Pillsbury Winthrop Shaw Pittman LLP
50 Fremont Street | San Francisco, CA 94105-2228 | tel 415.983.1000 | fax 415.983.1200
MAILING ADDRESS: P. O. Box 7880 | San Francisco, CA 94120-7880

David R. Farabee
tel 415.983.1124
david.farabee@pillsburylaw.com

November 3, 2009

VIA EMAIL & U.S. MAIL

Allan Zabel
Senior Counsel
Office of Regional Counsel
U.S. E.P.A. – Region IX
75 Hawthorne Street
San Francisco, CA 94105

Alexander Crockett
Assistant Counsel
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Re: PSD and $PM_{2.5}$ Nonattainment NSR Applicability to the Marsh Landing Generating Station

Dear Allan and Sandy:

During our recent discussions regarding air quality permitting for the new Marsh Landing Generating Station ("Marsh Landing"), Mirant's representatives informed you that the recent contract between Pacific Gas and Electric Company and Mirant Delta, LLC that requires the retirement of Contra Costa Power Plant Units 6 and 7 as of May 1, 2013, and changes in Marsh Landing's facility design, had resulted in our reanalysis of the applicability of federal PSD and $PM_{2.5}$ NSR permit requirements to Marsh Landing. During those discussions, Mirant asked for EPA's and BAAQMD's concurrence with our conclusion that the Contra Costa Power Plant and Marsh Landing are separate stationary sources for purposes of federal PSD and NSR permitting, and that as a separate stationary source Marsh Landing will not require a PSD permit or a nonattainment NSR permit for $PM_{2.5}$. Mirant agreed to provide you with our analysis and references to pertinent EPA policy and applicability determinations. Enclosed is a white paper that provides our applicability analysis.

We have not included the EPA documents that are referenced in the analysis, but would be happy to provide you with copies at your request.

I will contact you within the next few days to answer any questions, and to schedule a meeting between EPA, BAAQMD and Mirant to resolve this question. Thank you for your assistance with this issue, and best regards.

Very truly yours,

David R. Farabee

Enclosure

cc: Brian Bateman (BAAQMD)

Mirant Marsh Landing
PSD/NSR Analysis

Mirant Marsh Landing
PSD/NSR Applicability

Background

Mirant Marsh Landing, LLC ("Mirant Marsh Landing") has applied for permits to construct and operate a new electric power generating facility (the Marsh Landing Generating Station ("Marsh Landing")) to consist of four gas-fired simple cycle gas turbines and ancillary equipment. The Marsh Landing Generating Station will be adjacent to the existing Contra Costa Power Plant (the "CCPP") owned and operated by Mirant Delta, LLC ("Mirant Delta"). Mirant Marsh Landing and Mirant Delta ultimately are commonly owned by Mirant Americas, Inc. and Mirant Corporation. However, Mirant Delta and Mirant Marsh Landing each have independent capital structures and independent contractual obligations, including off-take arrangements with different terms. In addition, given their different life spans, capital structures and off-take arrangements, each of CCPP and Marsh Landing by necessity will be operationally independent and completely separate from the other. In fact, as discussed below, the facilities are not expected to be in operation contemporaneously. Additional background detail is provided below and on pages 1 and 2 of a letter from David R. Farabee, Pillsbury, to Brian Bateman, Director, Engineering Division, Bay Area Air Quality Management District ("District"), dated Feb. 27, 2008 (Attachment 1) (the "2008 Letter").

The CCPP currently consists of Units 6 and 7. The CCPP has been considered a major stationary source because it has no annual emission limits, so that historically its potential to emit and actual emissions of several regulated air pollutants exceeded the 100 tons per year PSD major source threshold applicable to fossil fuel-fired steam electric plants. However, CCPP's actual emissions of each regulated air pollutant have been well below 100 tons per year since at least 2005, if not earlier. See Attachment 2. Marsh Landing's potential to emit each pollutant regulated under the Clean Air Act is less than 100 tons per year after commercial operation begins. See Attachment 3.

