

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK,)	
and ERIN M. CROTTY, Commissioner of Environmental)	
Conservation of the State of New York)	
)	
Plaintiffs,)	
)	
v.)	Civ. No. 03CV4236
)	
MIRANT NEW YORK, INC., and)	Judge Koeltl
MIRANT LOVETT, L.L.C.)	
)	
Defendants.)	
)	
)	

CONSENT DECREE

WHEREAS, Plaintiffs, the State of New York and Erin M. Crotty, Commissioner of Environmental Conservation of the State of New York (collectively the “State”), filed a Complaint on June 11, 2003, against Mirant New York, Inc. and Mirant Lovett, L.L.C. (collectively, “Mirant”) pursuant to the Clean Air Act, 42 U.S.C. §§ 7400 *et seq.* (the “Act”), Sections 71-2103 and 71-2107 of the New York State Environmental Conservation Law (“ECL”) and New York State Executive Law § 63(12), for injunctive relief for alleged violations of, among other things:

- (a) the Clean Air Act’s New Source Review (“NSR”) provisions including the Prevention of Significant Deterioration (“PSD”) provisions of 42 U.S.C. §§ 7470-

92 and 40 C.F.R. § 52.21, incorporated into New York law in 6 NYCRR § 200.10; and

(b) the common law of public nuisance regarding emissions of nitrogen oxides (NO_x) and sulfur dioxide (SO₂) from the Lovett plant;

WHEREAS, the alleged violations are based primarily upon actions and/or omissions of Orange and Rockland Utilities, Inc., the prior owner of the Mirant facilities relevant herein, to which a Notice of Violation (“NOV”) was issued on or about May 25, 2000 regarding such actions and/or omissions;

WHEREAS, Mirant, on its own behalf and without prejudice to the rights, arguments, and defenses of the prior owners, denies the violations alleged in the Complaint, maintains that it has been and remains in compliance with the Clean Air Act and related state laws and is not liable for civil penalties or injunctive relief;

WHEREAS, the State and Mirant have agreed that, notwithstanding their respective positions on the issues herein, settlement of this action is in the best interest of the Parties and in the public interest, and that entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter; and

WHEREAS, the State and Mirant have consented to entry of this Consent Decree without trial of any issue;

NOW, THEREFORE, without any admission of fact or law, without any adjudication on the merits of the allegations set forth in the NOV and the Complaint, and without any admission of the violations alleged in the NOV and the Complaint, it is hereby ORDERED AND ADJUDGED as follows:

I. JURISDICTION AND VENUE

1. The Court has jurisdiction of this matter pursuant to section 304 of the Clean Air Act, 42 U.S.C. § 7604 and pursuant to 28 U.S.C. §§ 1331, 1355 and 1367 and ECL §§ 71-2103 and 2107. Solely for the purposes of this Consent Decree and the State's underlying Complaint, Mirant waives all objections that it may have to the jurisdiction of the Court, and to venue.

Except as expressly provided for herein, this Consent Decree shall not create any rights in any Party other than the State and Mirant.

II. APPLICABILITY

2. The provisions of this Consent Decree shall apply to and be binding upon the State and upon Mirant, its affiliates, successors and assigns.

3. If Mirant proposes to sell or transfer any of its real property or operations subject to this Consent Decree, it shall advise the purchaser or transferee in writing of the existence of this Consent Decree before such sale or transfer. The purchaser or transferee shall be made a Party-Defendant to this Consent Decree and thereby consent to joint and several liability with Mirant for all the requirements of this Consent Decree. Upon a showing by Mirant and/or purchaser or transferee that: (a) the purchaser or transferee has the financial capability, technical capability, and recent history of compliance to justify a transfer of liability from Mirant to the purchaser or transferee; (b) the purchaser or transferee has contracted or will contract with Mirant to assume the obligations and liabilities applicable to each unit subject to such sale or transfer; and (c) Mirant and the purchaser or transferee have properly allocated any emission allowance or credit requirements under this Consent Decree that may be associated with each such unit, the State shall agree to such a modification of this Consent Decree that shall make the purchaser or

transferee solely liable as a party defendant to this civil action and Consent Decree for all requirements under this Consent Decree that are applicable to the purchased or transferred unit. The State shall respond to such a showing within forty-five days of its submission by Mirant or transferee, and the State's agreement to such a modification of this Consent Decree shall not be unreasonably withheld.

