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April 2, 2008

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RE: Environmental Integrity Project Notice of Intent to Sue for Violations of the Clean Water Act at the Faulkner Fly Ash Disposal Facility in Charles County, Maryland

Dear Mr. Huber and Mr. Muller:

We are writing on behalf of the Environmental Integrity Project, the Potomac Riverkeeper, and the individual plaintiffs identified in attachment A (collectively, "Plaintiffs") to provide you with notice of their intent to file suit for significant and ongoing violations of the Clean Water Act, 33 U.S.C. § 1251 et. seq., ("CWA") at the Faulkner Fly Ash Storage Facility ("the Facility").

As is more fully explained below, the Faulkner Fly Ash Storage Facility is discharging toxic pollutants at levels that exceed Maryland's water quality criteria ("WQC"), discharging numerous pollutants without a National Pollutant Discharge Elimination System ("NPDES") permit, and failing to perform required monthly monitoring for various pollutants in violation of an NPDES permit. Mirant's illegal discharges into Bowling Creek and other tributaries of Zekiah Swamp Run, which flow into Zekiah

Swamp, and ultimately into the Wicomico River, have injured, and will continue to injure, the health, environmental, aesthetic, and economic interests of the Plaintiffs. These injuries are traceable to the violations, and redressing the violations will redress the injuries. This notice is being provided pursuant to Section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b).

Citizens are entitled to bring suit to enjoin violations of an “effluent standard or limitation” established under the Clean Water Act and to seek penalties for such violations. 33 U.S.C. § 1365(a)(1). “Effluent standard or limitation” means “an unlawful act under subsection (a) of 1311[,] . . . an effluent limitation under section 1311 or 1312[,] . . . [or] a permit or condition thereof issued under section 1342.” *Id.* § 1365(f). Accordingly, citizens may bring suit to enjoin discharges that exceed Maryland’s numerical WQC for toxic pollutants, the discharge of pollutants without an NPDES permit, and discharges that violate effluent standards and limits set forth in an NPDES permit, and may seek civil penalties for such violations.

The CWA provides for civil penalties of up to \$32,500 per day per violation. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. In accordance with section 505(b) of the Clean Water Act, we are writing to notify you that the named plaintiffs intend to file suit in the applicable federal district court any time sixty (60) days after the postmarked date of this letter to enjoin the violations described below that occurred after the January 3, 2006 effective date of the confirmation of Mirant Corporation’s bankruptcy plan,¹ ensure future compliance, recover attorney fees and costs of litigation, and obtain other appropriate relief.

I. Background

Fly ash disposal operations were established by the Potomac Electric Power Company (“PEPCO”) in 1970 at the Facility in Charles County, Maryland. Fly ash contains heavy metals, high levels of sulfates, hydrocarbons, radionuclides, and other constituents toxic to both human health and the environment.

Maryland Department of the Environment (“MDE”) issued NPDES Permit MD0056928 (“1997 NPDES Permit”), which covers limited discharges from the Facility, on February 1, 1997. The 1997 NPDES Permit authorized the Facility to “discharge treated leachate, truck rinse water, wastewater from an aquaculture operation and storm water via Outfalls 001 and 002” to Bowling Creek and tributaries of Zekiah Swamp Run. Water Mgmt. Admin., Md. Dep’t of the Env’t, NPDES Permit for Potomac Electric Power Company (No. MD0056928) § I.A. (Feb. 1, 1997) [hereinafter “1997 NPDES Permit”]. The permit states that the owner of the Facility must conduct monthly monitoring for several pollutants at Outfalls 001 and 002, and imposes emission limits for total suspended solids (“TSS”) and iron. *Id.* In addition, the owner of the Facility must “take all reasonable steps to minimize or prevent any adverse impact to waters of the State or to human health resulting from noncompliance” with any limitations established in the permit. *Id.* § II.B.4. The 1997 NPDES Permit expired on January 31, 2002, and has never been renewed.