Mirant Delta has entered into a contract with Pacific Gas and Electric Company ("PG&E") pertaining to CCPP. This contract provides for PG&E to purchase the output of CCPP Units 6 and 7 through April 30, 2013. In addition, Mirant Delta agreed to take all commercially reasonable steps to retire CCPP Units 6 and 7 on May 1, 2013, subject to any regulatory requirements.[1] Mirant Marsh Landing has a separate Power Purchase Agreement ("PPA") with PG&E which provides for Marsh Landing to begin commercial operation and for PG&E to commence purchasing Marsh Landing's output on May 1, 2013.[2, 3]

Given the facts at the time, in the 2008 Letter Mirant presumed that Marsh Landing and CCPP would be a single facility for the purposes of determining the applicability of Clean Air Act requirements. The focus of the 2008 Letter was seeking the District's agreement to issue separate permits for CCPP and Marsh Landing, and the question of whether these activities were properly considered one facility or two was not analyzed in any significant detail. Further, that analysis assumed that the CCPP facility would continue operating after the commencement of commercial operations of the Marsh Landing facility. This key fact is no longer true. As noted above, Mirant Delta agreed to permanently shut down the CCPP when its contract with PG&E expires (at 11:59 p.m. on April 30, 2013), subject to any regulatory requirements. Marsh Landing is scheduled to begin commercial operation the

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[1] We note that the retirement of CCPP is consistent with state policies regarding the retirement of electric generation utilizing once-through cooling and other aging power plants. The only identified regulatory requirement is providing notification of the shutdown to the California Independent System Operator (CAISO) no later than 60 days in advance. In meetings with the CAISO, the CAISO staff have indicated that there are no generation resource concerns with the retirement of CCPP concurrent with commercial operation of Marsh Landing.

[2] Note that the PPA allows Marsh Landing to commence commercial operation up to one month early if the conditions precedent specified in the PPA are met. The Marsh Landing PPA also allows for the delivery date to be pushed later in time due to force majeure events and other excused events. The CCPP contract with PG&E does not allow for extension of the April 30, 2013 retirement date for CCPP 6 and 7. The possible slight variations in the date that Marsh Landing commercial operation may begin do not have a significant effect on the analysis provided in this document.

[3] Since the 2008 Letter, several design features of the Marsh Landing facility have changed. Most significantly, the facility will now consist of four simple cycle gas turbine peaking units instead of the original design of two simple cycle units and two combined cycle units.

following day. Hence, Marsh Landing will necessarily operate separately from the CCPP.

Based on these facts, and the EPA guidance discussed below, Mirant has concluded that Marsh Landing will be a new facility and will not require a PSD permit.

Marsh Landing is a New Facility That Does Not Require a PSD Permit

Under pertinent EPA policy and guidance, Marsh Landing is appropriately considered a new stationary source rather than part of the existing CCPP. As a new stationary source, Marsh Landing is subject to the default 250 tons per year PSD major source threshold because it consists of four gas-fired simple cycle gas turbines without an accompanying steam cycle and therefore is not a "fossil fuel-fired steam electric plant." *See* 40 C.F.R. § 52.21(b)(i)(*a*). Since Marsh Landing's emissions will not exceed 250 tpy of any regulated air pollutant and will be less than 100 tpy during commercial operation (*see* Attachment 3), Marsh Landing will not be a new major stationary source and therefore will not require a PSD permit.

Facility Definition

EPA's PSD regulations define a "facility," in relevant part, as:

> "all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except . . ."

See 40 C.F.R. § 52.21(b)(6); *see also* District Rules 2-2-215, 2-6-206.

Marsh Landing and the CCPP initially appear to be within the definition of a "facility" given that: (1) they will be located on adjacent properties; (2) are under the ultimate common ownership of Mirant Americas, Inc. and Mirant Corporation (notwithstanding several intervening corporate entities); and, (3) are in the same industrial grouping (SIC code 4911: Electric Services). While this creates a "presumption" that the sources constitute a single "facility," source-specific factors as described below allow a determination that Marsh Landing and the CCPP are in fact

two separate facilities. *See, e.g.,* "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act," memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, p. 10 (Aug. 2, 1996).

