollution, having emitted more than double the amount of nitrogen oxides allowed under its permit during the 2003 ozone season. An independent analysis by Abt Associates, the same firm frequently employed by EPA, shows that pollution from Mirant’s Potomac River power plant is responsible for eighty-eight deaths each year. *See* Clean Air Task Force, *Dirty Air, Dirty Power: Mortality and Health Damage Due to Air Pollution from Power Plants* (June 9, 2004).

To avoid penalties under a civil enforcement action, Mirant entered into a consent decree with the Commonwealth of Virginia that included a requirement for Mirant to conduct a downwash study analyzing the effects of the Potomac River plant on the surrounding neighborhood. After reviewing the modeling from this study, DEQ recognized “that emissions from the Potomac River Generating Station result in, cause or substantially contribute to *serious* violations of the primary national ambient air quality standards” and ordered Mirant to “*immediately* undertake such action as is necessary to ensure protection of human health” *See* Letter from Robert G. Burnley to Lisa D. Johnson (Aug. 19, 2005) (emphasis in original).

Considering the proximity of residences to the smokestacks and the unusually low stack heights at the plant, the results of the study were to be expected. Some apartments and condominiums, for example, are “within 300 yards of the opening of those stacks.” *See* Statement by Rep. Jim Moran on the Proposed Revision to the Commonwealth of Virginia State Implementation Plan, (Apr. 12, 2004) (attached). Moreover, other residential buildings, such as the twenty-two story Alexandria House (64.9 meters), are actually taller than the smokestacks on all five boilers (48.2 meters).

When in operation, the Potomac River facility literally pumps pollutants upwards from the power plant directly into people’s homes. Alexandria residents near the facility noted overwhelming improvements in air quality while DEQ’s order closing the plant remained in effect. For the first time in years, elderly residents of the Marina Towers complex reported not needing to utilize supplemental oxygen tanks on a daily basis. Others noted that they no longer had to place towels on their window sills to keep out soot from the Mirant facility.

Given the extraordinary nature of Mirant’s Clean Air Act violations and the dramatic impact of those violations on public health, it became apparent that the only way for the facility to comply with the law would be to shut down entirely. As Mirant has acknowledged, “it is not possible for us to satisfy” DEQ’s requirements without “temporarily shutting down to alleviate potential health concerns to the nearby community.” *See* News Release, “Mirant Will Proceed With Announced Plan to Temporarily Shut Down Potomac River Generating Station,” (Aug. 24, 2005).

By reversing this shutdown, the Emergency Order has compelled the operation of the Potomac River plant and required Mirant to defy federal and state air pollution control laws, as well as the terms of the Mirant-DEQ consent decree. The law is settled that “[t]he Commission

may not, ... when it lacks the power to ... [take action] directly, do so indirectly....” *National Fuel Gas Supply Corp.*, 909 F.2d at 1522. As the Commission itself has recognized, “the indirect extension” of a statutory limit “may indeed be unlawful.” *Public Utility District No. 1 of Klickitat County, Washington*, 22 F.E.R.C. P61,188, at n.4 (Feb. 22, 1983). Accordingly, in the interests of public health, DOE should rescind its Emergency Order and allow state and federal regulators to enforce the Clean Air Act and other state and federal air pollution control laws.

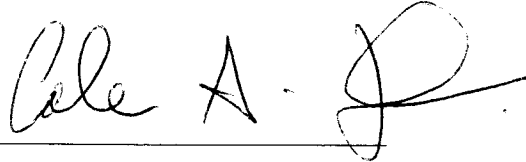
III. TO PROTECT AIR QUALITY AND PUBLIC HEALTH, DOE SHOULD RESCIND ITS EMERGENCY ORDER OF DECEMBER 20, 2005.