In 2007, Mirant submitted an application for an NPDES permit to the State that identified three new Outfalls: A, C, and F. Outfalls A, C, and F discharge from the series of passive wetland treatment cells installed at the Facility in 2002 as required by a Maryland consent order, which capture groundwater and leachate from the fly ash fill areas. Outfalls A and C discharge to Bowling Creek and Outfall F discharges into an unknown tributary of Zekiah Swamp Run. The 2007 application identified pollutants

¹ Mirant Mid-Atlantic, LLC Annual Report 66 (Dec. 31, 2007), available at <http://www.secinfo.com/d14D5a.tlHmb.htm>; Def.’s Mem. of Law in Opp’n to Pls.’ Mot. for a Prelim. Inj. with Temporary Restraints at 2, *In re Mirant Corp.*, No. 03-46590 (Bankr. N.D. Tex. Aug. 8, 2006).

that are “believed present” in the discharges from each of these Outfalls.² Furthermore, Mirant’s own monitoring data from 2006 and 2007 indicate they are discharging numerous pollutants from these three outfalls. See Attachment B. The State has not issued an NPDES permit authorizing discharges from Outfalls A, C, and F.

II. Violations

A. Discharge of Toxic Pollutants in Violation of Maryland’s Surface Water Quality Criteria and the Clean Water Act

The CWA prohibits the discharge of pollutants unless it is permitted. 33 U.S.C. § 1311(a). Maryland also prohibits the “discharge of any pollutant in toxic amounts . . .” and the State has adopted numerical surface WQC for toxic pollutants. Md. Code Regs. 26.08.03.01(A)(2), -.07(C); 26.08.02.03-2(A)(1). Maryland has specifically defined an effluent limit to include “parameters for the discharge of toxic . . . substances.” *Id.* 26.08.01.01(24)(c)(i). A citizen may bring suit to enjoin discharges that violate Maryland’s WQC for toxic pollutants because they are effluent limitations, and discharges of pollutants in toxic amounts are prohibited. 33 U.S.C. § 1365(a)(1), -(f); Md. Code Regs. 26.08.01.01(24)(c)(i), -.03.01(A)(2). Mirant’s 2006 and 2007 monitoring data and discharge monitoring reports (“DMRs”) show that they discharge selenium from Outfalls A, C, F, and 001 and cadmium from Outfalls A, C, and F at levels that exceed Maryland’s WQC in violation of the CWA.

1. Selenium

The Facility has discharged, and continues to discharge, selenium at levels that violate Maryland’s WQC from Outfalls A, C, F, and 001. The toxicity standard for aquatic life for selenium is 5 µg/L (chronic) and 20 µg/L (acute). Md. Code Regs. 26.08.02.03-2(G)(1). Mirant’s monthly monitoring data show that the Facility violated this standard in twenty-eight samples taken from Outfalls A, C, and F in 2006, and seventeen samples in 2007. Quarterly DMRs submitted to MDE indicate that discharge from Outfall 001 violated the WQC for selenium all four quarters of 2006, as well as the first three quarters of 2007.³ Furthermore, discharge from Outfall F violated the acute toxicity standard July through October of 2006. Discharge from Outfall 001 exceeded the acute standard the third quarter in 2006, and from January through September of 2007.

Table 1A: Selenium Discharges in Violation of State WQC in 2006⁴

	Outfall A	Outfall C	Outfall F	Outfall 001
Number of Months WQC Violated	6	12	12	12
Number of Violations	182	362	362	362

² The following pollutants were identified in Mirant’s 2007 application as “believed present” in discharge from either Outfalls A, C, F : bromide, color, fluoride, nitrate-nitrite, organic nitrogen, phosphorous, alpha, beta, radium, radium 226, sulfate, sulfide, sulfite, surfactants, aluminum, barium, boron, cobalt, iron, magnesium, manganese, molybdenum, tin, titanium, antimony, arsenic, beryllium, cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, thalium, zinc, cyanide, phenols, and bis (2-ethyl-hexyl) phthalate.

³ Plaintiffs have requested, but have been unable to obtain monitoring information for Outfall 001 for the fourth quarter of 2007.