Guidance Treating Adjacent Activities as Separate "Facilities"

EPA has issued extensive guidance regarding whether adjacent facilities should be aggregated as one facility or treated as two facilities for PSD permitting. All of the pairs of facilities discussed below were (1) located on adjacent properties; (2) owned by the same entity or entities; and, (3) had the same SIC code. However, in each of these cases EPA determined that the facilities operated independently and therefore lack common control and should be treated as two separate facilities. Marsh Landing unambiguously fits within the guidance treating two adjacent facilities as separate facilities.

- In 1999, EPA Region IV surveyed and compiled existing EPA guidance to determine whether the agency would consider adjacent and commonly owned bulk gasoline terminals a single facility, or separate and independent facilities. The owner asserted that the terminals operated independently, had separate fuel and utility pipelines, and were not interconnected. Each facility could continue operating with no substantial change if the other facility were to shut down. On that basis, EPA concluded that the facilities were two independent sources. *See* "Applicability of Title V Permitting requirements to Gasoline Bulk Terminals Owned by Williams Energy Ventures, Inc.," letter from EPA Region 4 to Mecklenburg County Dept. of Env. Protection (May 19, 1999) (surveying EPA guidance on aggregation from 1980 to 1998).

  Similar to the Williams gasoline terminals, Marsh Landing will have its own control room, an independent connection to the PG&E natural gas pipeline system

for its fuel supply, its own water supply, and its own fire protection system.[4] Marsh Landing also will have its own independent connections to the electric transmission system, its own independent wastewater discharge connection, and its own independent contractual arrangements covering the sale of its power output. Not only could Marsh Landing operate without CCPP, it will operate without CCPP because the CCPP will be permanently shut down on April 30, 2013 -- either just prior to the commencement of commercial operations at the Marsh Landing facility or no more than 30 days after Marsh Landing begins commercial operation. Just as EPA determined that the two gasoline terminals were independent facilities, EPA should determine that Marsh Landing and the CCPP are independent.

- In 2001, EPA issued a determination that two adjacent and commonly owned power generating facilities could be permitted separately. The joint owners were in the process of constructing one power facility (a minor source that was not subject to PSD) and requested that EPA determine whether a second facility constructed on the same property would be considered part of the first facility, such that the companies would be required to obtain a single PSD permit. If the facilities were permitted separately, PSD would not be triggered and each facility could obtain its own minor NSR permit.

  EPA concluded that each facility could be permitted separately as a minor source. EPA apparently was particularly persuaded by the fact that, regardless of whether the facilities obtained minor NSR or PSD permits, the permits would require BACT, so the facilities were not circumventing emission control requirements by obtaining minor source permits. EPA also noted that facilities would operate separately, in that "the two projects would not share the same transmission line,

[4] Mirant Marsh Landing's Application for Certification, filed with the California Energy Commission in May 2008, and amended in September 2009, provides that Marsh Landing will use the existing CCPP firewater system in addition to its own fire protection system. However, as CCPP will be shut down, Marsh Landing will not be sharing the existing system.

fuel supply contracts, power sales contracts, gas metering stations, or connections to water and wastewater systems." *See* "PSD Applicability for Fredrickson Power L.P.," letter from Doug Cole, Acting Manager Federal & Delegated Air Programs Unit, Region 10, to, Grant Cooper and Raymond McKay (Oct. 12, 2001).

The same rationale as in Fredrickson Power applies to Marsh Landing and the CCPP. The facilities will be operated separately, and regardless of the permitting approach, Marsh Landing will install the same level of pollution control on the gas turbines because BACT is required by the District's permitting rules even for non-major sources.[5] Further, just like the Frederickson Power facilities, the CCPP and Marsh Landing will not share any transmission lines, fuel supply or power sales contracts, gas metering stations, or connections to water supply or wastewater systems, and each facility will be physically able to continue operating with no substantial change if the other facility shuts down. Thus, even if the facilities were to be operated at the same time before or after May 1, 2013, they would be completely separate under the standards applied in the Frederickson Power case.