4. Nothing in this Consent Decree shall be construed to impede Mirant and any purchaser or transferee of real property or operations subject to this Consent Decree from contractually allocating as between themselves the burdens of compliance with this Consent Decree; provided, however, that both Mirant and such purchaser or transferee shall remain jointly and severally liable to the State for the obligations of this Consent Decree until such time as a modification to this Consent Decree occurs under Paragraph 3 of this Consent Decree, except that Mirant shall not be liable for stipulated or other penalties for the acts and omissions of a *bona fide* purchaser of the assets.

5. Notwithstanding any retention of contractors, subcontractors or agents to perform any work required under this Consent Decree, Mirant shall be responsible for ensuring that all work is performed in accordance with the requirements of this Consent Decree. In any action to enforce this Consent Decree, Mirant shall not assert as a defense the failure of its employees, servants, agents, or contractors to take actions necessary to comply with this Consent Decree, unless Mirant establishes that such failure resulted from a Force Majeure event, as defined in this Consent Decree.

III. DEFINITIONS

The following definitions apply solely for purposes of this Consent Decree:

6. “Consent Decree” means this Consent Decree and the Appendices thereto.
7. “DEC” refers to the New York State Department of Environmental Conservation.
8. “Emission reduction credits” or “ERCs” means any decrease in emissions of a nonattainment contaminant (including volatile organic compounds [VOCs] and NO_x) in tons per year that is surplus, quantifiable, permanent, and enforceable and that results from a physical change in or a change in the method of operating an emission unit subject to 6 NYCRR Part 201 and is quantified as the difference between prior actual annual emissions or prior allowable annual emissions, whichever is less, and the subsequent maximum annual potential, and is certified in accordance with the provisions of 6 NYCRR 231-2.6.
9. “KW” means a kilowatt, which is one thousandth of a megawatt (MW).
10. “Lovett plant” means the Lovett electricity generating plant located in Stony Point, Rockland County, New York, owned and operated by Mirant. The Lovett plant consists of three generating units known as Units 3, 4 and 5.
11. “lb/mmBTU” means pounds per million British Thermal Units of heat input.
12. “MW” means a megawatt.
13. “NO_x” means oxides of nitrogen.
14. “Conversion” applies only to Unit 5 and means the removal or permanent disabling of devices, systems, equipment, and ancillary or supporting systems at Unit 5 to the extent that it cannot be fired with coal, and the subsequent installation of all devices, systems, equipment, and ancillary or supporting systems at Unit 5 needed to fire that Unit with natural gas under the limits set in this Consent Decree. If Unit 5 is converted under this Consent Decree, number two fuel oil may be used in accordance with applicable operating permits.

15. “Repower” applies only to Unit 3 and means the removal or permanent disabling of devices, systems, equipment, and ancillary or supporting systems at Unit 3 to the extent that it cannot fire coal unless that coal is fired using advanced clean coal technology, and the subsequent installation of all devices, systems, equipment, and ancillary or supporting systems at Unit 3 needed to fire that Unit with natural gas or other permitted fuel (including coal if fired using clean coal technology), including a combined cycle gas turbine, a heat recovery steam generator (HRSG) and associated equipment or equivalent generating equipment and the installation of a DEC-approved SCR or equivalent technology for control of NO_x emissions and a carbon monoxide catalyst for control of carbon monoxide emissions if required by permit.

16. “SCR” means Selective Catalytic Reduction.

17. “SO₂” means sulfur dioxide.

18. “SO₂ Allowance” has the same definition of “allowance” found at 42 U.S.C. § 7651a(3): “an authorization, allocated to an affected Unit, by the Administrator [of EPA] under [Subchapter IV of the Act] to emit, during or after a specified calendar year, one ton of sulphur dioxide.”

19. The "30-Day Rolling Average Emission Rate" for a particular air contaminant shall be determined by determining each operating day's heat input weighted average air contaminant emission rate based on the heat input weighted average of the block hourly arithmetic average emission rates during each operating day (measured in pounds per million BTU) using 40 C.F.R. Part 75-compliant continuous emission monitoring system data. The block hourly heat input weighted average emission rate shall be calculated for each one-hour period starting with the period 12:00:00 a.m. to 12:59:59 a.m. and continuing through until the last period 11:00:00 p.m.

to 11:59:59 p.m. The 30-Day Rolling Average Emission Rate shall be the heat input weighted average of the operating day heat input weighted air contaminant emission rates for a thirty operating day period. A new 30-Day Rolling Average Emission Rate for that air contaminant shall be calculated for each new operating day, based upon the total number of pounds of that contaminant emitted that day and during the previous twenty-nine consecutive operating days divided by the total number of British Thermal Units of heat input used during that day and during those previous twenty-nine consecutive operating days.