At least since 2001, Alexandria residents near the facility have been pleading with state and federal regulators to close the Potomac River Generating Station permanently. *See* Annie Gowen, “Alexandria Plant Eyes Shutdown,” *Washington Post*, at VA-03 (May 20, 2004). For more than a year, the *Washington Post* has been reporting that the facility could be taken offline. *Id.* In April 2004, U.S. Congressman Jim Moran, who represents the district where the plant is located, released a statement calling Mirant’s corporate behavior “deplorable.” *See* Statement by Rep. Jim Moran, (Apr. 12, 2004). Congressman Moran noted that the Potomac River facility has been on EPA’s High Priority Violator list and that Mirant was an EPA Global High Priority Violator. *Id.*

Given this extensive history, DOE would be choosing the wrong course of action to promote the continued operation of an unreliable and outdated facility, owned by a company with a disgraceful environmental compliance record. Accordingly, the Southern Environmental Law Center and the American Lung Association of Virginia request that the Department of Energy rescind its Emergency Order of December 20, 2005, and instead mandate that Pepco

complete its transmission line upgrades as soon as practicable. We thank you for the opportunity to submit these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Caleb A. Jaffe". The signature is written in a cursive style and is positioned above a horizontal line.

Caleb A. Jaffe, Staff Attorney
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American Lung Association of Virginia
9221 Forest Hill Avenue
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ATTACHMENTS

1. Letter from Robert G. Burnley, Director, Virginia Department of Environmental Quality (DEQ), to Lisa D. Johnson, President, Mirant Potomac River, LLC (Aug. 19, 2005).
2. Jonathan Levy, "Analysis of Particulate Matter Impacts for the City of Alexandria, Virginia," (Apr. 2004) (excerpt).
3. Statement by Rep. Jim Moran on the Proposed Revision to the Commonwealth of Virginia State Implementation Plan, (Apr. 12, 2004).

ATTACHMENT

#1



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

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Robert G. Burnley
Director

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W. Tayloe Murphy, Jr.
Secretary of Natural Resources

August 19, 2005

Lisa D. Johnson, President
Mirant Potomac River, LLC
8711 Westphalia Road
Upper Marlboro, Maryland 20774

Dear Ms. Johnson:

DEQ is in receipt of the results of Mirant's "downwash" modeling provided by Mirant to DEQ pursuant to the consent special order between the State Air Pollution Control Board and Mirant Potomac River, LLC.

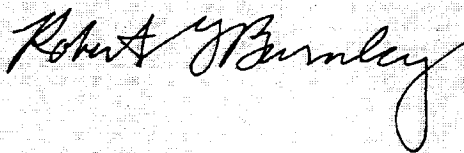
A cursory review of the modeling reveals that emissions from the Potomac River Generating Station result in, cause or substantially contribute to *serious* violations of the primary national ambient air quality standards or "NAAQS" for sulfur dioxide (SO₂), nitrogen dioxide (NO₂) and PM₁₀. NAAQS are established by the U. S. Environmental Protection Agency at concentrations necessary to protect human health with an adequate margin of safety.

The Virginia Air Pollution Control Regulations at 9 VAC 5-20-180(I) provides as follows: *Regardless of any other provision of this section, the owner of any facility subject to the Regulations for the Control and Abatement of Air Pollution shall, upon request of the Board, reduce the level of operation at the facility if the Board determines that this is necessary to prevent a violation of any primary ambient air quality standard. Under worst case conditions, the Board may order that the owner shut down the facility, if there is no other method of operation to avoid a violation of the primary ambient air quality standard. The Board reserves the right to prescribe the method of determining if a facility will cause such a violation. In such cases, the facility shall not be returned to operation until it and the associated air pollution control equipment are able to operate without violation of any primary ambient air quality standard.* (Emphasis added).

Because of the serious violations of the human health-based NAAQS, and as provided in 9 VAC 5-20-180(I), I am writing on behalf of the Board to request 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, including the potential reduction of levels of operation, or potential shut down of the facility. A summary of the actions being taken and their progress toward eliminating NAAQS violations is to be provided to DEQ no later than 2 pm, Wednesday, August 24, 2005.

Failure to comply with this request will result in DEQ taking appropriate and immediate enforcement action pursuant to § 10.1-1309 of the Air Pollution Control Law.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert G. Burnley", is written over a light gray grid background.