- In 2002, EPA evaluated whether a landfill and a co-located power generating facility were a single source. EPA determined that the sources would not require a single PSD permit despite certain factors that linked the facilities. The landfill contracted to sell all of its gas to the power company and the power company was obligated to pay for all of the gas, even if it could not use it. However, EPA found it persuasive that they were separate sources because, in part, the companies would not share equipment (including pollution control equipment), compliance responsibilities, intermediates, products, byproducts, manufacturing equipment, payroll activities, employee benefits, health plans, or other administrative

[5] The one exception is that the fuel gas preheaters would be subject to BACT if Marsh Landing must obtain a PSD permit. While the preheaters are exempt from BACT under the District's permitting rules, Mirant Marsh Landing does not plan to change the preheater design if the facility is not subject to the PSD permit program.

functions. Finally, neither facility was dependent on the other, in that one could shut down and the other could continue to operate at full capacity. *See* "Common Control for Maplewood Landfill, also known as Amelia Landfill, and Industrial Power Generating Corporation" letter from Judith M. Katz, Director Air Protection Division, Region III, to, Gary E. Graham, Virginia Department of Environmental Quality (May 1, 2002).

EPA may directly apply this determination to Marsh Landing. While Mirant Marsh Landing and Mirant Delta will both rely on certain corporate-level services that are not related to their design, construction, operation and management (until CCPP is shut down),[6] they will not share or overlap any resources pertinent to the generation and sale of electricity and thus are two separate sources.

Guidance Aggregating Adjacent Activities into a Single Facility

Marsh Landing fits within the scope of EPA's determinations that adjacent activities can be permitted separately. In addition, Marsh Landing clearly does not fit within the scope of EPA determinations where adjacent activities were aggregated into a single facility.

- In 2009, EPA determined that a co-located landfill and gas-to-energy facility were a single facility. Among other factors, EPA found that the sources had intertwined financial interests in the daily operation of each facility, the landfill was the gas-to-energy plant's only source of fuel, and each entity required permission to buy or sell fuel outside of their exclusive contractual relationship. *See* "Common Control Determination for Ocean County Landfill and the Manchester Renewable Power Corp./LES" letter from Ronald J. Borsellino, Acting Director Division of Environmental Planning and Protection (May 11,

[6] Each of Mirant Delta and Marsh Landing receive general administrative services, including payroll, benefits, accounting and other "back office" types of activities, pursuant to separate standard service agreements with Mirant Services LLC.

2009). As discussed earlier, Marsh Landing and CCPP will have separate fuel supply and power sales arrangements that require their independent operation. In addition, reflecting their independent operations, financing and life spans, the facilities will have independent and separate operating permits. Further, Marsh Landing and CCPP will be party to different financing arrangements which will restrict inter-company dealings between the facilities to circumstances no more favorable than would be expected with an unaffiliated third party. Under all of these contracts, the two facilities' operating and financial performance will be separate and not connected or intertwined in any way. Mirant Delta and Mirant Marsh Landing have commenced the process to subdivide and sell the parcel of land that the Marsh Landing facility will occupy from Mirant Delta's ownership to Mirant Marsh Landing ownership. This sale will be based on the value determined by an independent appraisal – in order to comply with the requirement in Mirant Delta's debt agreements that such a transaction be on arms' length terms -- with Mirant Marsh Landing paying the sales price to Mirant Delta. The two facilities also will be physically and operationally separate, will have no shared permits, and neither project will depend on or require approval from the other to operate. This would be the case even if their operating periods were to overlap. Moreover, CCPP is scheduled to be shut down the day that Marsh Landing is scheduled to commence commercial operation, as discussed above.

- In an early decision, EPA aggregated two nearby General Motors plants into a single facility. The facilities were located approximately a mile apart, with one plant making auto bodies that were then transported to the other plant for assembly. Because the facilities were "programmed together to produce one line of automobiles" and shared other resources, EPA considered the sources part of a single, interdependent facility. *See* "PSD Definition of a Source," memorandum from Edward E. Reich, Director, Division of Stationary Source Enforcement, to, Steve Rothblatt, Chief, Air Programs Branch, Region V (June 30, 1981). In contrast, Marsh Landing and CCPP will not work in concert, supply inputs to each other, participate in the production process of the other, or involve themselves in the supply chain of the other any manner. In fact, for the reasons described above,

the situation with Marsh Landing is exactly the opposite of that in the GM decision, as the CCPP and Marsh Landing facilities are not expected to operate contemporaneously