20. “Operation Status” of Unit 4 or Unit 5 means that period during which the unit in question is firing fuel except when firing fuel while that unit is in Transitional Operation Status.

21. “Operational Status” means the status the unit in question is in at any given time.

22. “Operating Day” for Unit 4 or Unit 5 means any calendar day, starting at 12:00:00 a.m. and ending 11:59:59 p.m., during which the Unit in question fires fossil fuel for at least one hour.

23. “Transitional Operation Status” for a unit means:

A. in the case of NO_x , any period the unit is firing fuel at below fifty percent load. Mirant may not intentionally reduce or maintain load on a unit below fifty percent in order to maintain the unit in Transitional Operation Status in order to avoid complying with the emission rates provided for in this Consent Decree.

B. in the case of SO_2 , any period the unit is firing coal or oil (including periods when coal or oil is cogenerated with gas) during which in-duct flue gas velocity and/or temperature are below minimum operational values specified by the SO_2 emission control system vendor, except that Mirant may not intentionally reduce or maintain temperature or in-duct flue gas

velocity below the minimum operational values in order to maintain the unit in Transitional Operation Status in order to avoid complying with the emission rates provided for in this Consent Decree. The minimum operational temperature and velocity values are the conditions at which ninety percent of the design SO₂ removal rate is achieved; they are to be determined initially by vendor data but may be adjusted by testing the system after installation.

24. “Extent Feasible,” when used in reference to optimization of the operation of emission controls in this Consent Decree means operating adjustments but does not include changes in engineering or design requiring capital expenditures, except as provided in Paragraph 33.B(ii) of this Consent Decree.

IV. EMISSION REDUCTIONS AND CONTROLS

A. REPOWERING OF UNIT 3

25. By November 1, 2003, Mirant intends to submit subject to the provision of Paragraph 26, infra: (a) an application pursuant to Article X of the Public Service Law (PSL) to the New York State Board on Electric Generation and the Environment for a certificate to repower Unit 3 of the Lovett plant as a natural gas fired electricity generating unit of approximately 250 megawatts (nominal); (b) an application pursuant to PSL Article VII to construct or extend a pipeline capable of providing sufficient natural gas to the Lovett plant for repowered Unit 3 and converted Unit 5; and (c) applications for any other permits necessary to modify and operate Unit 3 as a repowered facility. Mirant shall exercise diligent efforts to timely respond to any issues arising in the course of the permitting/certificate proceedings and timely provide the information needed by the permit/certificate issuing agencies to process the applications.

26. Mirant may abandon its plans to repower Unit 3 at any time by providing notice to

DEC in accordance with Paragraph 65 of this Consent Decree within ten days of deciding to discontinue the repowering of Unit 3. If Mirant abandons its plans to repower Unit 3, the release and covenant not to sue of Paragraphs 44 and 45 shall be inapplicable to Unit 3.

B. CONVERSION OR CONTROL OF UNIT 5/INSTALLATION OF CONTROLS ON UNIT 4

27. By April 30, 2007, Mirant shall either: (a) complete conversion of Unit 5 to a natural gas fired boiler and permanently cease the firing of coal in Unit 5; (b) complete installation of controls on Unit 5 in accordance with Paragraph 28, below or (c) permanently discontinue operation of Unit 5. Mirant shall inform the State of its election, which the State shall consider to be information which if disclosed would cause substantial injury to Mirant's competitive position, by no later than August 1, 2004. Nothing in this Consent Decree shall be construed as prohibiting Mirant from complying with the requirements of this Consent Decree by discontinuing operation of Unit 5 at any time, even if it has elected to convert or control it.

28. If Mirant elects to control Unit 5, rather than convert it or permanently discontinue its operation, the requirements for installation of controls on Unit 5 are governed by this Paragraph 28.