⁴ Only violations occurring after 1/3/06 are included.

Table 1B: Selenium Discharges in Violation of State WQC in 2007

	Outfall A	Outfall C	Outfall F	Outfall 001
Number of Months WQC Violated	2	8	7	9
Number of Violations	61	242	211	273

Evidence supporting these violations can be found in Attachment B, which contains the 2006 surface water monitoring data that Mirant submitted to MDE, and Attachment C, which contains the 2006 and 2007 DMRs Mirant submitted to MDE.

2. Cadmium

The Facility also discharges cadmium at levels that exceed Maryland's WQC. The chronic toxicity standard for aquatic life is 0.64 µg/L, adjusted for a hardness of 400 CaCO₃ mg/L.⁵ Mirant's monitoring data shows that the discharge from Outfalls A, C, and F violated this standard eight different sampling events in 2006 and four sampling events in 2007.

Table 2A: Cadmium Discharges in Violation of State WQC in 2006⁶

	Outfall A	Outfall C	Outfall F
Number of Months WQC Violated	5	1	2
Number of Violations	148	31	62

Table 2B: Cadmium Discharges in Violation of State WQC in 2007

	Outfall A	Outfall C	Outfall F
Number of Months WQC Violated	2	1	1
Number of Violations	59	31	31

Evidence supporting these violations is provided in Attachment B, which contains the 2006 and 2007 monthly monitoring data submitted by Mirant to MDE.

B. Discharge of Pollutants Without an NPDES Permit in Violation of the Clean Water Act from Outfalls A, C, and F

Section 301(a) of the CWA prohibits all discharges of pollutants without an NPDES permit. 33 U.S.C. § 1311(a). The Facility does not have an NPDES permit for Outfalls A, C, and F. Although these

⁵ See Md. Code Regs. § 26.08.02.03-2(G). The criteria listed in the Md. Code of Regs. is based upon a default hardness of 100 mg/L. *Id.* "MDE calculates freshwater aquatic life criteria as a function of a hardness adjustment formula for metals . . . where toxicity is a function of total hardness. . . . When the measured hardness exceeds 400 mg/L, MDE will use this value as an upper limit when calculating the hardness adjusted criteria." Md. Dep't of the Env't, Water Quality Analysis of Copper, Lead, Selenium, and Zinc in Zekiah Swamp, Prince George's and Charles Counties, Maryland 6 (Aug. 2006). According to the monthly monitoring data conducted at Outfalls A, C, and F, the measured hardness exceeded 400 mg/L at all three outfalls every month in 2006 and 2007.

⁶ Only violations occurring after 1/3/06 are included.

outfalls were created in 2002,⁷ Mirant did not submit an application to permit these Outfalls until January 17, 2007, and the State has not issued an NPDES permit authorizing discharges from Outfalls A, C, and F. Thus, all discharges of pollutants from Outfalls A, C, and F are prohibited under the CWA.

Mirant's monitoring data from 2006 shows that the Facility discharges numerous pollutants from Outfalls A, C, and F. Each day of discharge from each Outfall for each pollutant not authorized in the NPDES Permit constitutes a separate violation of the CWA.⁸

Table 3A: Unauthorized Discharges from Outfalls A, C, and F in 2006⁹

	Outfall A		Outfall C		Outfall F	
	Months Pollutant Detected	Number of Violations	Months Pollutant Detected	Number of Violations	Months Pollutant Detected	Number of Violations
Cadmium	6	178	2	61	4	122
Selenium	12	212	12	362	12	362
Sulfate	12	362	12	362	12	362
Nickel	4	117	1	31	2	59
Iron	12	362	11	331	12	362
Lead	0	0	1	31	2	62
Magnesium	12	362	12	362	12	362
Copper	7	209	11	332	11	332
TSS	9	270	10	301	6	181