EPA has succinctly summarized its guidance on these points as follows: "If facilities can provide information showing that the new source has no ties to the existing source, or vice versa, then the new source is most likely a separate entity under its own control." *See* letter from William Spratlin, U.S. EPA, to, Peter Hamlin, Iowa Department of Natural Resources (Sept. 18, 1995). Other than common corporate ownership, Marsh Landing will have no ties to the existing CCPP which, in any event, is scheduled to be shutdown and inoperable within a month of when Marsh Landing begins commercial operation. This situation therefore fits directly within the guidance that authorizes separate permits for adjacent facilities. In addition, Marsh Landing and CCPP do not fit within the guidance where facilities were aggregated for major source permitting. Marsh Landing emissions will be below the established major source thresholds for all criteria pollutants after commercial operation. Accordingly, Marsh Landing should be considered an independent facility. As such, it is not a major source and does not require a PSD permit.

Marsh Landing Will not Trigger Appendix S Nonattainment Permitting for $PM_{2.5}$

The EPA Administrator has signed a final rule designating the San Francisco Bay Area as nonattainment for the $PM_{2.5}$ 24-hour standard. The rule has not yet been published in the Federal Register, but is expected to become effective before the end of 2009. Under EPA policy, since the District will not have a SIP-approved permitting program for $PM_{2.5}$ when the nonattainment designation becomes effective, 40 C.F.R. Part 51, Appendix S will govern permitting for major sources of $PM_{2.5}$ until a SIP-approved permit program is in place.

Under Appendix S, the analysis is essentially the same as under the PSD rules, except that each nonattainment pollutant is evaluated independently: If CCPP and Marsh

Landing are different stationary sources, the 100 TPY nonattainment area major stationary source threshold is applied separately to each nonattainment pollutant at each facility.

Consistent with the PSD analysis above, Marsh Landing will not be a major source or modification under Appendix S because it is a different stationary source than the CCPP and its $PM_{2.5}$ emissions will be under 100 tpy. Hence, Marsh Landing will not require a permit pursuant to Appendix S. This conclusion applies irrespective of Marsh Landing's major source status for other nonattainment pollutants. *See* Appendix S (Appendix S requirements apply to a facility that would locate in an area designated "as nonattainment for a pollutant for which the source or modification would be major."); NSR Workshop Manual, pp. F.7, F.9 ("only if a modification results in a significant increase . . . of a *pollutant, for which the source is major and for which the area is designated nonattainment, do nonattainment requirements apply*.") (emphasis added); *see also* "New Source Review (NSR) Program Transitional Guidance," memorandum from John S. Seitz, Director Office of Air Quality Planning and Standards (Mar. 11, 1991) ("NSR nonattainment permit regulations apply *to pollutants for which the area is designated nonattainment*") (emphasis added). Hence, even if the facility's emissions were major for NOx or VOCs as ozone precursors (which they are not expected to be), that would not trigger Appendix S applicability for $PM_{2.5}$.

Conclusion

Marsh Landing should be permitted as a new facility, separate from the CCPP. A common sense review of the facts demonstrates that Marsh Landing is not dependent upon, an extension of, or a modification of the CCPP. Marsh Landing will not be a "major source" as defined by 40 C.F.R. § 52.21(b)(1)(i)(a), and therefore, does not require the issuance of a PSD permit. In addition, Marsh Landing will not be a "major source" for $PM_{2.5}$, and therefore will not need a federal nonattainment permit pursuant to Appendix S. Mirant only requires permits from the District, which, in any event, will require compliance with BACT.

ATTACHMENT 1

Pillsbury
Winthrop
Shaw
Pittman LLP

50 Fremont Street
San Francisco, CA 94105
Tel 415.983.1000
Fax 415.983.1200

MAILING ADDRESS
P. O. Box 7880
San Francisco, CA 94120
www.pillsburylaw.com

February 27, 2008

David R. Farabee
Phone: 415.983.1124
david.farabee@pillsburylaw.com

VIA E-MAIL AND U.S. MAIL

Mr. Brian Bateman
Director, Engineering Division
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Re: Permitting Approach for Marsh Landing Generating Facility at Site of Mirant Contra Costa Generating Facility

Dear Mr. Bateman:

At a recent meeting between you and other Bay Area Air Quality Management District ("District") staff with representatives of Mirant Corporation ("Mirant"), Mirant's representatives presented plans to construct a new generating facility with approximately 830 MW of capacity (the "Marsh Landing Generating Facility") adjacent to Mirant's existing facility (the "Contra Costa Generating Facility") in Contra Costa County, California, just east of the City of Antioch.