A. NO_x Emission Control

(i) The NO_x emission control system implemented by Mirant on Unit 5 shall be an SCR unit (unless Mirant demonstrates to DEC that equivalent or greater NO_x emission reductions can be achieved through an alternative control technology approved by DEC). The NO_x emission control system selected by Mirant shall attain an average emission rate of 0.10 lb. NO_x/mmBTU on a thirty day rolling average over all periods of operation from fifty percent load

to full load. Beginning April 30, 2007, Mirant shall not emit NO_x from Unit 5 at a rate in excess of the permissible 30-Day Rolling Average Emission Rate for NO_x pertaining to Unit 5.

(ii) Mirant shall operate the SCR at all times Unit 5 is in Operation Status or is in Transitional Operation Status except when the average flue gas temperature at the inlet to the SCR catalyst bed is below that temperature specified by the SCR vendor at which catalytic reaction with ammonia may begin. Mirant shall have all flue gas pass through the SCR at all times that Unit 5 fires fuel, shall inject ammonia at all times the average flue gas temperature at the inlet to the SCR catalyst bed is above that temperature specified by the SCR vendor at which catalytic reaction with ammonia may begin, and shall operate and maintain the SCR in a manner to optimize reduction of NO_x emissions while avoiding ammonia slip above levels authorized by permit.

(iii) In no event shall total annual NO_x emissions from Unit 5 exceed 1072 tons.

B. SO₂ Emission Control

(i) In light of site specific technical constraints, the SO₂ emission control system implemented by Mirant on Unit 5 shall consist of alkaline-based in-duct sorbent injection (unless Mirant demonstrates to DEC that equivalent or greater SO₂ emission reductions can be achieved through an alternative control technology approved by DEC). Beginning April 30, 2007, Mirant shall not emit SO₂ from Unit 5 at a rate in excess of the permissible 30-Day Rolling Average Emission Rate for SO₂ pertaining to Unit 5.

(ii) While Unit 5 is in Operation Status or Transitional Operation Status, Mirant shall operate and maintain the required SO₂ emission control system in a manner to

optimize reduction of SO₂ emissions; provided, however, that Mirant need not operate the required SO₂ emission control system when Unit 5 is not fired with coal.

C. Baghouse. By no later than April 30, 2007, Mirant shall install on Unit 5 a baghouse designed to maintain compliance with applicable permit requirements, unless it elects instead to install a baghouse on Unit 4. Mirant shall inform DEC of its election by no later than August 1, 2004.

D. Permit. In the event that Mirant elects to install controls on Unit 5, Mirant shall submit any necessary permit applications relating to Unit 5 (which application shall contain a description of the proposed NO_x and SO₂ controls) by no later than August 1, 2003; shall award its construction contract for such controls by no later than August 1, 2004; and shall commence physical construction activities relating to installation of such controls by no later than November 1, 2006. For purposes of this Subparagraph 28.D and Subparagraph 51.A of this Consent Decree, the dates set forth in this Subparagraph 28.D are based upon the expectation that DEC shall issue the permits subject to such applications by February 1, 2004.

29. If Mirant elects to convert Unit 5, rather than install controls in accordance with Paragraph 28, above, or permanently discontinue its operation, the requirements for reducing emissions from Unit 5 are governed by this paragraph. In each calendar year starting with calendar year 2009, emissions of NO_x from Unit 5 shall not exceed 638 tons, with emissions of NO_x from Unit 5 during the period May 1 through September 30 of each such calendar year not exceeding 319 tons. If Mirant converts Unit 5, Mirant shall provide the State with annual reports of its NO_x emissions that demonstrate its compliance with the applicable limitations. The aforesaid limitation on annual NO_x emissions from Unit 5 shall be inapplicable if, at any time

after converting Unit 5, Mirant equips Unit 5 with an SCR that qualifies as Best Available Control Technology, as defined by 42 U.S.C. § 7479(3). Within three months of converting Unit 5, Mirant shall consent to a modification to its Title V operating permit incorporating the above-referenced limitations on the annual NO_x emissions of Unit 5.

30. By April 30, 2008, Mirant shall complete installation of controls on Unit 4 in accordance with Paragraph 31, below or permanently discontinue its operation. Mirant shall inform the State of its election, which the State shall consider to be information which if disclosed would cause substantial injury to Mirant's competitive position, by no later than August 1, 2005. Nothing in this Consent Decree shall be construed as prohibiting Mirant from complying with the requirements of this Consent Decree by discontinuing operation of Unit 4 at any time, even if it has elected to install controls on it.