Table 3B: Unauthorized Discharges from Outfalls A, C, and F in 2007

	Outfall A		Outfall C		Outfall F	
	Months Pollutant Detected	Number of Violations	Months Pollutant Detected	Number of Violations	Months Pollutant Detected	Number of Violations
Cadmium	2	59	1	31	1	31
Selenium	4	122	8	304	7	211
Sulfate	10	303	8	242	7	211
Nickel	1	28	0	0	0	0
Iron	10	303	8	242	4	122
Lead	2	58	1	28	1	28
Magnesium	10	303	8	242	7	211
Copper	2	62	4	122	7	211
TSS	4	123	4	123	3	91

Evidence supporting these violations can be found in Attachment C, which contains 2006 and 2007 monitoring data submitted by Mirant to MDE.

⁷ Matthew Erbe et al., Md. Power Plant Research Program, Evaluation of Long-Term Surface Water and Ground Water Quality at the Faulkner Fly Ash Storage Site § 1.1 (May 18, 2006).

⁸ Table 3 includes pollutants that Mirant currently conducts monitoring for. To the extent that Mirant discharges pollutants they do not test for from Outfalls A, C, F, plaintiffs allege additional violations of the CWA.

⁹ Only violations occurring after 1/3/06 are included.

C. Failure to Perform Monthly Monitoring For pH, TSS, Iron, Lead, Copper, Selenium, Sulfates, and Hardness

Mirant is in violation of the 1997 NPDS permit for failure to conduct monthly monitoring for various pollutants. Condition I, Section A of the 1997 NPDES permit requires the collection and submission of monthly monitoring data for pH, total suspended solids (TSS), iron, lead, copper, selenium, sulfates, and hardness. Mirant has failed to conduct monitoring for these parameters on a monthly basis. Based on a review of DMRs that have been filed with MDE on a quarterly basis, these violations have occurred on at least the occasions noted in the chart below.

Table 4A: Number of Months Monitoring Not Conducted as Required Per Quarter (Outfall 001) in 2006

Pollutant	01/1/06 – 03/31/06	04/1/06 – 06/30/06	07/1/06 – 9/30/06	10/1/06 – 12/31/06
pH	1	1	2	2
TSS	1	1	2	2
Iron	1	1	2	2
Lead	1	1	2	2
Copper	1	1	2	2
Selenium	1	1	2	2
Sulfates	1	1	2	2
Hardness	1	1	2	2

Table 4B: Number of Months Monitoring Not Conducted as Required Per Quarter (Outfall 001) in 2007

Pollutant	04/1/07 – 06/30/07	07/1/07 – 9/30/07
pH	1	2
TSS	1	2
Iron	1	2
Lead	1	2
Copper	1	2
Selenium	1	2
Sulfates	1	2
Hardness	1	2

Evidence of these violations is provided in Attachment C, which consists of Mirant’s 2006 and 2007 DMRs. Each failure to monitor for each parameter is a separate violation of the CWA.

III. Conclusion

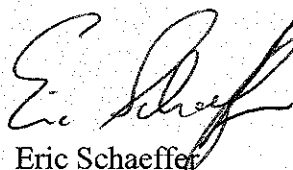
Mirant Md Ash Management, LLC—and Mirant Corporation, Mirant Americas, Inc., Mirant Americas Generation, LLC, Mirant North America, LLC, and Mirant Mid-Atlantic, LLC to the extent they are also owners and/or operators of the Facility—currently own and/or operate the Faulkner Fly Ash Storage Facility in violation of the Clean Water Act and COMAR. Accordingly, plaintiffs intend to file suit to enjoin violations described above and ensure future compliance, obtain civil penalties for past violations occurring after January 3, 2006, ensure future compliance, recover attorney fees and costs of litigation, and obtain other appropriate relief.

The addresses of the plaintiffs are listed below. If you have any questions regarding the allegations in this notice, believe any of the foregoing information to be in error, wish to discuss the exchange of information consistent with the suggestion above, or would otherwise like to discuss a settlement of this matter prior to the initiation of litigation, please contact Eric Schaeffer at the Environmental Integrity Project at (202) 296-8880.

Sincerely,



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