During the meeting, Mirant's representatives proposed that the District treat the Marsh Landing Generating Facility as a facility separate from the existing Contra Costa Generating Facility for permitting purposes, including Authority to Construct ("ATC") and Title V permitting. You asked for a letter describing the rationale for the District to permit the Marsh Landing Generating Facility as a separate facility. This letter responds to that request.

BACKGROUND

The Marsh Landing Generating Facility will be situated on a parcel of approximately 45 acres that will be created by a subdivision of the existing single parcel that constitutes the site of the Contra Costa Generating Facility. The parcel will be purchased by Mirant Marsh Landing, LLC from Mirant Delta, LLC pursuant to an arm's length sale.

The Contra Costa Generating Facility and the Marsh Landing Generating Facility will have separate ownership, financings and operations – a separateness and independence that is dictated by the different life cycles of the facilities. The currently operating generating units at the Contra Costa Generating Facility (Units 6 and 7) have been in operation since 1964. In addition to having a significantly shorter life expectancy than the Marsh Landing Generating Facility, these units have a different risk profile.

The Contra Costa Generating Facility (together with the existing Pittsburg Generating Facility) is owned by Mirant Delta, LLC. The Marsh Landing Generating Facility will be owned by a new company to be called Mirant Marsh Landing, LLC. While Mirant Marsh Landing, LLC and Mirant Delta, LLC will have ultimate common ownership under Mirant Americas, Inc. and its parent Mirant Corporation, it is necessary under Mirant Delta's financing arrangements, and will be necessary under Marsh Landing's financing arrangements, that the respective facilities have separate corporate identities and operate independently.

Mirant expects to sell the capacity from the Marsh Landing Generating Facility to a load serving entity in California pursuant to a long-term contract. That contract, together with the attractive environmental and operating characteristics that are being incorporated into the project design, are anticipated to facilitate the financing and, ultimately, the construction of the Marsh Landing Generating Facility. Neither the load serving entity who will purchase the output, nor the lenders to the Marsh Landing Generating Facility, will be willing to assume the risk that the operations of the Marsh Landing Generating Facility could be subject to the risk of curtailment because of operating risks or permit restrictions arising out of the older Contra Costa Generating Facility.

To that end, the Marsh Landing Generating Facility will be operationally separate from the Contra Costa Generating Facility. The Marsh Landing Generating Facility will have its own separate new control room and, to the extent possible, management and operating personnel independent and separate from the management and operation of the existing Contra Costa Generating Facility. In addition, the Marsh Landing Generating Facility will have an independent connection to the Pacific Gas and Electric Company ("PG&E") natural gas pipeline for its fuel supply. The Marsh Landing Generating Facility will use dry cooling, and will not use cooling water from the existing Contra Costa Generating Facility's supply from the Sacramento/San Joaquin River system. Also, the Marsh Landing Generating Facility will rely on recycled water from the Delta Diablo Sanitation District ("DDSD") for process water pursuant to its own separate contract with DDSD. The electricity generated by the new facility will be interconnected to the California ISO system at PG&E's existing substation at the site. To the extent that there are limited inter-company arrangements between Mirant Marsh Landing, LLC and Mirant Delta, LLC, those arrangements will be on an arms-length basis.

ANALYSIS

Definition of "Facility"

District rules define a "facility" as:

> "Any property, building, structure, or installation (or any aggregation of facilities) located on one or more contiguous or adjacent properties and under common ownership or control of the same person that emits or may emit any air pollutant and is considered a single major industrial grouping (identified by the first two-digits of the applicable code in *The Standard Industrial Classification Manual*)." District Rules 2-2-215, 2-6-206.