31. If Mirant elects to control Unit 4, rather than permanently discontinue its operation, the requirements for installation of controls on Unit 4 are governed by this Paragraph 31.

A. NO_x Emission Control

(i) The NO_x emission control system implemented by Mirant on Unit 4 shall be an SCR unit (unless Mirant demonstrates to DEC that equivalent or greater NO_x emission reductions can be achieved through an alternative control technology approved by DEC). The SCR and catalyst selected by Mirant shall attain an average emission rate of 0.10 lb. NO_x/mmBTU on a thirty day rolling average over all periods of operation from fifty percent load to full load. Beginning April 30, 2008, Mirant shall not emit NO_x from Unit 4 at a rate in excess of the permissible 30-Day Rolling Average Emission Rate for NO_x pertaining to Unit 4.

(ii) Mirant shall operate the SCR at all times Unit 4 is in Operation

Status or Transitional Operation Status except when the average flue gas temperature at the inlet to the SCR catalyst bed is below that temperature specified by the SCR vendor at which catalytic reaction with ammonia may begin. Mirant shall have all flue gas pass through the SCR at all times that Unit 4 fires fuel, shall inject ammonia at all times the average flue gas temperature at the inlet to the SCR catalyst bed is above that temperature specified by the SCR vendor at which catalytic reaction with ammonia may begin, and shall operate and maintain the SCR in a manner to optimize reduction of NO_x emissions while avoiding levels of ammonia slip above levels authorized by permit.

(iii) In no event shall total annual NO_x emissions from Unit 4 exceed 1025 tons.

B. SO₂ Emission Control

(i) In light of site specific technical constraints, the SO₂ emission control system implemented by Mirant on Unit 4 shall consist of alkaline-based in-duct sorbent injection (unless Mirant demonstrates to DEC that equivalent or greater SO₂ emission reductions can be achieved through an alternative control technology approved by DEC). Beginning April 30, 2008, Mirant shall not emit SO₂ from Unit 4 at a rate in excess of the permissible 30 Day Rolling Average Emission Rate for SO₂ pertaining to Unit 4.

(ii) While Unit 4 is in Operation Status or Transitional Operation Status, Mirant shall operate and maintain the required SO₂ emission control system in a manner to optimize reduction of SO₂ emissions; provided, however, that Mirant need not operate the required SO₂ emission control system when Unit 4 is not fired with coal.

C. Baghouse. By no later than April 30, 2008, Mirant shall install on Unit 4 a

baghouse designed to maintain compliance with applicable permit requirements, unless it elects instead to install a baghouse on Unit 5.

D. Permit. Unless Mirant elects to discontinue operation of Unit 4, Mirant shall submit any necessary permit applications relating to Unit 4 (which application shall contain a description of the proposed NO_x and SO₂ controls) by no later than April 1, 2004; shall award its construction contract for such controls by no later than August 1, 2005; and shall commence physical construction activities relating to installation of such controls by no later than November 1, 2007. For purposes of this Subparagraph 31.D and Subparagraph 51.A of this Consent Decree, the dates set forth in this Subparagraph 31.D are based upon the expectation that DEC shall issue the permits subject to such applications by January 1, 2005.

C. DETERMINATION OF PERMISSIBLE EMISSION RATE

32. The maximum permissible emission rate for NO_x emissions from Unit 4 or from Unit 5 (unless Unit 5 is converted to gas firing only), as the case may be, is the maximum 30-Day Rolling Average Emission Rate for NO_x that this Consent Decree authorizes Mirant to emit from that unit. For any given thirty day rolling average period, the permissible emission rate shall be the weighted average of the emission rates set forth below, weighted based on the heat input for each Operational Status in the thirty operating day period used in calculating the 30-Day Rolling Average Emission Rate:

- A. during hours when the unit in question is in Operation Status, 0.10 lbs/mmBTU;
- B. during hours when the unit in question is in Transitional Operation Status,
 - (i) during hours when the unit in question is firing fuel and the average

flue gas temperature at the inlet to the SCR catalyst bed is below that temperature at which catalytic reaction with ammonia may begin, 0.45 lbs/mmBTU; and