Robert G. Burnley

C: W. Tayloe Murphy, Jr.
Secretary of Natural Resources

Carl Josephson – Office of the Attorney General

Michael G. Dowd – DEQ
Ken McBee – DEQ
Jeffery Steers - DEQ

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ATTACHMENT

#2

EXECUTIVE SUMMARY: Analysis of Particulate Matter Impacts for the City of Alexandria, Virginia

Jonathan Levy, Assistant Professor of Environmental Health and Risk Assessment, Harvard School of Public Health

This report provides a detailed look at the influence of five power plants on air pollution and health in Alexandria, based on a previously published regional analysis. The focus is on fine particulate matter (PM_{2.5}), since studies have shown that respiratory and cardiovascular health are affected by PM_{2.5} at current outdoor levels in Alexandria.

We modeled sulfur dioxide (SO₂), nitrogen dioxide (NO₂), and directly-emitted (primary) PM_{2.5} emissions from Benning, Chalk Point, Dickerson, Possum Point, and Potomac River. We considered both current emissions and what the plants would emit if Best Available Control Technology were used.

The Potomac River plant contributes about 0.2-0.6 µg/m³ of PM_{2.5} in Alexandria (where outdoor levels are about 13-15 µg/m³). The variation within Alexandria is mostly from primary PM_{2.5}, since the secondary particulate matter (formed from SO₂ and NO₂ emissions) is more uniform across the city. The maximum impact of the Potomac River plant occurs in Washington, about 4 km from the plant.

When we consider all five power plants together, they contribute about 0.6-1.1 µg/m³ of PM_{2.5} in Alexandria. The five power plants contribute about 2.3 deaths, 0.7 cardiovascular hospital admissions, and 1.2 pediatric asthma emergency room visits per year within Alexandria. This is about 1% of the total regional impacts, given that only 0.2% of the regional population is found in Alexandria. If Best Available Control Technology were used, it would eliminate 1.7 deaths, 0.5 cardiovascular hospital admissions, and 0.9 pediatric asthma emergency room visits per year in Alexandria (31% of which are related to Potomac River).

Interpretation of these findings is complex. Although much of the PM_{2.5} in Alexandria would remain if these emission controls were implemented, the Potomac River plant is likely the single largest contributor to PM_{2.5} in Alexandria. It is also clear that emission control decisions must consider regional impacts if total public health benefits are a concern, but must also evaluate local impacts to ensure that populations are not disproportionately impacted. Our findings cannot provide a definitive policy recommendation, in part because we did not consider control costs and did not conduct detailed near-source modeling necessary to fully understand spatial patterns. However, this report provides some information about the relative importance of local and regional power plants for air pollution in Alexandria, which can be used to inform future policy decisions.

ATTACHMENT

#3

FORWARDED FROM: Tim Aiken, tim.aiken@mail.house.gov

Statement by Rep. Jim Moran
on the
Proposed Revision to the Commonwealth of Virginia
State Implementation Plan

Monday, April 12, 2004

I regret that I cannot be here in person to offer comment on a troubling issue of great concern, but I am traveling on a congressional delegation trip to the Middle East with my colleague Rep. Tom Davis.

There is much to say, unfortunately much of it falls outside the constrained and limited scope of this hearing, but it bears mentioning never-the-less given the absence of opportunities to comment at additional public forums.

I appreciate the sincere efforts of some state officials, but in all good conscience, I cannot fathom how the state can proceed with revisions to the Potomac River Power Plant's operating permit until it can answer a host of questions and undertakes substantial amount of additional work to investigate and monitor the operations of this plant. The more I look into this issue, the more I am troubled by what appears to be a minimalist approach on regulation and oversight, doing the least amount necessary, and in the process failing completely to safeguard the public's health.

Mirant's behavior, in general, is deplorable. It violated its permit level for NO_x at all four of its coal-fired power plants in the D.C. area during this past summer's ozone season. At Potomac River, Mirant emitted more than twice the amount allowed under its NO_x permit of 1,019 tons during the summer ozone season. That is no rounding error, it is a blatant violation of its operating permit. In addition, I understand EPA cited the Potomac River Plant two years ago with installing boiler modifications without installing the necessary pollution control equipment, triggering a probable violation of New Source Review (NSR) requirements.

Although the EPA has not issued a formal Notice of Violation (NOV), this citation and the NO_x exceedance elevated the Mirant plant to High Priority Violator status within EPA and therefore puts the plant on high priority monitoring. Not only is the Alexandria Mirant plant an EPA High Priority Violator but all Mirant plants have been cited for violating New Source Review, resulting in EPA designating the entire corporation as Global High Priority Violators. Clearly, Mirant is not a responsible corporation.