Considered together, the Marsh Landing Generating Facility and the existing Contra Costa Power Facility fall within the District's definition of "facility" given that they will be located on properties that are "contiguous or adjacent", their respective owners are under the common ownership of Mirant Americas, Inc. (notwithstanding several intervening corporate entities), and their respective operations are in the same industrial grouping (SIC code 4911: Electric Services). Even though the facilities would constitute a single "facility" under this definition, EPA policy and the District's own precedents allow the two facilities to be permitted separately as long as all requirements applicable to the combined source are met.

EPA Policy

Much of EPA's policy guidance regarding co-located facilities relates to situations where parties are seeking to have their facilities classified as completely separate facilities. That guidance generally doesn't apply in this situation. However, in several cases where EPA has determined that co-located facilities should be considered one facility, it has also specified that the facilities need not share a common permit. For example, in a November 27, 1996 letter to Jennifer Schlosstein at Simpson Paper Company from Matt Haber of EPA Region 9 (Enclosure 1), EPA determined that two facilities under separate ownership should be considered parts of the same source. However, EPA went on to state: "There is no need for Simpson and SMI to certify or assure compliance over each other in a title V permit. EPA recommends that even though they are considered one source, each facility apply for a separate title V permit, each with its own responsible official, under the title V application process."

In a September 13, 2000 letter to the Colorado Air Pollution Control Division from Kerrigan Clough of EPA Region 8 objecting to the Title V permit issued for a power generating facility co-located with a brewery (Enclosure 2), EPA noted that the subject facility is part of a single source made up of two facilities. EPA further directed that the Title V permit "must state that TriGen is considered to be part of a single source in

conjunction with the Coors Brewery, for purposes of determining applicability of nonattainment area new source review (NSR) and prevention of significant deterioration (PSD) requirements and Title V operating permit requirements. Future modifications of the two facilities that make up the single source must be addressed together to calculate net emissions increases for comparison with NSR and PSD significance levels." As pertinent here, although EPA directed that the facilities must be considered parts of a single source, it did not object to Colorado's issuance of separate Title V permits to the brewery and to the power plant.

Finally, on August 2, 1996, EPA's Office of Air Quality Planning and Standards issued a policy memo and an accompanying guidance document entitled "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act" (Enclosure 3). Although much of this guidance is not germane to non-military facilities, EPA did make several general statements regarding Title V permitting. As pertinent here, the guidance specifies as follows:

> After determining that stationary sources at a military installation are subject to title V permitting, permitting authorities have discretion to issue more than one title V permit to each major source at that installation, so long as the collection of permits assures that all applicable requirements would be met that otherwise would be required under a single permit for each major source. In other words, all stationary sources that are subject to title V permitting within a major source must be covered by one of these permits, and a major source may not be divided in a way that changes how it would be subject to or comply with applicable requirements compared with what would otherwise occur if a single title V permit were issued to that major source.
>
> Permitting authorities may accept multiple permit applications from each major source, provided that each permit application is certified by a responsible official who is selected in accordance with the requirements of 40 CFR 70.2 or 71.2.
>
> Military Major Source Policy Memo, pages 4-5.

<u>BAAQMD Precedents</u>

The District itself has interpreted its permitting rules to allow two facilities that comprise a single facility under the District's definition to have separate major source permits. For example, the Statement of Basis for the Major Facility Review Permit ("Title V Permit") Reopening – Revision 1 issued to the ConocoPhillips-San Francisco Refinery (Facility

#A-0016) states that the refinery and ConocoPhillips' nearby Carbon Plant (Plant # A0022) are a single facility with separate Title V permits:

> ConocoPhillips also owns the ConocoPhillips Carbon Plant (Plant # A0022). Because the refinery and the carbon plant are so close together, have a common owner, and are in the same industrial grouping, they are considered to be one facility. Because District review of the original permit applications was so close to completion at the time of this determination, the carbon plant has been issued a separate Title V permit, which is authorized by Title V regulations.
>
> Permit Evaluation and Statement of Basis: Site #A0016, page 5.