(ii) during all other hours while the unit in question is in Transitional Operation Status for NO_x control purposes, that rate reflecting optimization of the operation of the SCR at any given average flue gas temperature at the inlet to the SCR catalyst bed in accordance with the vendor's specifications while avoiding ammonia slip above levels authorized by permit. For purposes of determining compliance with this provision, by no later than six months after Mirant's selection of a vendor for the NO_x emission control equipment for the unit in question, or initiation of construction of the SCR for that unit, whichever is earlier, Mirant shall provide DEC with a preliminary graph (and with the supporting documentation used in preparing the preliminary graph), the "x" axis of which shall represent SCR inlet temperature and the "y" axis of which shall represent the emission rate of NO_x in pounds per mmBTU, with the resulting curve on that graph representing the optimized NO_x emission rate at a given heat input rate with an ammonia slip at or below levels authorized by permit. DEC shall review the preliminary graph and its supporting documentation to determine whether it is acceptable to serve as the graphic representation of the optimized NO_x emission rate at a given heat input rate with an ammonia slip at or below levels authorized by permit. In evaluating the aforesaid preliminary graph, the DEC shall accord such a graph a presumption of reasonableness. If, despite such presumption of reasonableness, DEC determines that the preliminary graph and its supporting documentation are not acceptable, Mirant shall submit to DEC a revised preliminary graph and supporting documentation that accounts for DEC's comments to the Extent Feasible. Mirant shall not operate Unit 5 after April 30, 2007, and shall not operate Unit 4 after April 30, 2008, until DEC

determines that the preliminary graph and its supporting documentation pertaining to that unit are acceptable, which determination shall not be unreasonably withheld. Upon DEC's acceptance of it, the preliminary graph shall be the final graph; and the final graph shall be used to determine compliance with this Consent Decree; and any permits incorporating the emission rate required by this Consent Decree will be modified to reflect the emission rate for Transitional Operation Status. For the first twelve months after installation of the NO_x emission control technology on a unit, Mirant shall, in coordination with DEC, optimize removal efficiency of the NO_x emission control systems during Transitional Operation Status through adjustments in operational practices.

33. The permissible emission rate for SO₂ emissions from Unit 4 or from Unit 5, as the case may be, is the maximum 30-Day Rolling Average Emission Rate for SO₂ that this Consent Decree authorizes Mirant to emit from that unit. For any given thirty day rolling average period, the permissible emission rate shall be the weighted average of the emission rates set forth below, weighted based on the heat input for each Operational Status in the thirty day period:

- A. during hours when the unit in question is in Operation Status, 0.60 lbs/mmBTU;
- B. during hours when the unit in question is in Transitional Operation Status,
 - (i) during hours when the unit in question is firing fuel and the average in-duct flue gas temperature or in-duct flue gas velocity is below that specified by the SO₂ emission control system vendor at which reaction with the sorbent may begin, 1.0 lb SO₂/mmBTU (unless the use of coal with a higher emission rate, not to exceed 1.1 lb SO₂/mmBTU, is authorized under Paragraph 37 of this Consent Decree); and
 - (ii) during all other hours while the unit in question is in Transitional

Operation Status for SO₂ emission control purposes, that rate reflecting optimization of the operation of the SO₂ emission control system at any given average in-duct flue gas temperature and velocity in accordance with the vendor's specifications. For purposes of determining compliance with this provision, by no later than six months after Mirant's selection of a vendor for the SO₂ emission control system equipment for the unit in question, or initiation of construction of the SO₂ emission control system, whichever is earlier, Mirant shall provide DEC with a preliminary graph (and with the supporting documentation used in preparing the preliminary graph), the "x" axis of which shall represent heat input for the unit in question measured in mmBTUs and the "y" axis of which shall represent the emission rate of SO₂ in pounds per mmBTU, with the resulting curve on that graph representing the optimized SO₂ emission rate at a given heat input rate and velocity using coal with an SO₂ generation potential not to exceed 1.0 lb/mmBTU (unless the use of coal with a higher emission rate is authorized under Paragraph 37 of this Consent Decree, in which event, the graph and supporting documentation shall assume use of coal having an SO₂ generation rate not exceeding that which is authorized in accordance with Paragraph 37 or 1.1 lb/mmBTU, whichever is lower). DEC shall review the preliminary graph and its supporting documentation to determine whether it is acceptable to serve as the graphic representation of the optimized SO₂ emission rate at a given heat input rate and velocity. If DEC determines that the preliminary graph and its supporting documentation are not acceptable, Mirant shall submit to DEC a revised preliminary graph and supporting documentation that accounts for DEC's comments to the Extent Feasible. Mirant shall not operate the unit for which the preliminary graph is being submitted until DEC determines that the preliminary graph and its supporting documentation are acceptable. For the first twelve