Having set the context, let me now comment on the proposed revision to the State Implementation Plan and specifically on the state operating permit. While I welcome the state's efforts to block Mirant from using the federal acid rain reduction cap and trade program as a way to get out from under the state's emission limits on its NOx permit, this revision falls far short of what is necessary to address a pattern of problems at the plant. It misses this most critical point: much of the analysis used to determine compliance with EPA air quality standards used incomplete abstract models based on the assumption the plant had a much taller smoke stack that would have dispersed pollutants over a much larger geographic area.

Instead, we have a plant without tall stacks operating and 14 story apartment and condominium buildings within 300 yards of the opening of those stacks. Two Alexandria residents, at their own expense, recently hired Sullivan Environmental Consultants, Inc of Alexandria to conduct a screening-level modeling analysis of the plant and just one of the adjacent residential buildings. Sullivan Environmental Consultants found that the top floors of Marina Towers were subject to maximum exposure of the plant's exhaust plume at least 1,200 hours per year. That is 50 days every year.

If the residents of the neighboring condominium and apartment building are in the direct path of emissions plumes from the plant, the 1019 tons per summer limitation may be insufficient to safeguard public health. If this plant has committed uncontrolled emissions increases in violation of the Clean Air Act's New Source Review requirements, then its NOx emissions could well be unlawfully high year round. The state permit may need to set limits on what the plant can emit during the rest of the year, not just a summertime limit. And, perhaps it needs to set an even lower limit during the summer ozone season.

Moreover, the NOx violations may be just one of what could be a number of violations of the National Ambient Air Quality Standards (NAAQS) including standards for sulphur dioxide (SO2), carbon monoxide (CO), particulate matter (PM10), volatile organic compounds (VOC) may also have been violated. At a minimum the plant warrants further review of state air toxic guidelines for mercury, cadmium, arsenic and lead. Unless you assume all emissions traveled straight up before dispersing into the atmosphere, there is a very high probability that elevated levels, concentrations above EPA's standards for safe exposure, are hitting these residents on a daily basis.

Reviewing the Department of Environmental Quality's emission statement certification data of March 28, 2003, we find that the Potomac River Plant emitted an estimated 16,120 tons of SO2 last year, 241.8 tons of carbon monoxide, 588.3 tons of PM10, 33.9 tons of VOC, 644.7 tons of non-VOC hazardous air, 0.2 tons of lead and 72 pounds of mercury. Sullivan Environmental consulting made a rough calculation on SO2 emissions and found that 16,120 tons per year translates into 3,865 micrograms per cubic meter/day. EPA's ambient air quality standard for SO2 is for no more than 360 micrograms per cubic meter within a 24-hour period. In other words, the concentration levels of SO2 that may be found on the top floors of Marina Towers may be 10 times higher 24 hours a day than what EPA allows to exist within a 24-hour period.

What steps is the state taking to determine if Marina Tower's residents and other neighboring residents are being exposed to unhealthy air? The plant is producing hot spots of elevated emission levels of these hazardous chemicals in these local residents' homes. DEQ needs to abandon its incomplete model, set up actual monitors, track emissions and measure actual concentration levels of the harmful air pollutants and the downright hazardous ones and determine if EPA's air quality standards are being met. Until this action is taken, I don't see any rationale for proceeding with revisions to the plant's operating permit.

Before closing let me comment on a separate but related issue. It is my understanding that the state has entered into closed negotiations with Mirant to determine the penalty for violations of the summertime NOx limits. Under state law, the Potomac River Plant can be fined up to \$25,000 per day. Mirant made a bad deal when it bought these out-dated power plants from Pepco and guaranteed a discounted rate for the power it sold back to Pepco. It is losing money on this deal and has already filed for bankruptcy in an attempt to get out from under the terms of its sales agreement. It's my guess that Mirant is cranking as much power as it can to maximize its revenue.

Alexandria residents are paying the price in unhealthy air and poor quality of life. The state should not side with this company and help it through a difficult financial time, not when it has so callously disregarded its impact on the residents of Alexandria.

As the guardian of the public's health and the public interest, the state must speak in the language the company seems to understand best, economics, and level the strongest possible penalties against this plant.

Thank you.