The District also has issued separate Title V permits to Valero Refining Company – California and to Valero Logistics Operations, L.P. (Facility #B5574), respectively, for the Benicia Refinery (Facility #B2626) and for "16 hydrocarbon liquid storage tanks that are integrated into the overall petroleum refinery and asphalt plant facilities" but are owned by Valero Logistics Operations. See, Permit Evaluation and Statement of Basis for Major Facility Review Permit for Valero Logistics Operations, L.P., Facility #B5574, December, 2005, page 4. According to the Statement of Basis, issuance of the Title V permit to Valero Logistics Operations reflected "simply a transfer of asset ownership [from Valero Refining to Valero Logistics], without any changes in overall emissions, applicable requirements, or monitoring," and the "statement of basis concerns only the assets owned by Valero Logistics Operations." Ibid., at page 1. The District described the tank ownership as follows: "This ownership includes the tank roof, associated primary and secondary seals, and attached instrumentation and control devices located inside the tank shell. All piping and equipment located outside the tank shell is owned by the refinery or asphalt plant owners." Ibid., at page 8. Due to this ownership arrangement, the District concluded that "organic emissions due to equipment leaks, as defined in BAAQMD Regulation 8, Rule 18, are not attributable to the Valero Logistics Operations assets. Therefore, Regulation 8, Rule 18 citations are retained in the B2626 and A0901 permits and are not shown on the tables in Section IV of this B5574 permit." Id.

Based on the EPA policies and District precedents described above, Mirant concludes that there is ample basis for the District to issue separate ATC and Title V permits to Mirant Marsh Landing, LLC for its new generating units to be located at the site of the Contra Costa Generating Facility.

Applicability of PSD Program

We also note that Mirant is aware of, and does not contest, the fact that co-location of the new sources with the existing power plant will result in the applicability to the Marsh

Landing Generating Facility of certain requirements that would not otherwise apply. In particular, the Contra Costa Generating Facility is an existing Prevention of Significant Deterioration ("PSD") major source and emissions from the Marsh Landing Generation Facility will exceed PSD "significance" thresholds for NO_x, PM_{10} and CO. Hence, due to its location adjacent to the Contra Costa Generating Facility site, the Marsh Landing Generating Facility will qualify as a PSD major modification.

CONCLUSION

As explained above, Mirant has proposed that the Marsh Landing Generating Facility have its own District permits to address a number of practical considerations that have a direct impact on Mirant's ability to obtain a long-term off-take agreement and financing for the new units. Mirant's request does not stem from any effort or desire to evade or minimize the efficacy of applicable District or federal requirements. As Mirant's representatives stated at the meeting with the District, and as restated here, by seeking separate permits Mirant is not trying to avoid any major source determination for the Marsh Landing Generating Facility, or to avoid the applicability to the Marsh Landing Generating Facility of any requirement that would apply to a similar expansion of the existing Contra Costa Generating Facility.

Thank you very much for your consideration of this matter. We are available to discuss this further with you at a mutually convenient time. If you have any additional questions, please contact Mark Strehlow of URS, at (510) 874-3055.

Very truly yours,

David R. Farabee

Encs.

cc: Lisa Cottle (Winston & Strawn)
Stephen Julien (Mirant)
Steve Nickerson (Mirant)
Karleen O'Connor (Winston & Strawn)
Jon Sacks (Mirant)
Mark Strehlow (URS)

ATTACHMENT 2

Attachment 2

Contra Costa Power Plant Actual Emissions (TPY)

	SO2	VOC	PM	NOx	CO*
2008	0.6	4.9	6.8	25.8	75
2007	0.5	4.1	5.7	12.1	75
2006	0.5	4.4	6.1	9.8	75
2005	1.1	9.4	13.0	20.4	75

* CO emissions are estimated using an AP-42 emission factor and are likely to be significantly overstated.

ATTACHMENT 3

Attachment 3

Marsh Landing Generating Station Expected Operational Emissions (TPY)[1]

SO2	VOC	PM 10	NOx	CO[2]
7.80	14.23	31.38	72.01	46.78

1. Emissions are based on a normal operating year. Simple cycle units' emissions are based on 1752 hours of operation (1705 operating hours with 167 startups and 167 shutdowns). Fuel gas preheater emissions are included.
2. Based on oxidation catalyst effective during startup at 85 percent removal of CO.