months after installation of the SO₂ emission control technology on a unit, Mirant shall, in coordination with DEC, optimize removal efficiency of the SO₂ emission control systems during Transitional Operation Status through adjustments in operational practices, and without incurring any additional capital expenditures in excess of 1.0 % of the capital expenditures relating to installation of those controls. Within ninety days of completion of the initial year of operation of the SO₂ emission control system, Mirant shall submit a final graph representing the optimized SO₂ emission rate at a given heat input (and with the supporting documentation used in preparing the final graph). DEC shall review the final graph and its supporting documentation to determine whether that graph is acceptable to serve as the graphic representation of the optimized SO₂ emission rate at a given heat input rate during Transitional Operation Status. Upon DEC's acceptance of it, which acceptance shall not be withheld unreasonably, the DEC-accepted final graph shall be used to determine compliance with this Consent Decree; and any permits incorporating the emission rate required by this Consent Decree will be modified to reflect the emission rate for Transitional Operation Status achieved as a result of the optimization process. Until that modification occurs, during those hours a unit is in Transitional Operation Status, the SO₂ emission rate from that unit shall not exceed that rate as shown on the DEC-approved final graph.

34. SO₂ emission compliance. If Mirant is installing the SO₂ emission control systems on both Units 4 and 5, Mirant may demonstrate compliance with the required emission rate through averaging between the two units, using a weighted average based on heat input. No stipulated penalties or civil penalties shall be available for exceedances of the SO₂ emission rate requirements prior to April 30, 2009 that are less than ten percent above the applicable emission

rate.

35. Alternative Control Technology. Mirant may substitute at any time alternative control technologies for the SO₂ and/or NO_x control technologies required by this Consent Decree upon showing, to the State's satisfaction, that the proposed alternative control technologies will achieve emission reductions that meet or exceed those required under this Consent Decree and that installation of such alternative technologies shall not be completed after, in the case of Unit 5, April 30, 2007 and, in the case of Unit 4, April 30, 2008. The State's approval of such alternative control technologies shall not be unreasonably withheld. If the State approves such alternative control technologies, the parties agree to modify, as appropriate, the provisions of this Consent Decree that may be affected by such alternative control technologies including, without limitation, any provisions relating to "Transitional Operation Status."

36. Mirant shall diligently apply for and consent to amendments to its Title V permits to incorporate the agreed upon operation of the NO_x and SO₂ emissions controls described in this Consent Decree.

37. The State recognizes that the coal Mirant presently uses to comply with 6 NYCRR Part 225 may not be suitable to fire Units 4 and 5 once the SCRs are placed into operation because of the potential for premature deactivation of the catalyst. Accordingly, upon approval by the U.S. Environmental Protection Agency ("USEPA") of the SIP revision reflecting such use, the State will authorize Mirant to use such higher sulfur content coal to mitigate such poisoning problem, and DEC shall revise 6 NYCRR Part 225 and apply for a SIP revision to reflect such use upon Mirant's demonstrating to DEC's satisfaction that use of coal containing sulfur at levels above those presently allowed by 6 NYCRR Part 225, coupled with the operation of the SO₂

emission control technology required by this Consent Decree, will not detrimentally affect ambient air quality as shown through the three hour ambient air standard for SO₂ identified in 40 C.F.R. § 50.5 and through the twenty-four hour and annual ambient air quality standards for SO₂ identified in 40 C.F.R. § 50.4. Until such State authorization is given, Mirant shall not use coal from which the SO₂ emissions shall exceed 1.0 lb/mmBTU.

D. RELATIONSHIP OF UNIT 3's REPOWERING TO COMPLIANCE DATES FOR UNITS 4 AND 5

38. Mirant may, at its own discretion, repower Unit 3 and nothing herein authorizes or prevents Mirant from doing so. However, if Mirant submits all permit/certificate applications required for the repowering of Unit 3 by November 1, 2003, and exercises diligent efforts to expeditiously respond to any issues arising in the course of the permitting/certificate proceedings and timely provides the information needed by the permit/certificate issuing agencies to process the applications, the deadlines above for control of Unit 4 or control or conversion of Unit 5 may be adjusted as follows: If, notwithstanding Mirant's diligent efforts to complete construction, the process of review of the applications for the permits and certificates for the repowering of Unit 3 is extended beyond December 31, 2004 and Unit 3 is not repowered by September 30, 2006, then the completion dates for control of Unit 4 and conversion or control of Unit 5 shall be extended by one month for each month that the process relating to review of the permit and certificate applications for repowering of Unit 3 is extended beyond December 31, 2004 due to circumstances beyond Mirant's control. In no event shall the completion of the conversion or control of Unit 4 or Unit 5 be extended beyond December 31, 2008.

E. EMISSION REDUCTION CREDITS

39. Nothing in this Consent Decree shall be construed to prevent, limit, or restrict Mirant from generating and using VOC ERCs. Furthermore, in consideration for Mirant's agreement to meet the NO_x emission rates specified above, notwithstanding Mirant's contention that such emission rates are not required by applicable law, the parties agree that in determining whether any NO_x emission reductions at Units 4 and 5 are "surplus," in accordance with 6 NYCRR 231-2.6(a)(5)(ii)(a), pursuant to any application for credits filed by Mirant during the term of this Consent Decree, (i) the "prior allowable annual emissions" as defined in 6 NYCRR 231-2.1(b)(31) shall be 1025 tons per year for Unit 4 and 1072 tons per year for Unit 5 notwithstanding any requirement of this Consent Decree, unless a change in the governing laws limits Mirant's annual emissions to below those levels; and (ii) any calculation of "prior actual annual emissions" shall not include any emission reductions resulting from implementation of the requirements of this Consent Decree. Mirant will use all NO_x ERCs generated in accordance with this Paragraph 39 for projects developed by Mirant New York, Inc. in New York only, and the NO_x ERCs shall not be sold to any party not a wholly owned subsidiary of Mirant New York, Inc. or a bona fide purchaser of all the Lovett assets; provided, however, that nothing herein shall be read to prevent Mirant from generating NO_x ERCs for achieving any reductions not required by this Consent Decree nor limiting the sale, exchange, or other transfer of such ERCs to third parties.

F. RETIREMENT OF SULFUR DIOXIDE ALLOWANCES

40. A. By December 31, 2008, Mirant will permanently retire or restrict SO₂ Allowances as follows: For each year during the years 2009 to 2030, Mirant will permanently retire 972 SO₂ Allowances presently allocated to Unit 4 and 982 SO₂ Allowances presently

allocated to Unit 5.

B. Additionally, for each year during the years 2009 to 2030, Mirant will place 324 SO₂ Allowances presently allocated to Unit 4 and 327 SO₂ Allowances presently allocated to Unit 5 in a separate Acid Rain Program Mirant account. Additionally, for each year during the years 2009 to 2030, for any year in which the performance of the SO₂ technology required by this Consent Decree results in Unit 4 or Unit 5 performing at an SO₂ emission rate below the SO₂ emission rate required by Paragraph 33 of this Consent Decree, Mirant will place in such separate Acid Rain Program Mirant account an amount of SO₂ Allowances presently allocated to such Unit which is equal to the corresponding additional reduction in SO₂ emissions for that year directly caused by the lower SO₂ emission rate. The SO₂ Allowances in such separate Acid Rain Program Mirant account may only be used for SO₂ emissions from Lovett Unit 4 or 5 in any years Unit 4 SO₂ emissions exceed 3714 tons or Unit 5 SO₂ emissions exceed 3569 tons, and if any such Allowance is not needed and used at Lovett Unit 4 or 5 for such purpose within a period of two years following the vintage allocation year of the Allowance, Mirant will permanently retire such Allowance. This surrender of SO₂ Allowances is in addition to the surrender of Allowances under Paragraph 40.A. In no event shall Mirant sell or transfer any of the SO₂ Allowances placed in this separate Acid Rain Program Mirant account under this Paragraph 40.B to a third party or use such Allowances at any other unit.

G. PROHIBITION ON NETTING CREDITS FOR NO_x AND SO₂ EMISSION REDUCTIONS

41. For any and all emission control actions taken by Mirant to comply with the terms of this Consent Decree, including but not limited to the repowering of certain units, any emission

reductions achieved shall not be considered as a creditable contemporaneous emission decrease for the purpose of obtaining a netting credit under the PSD and nonattainment NSR programs, except to the extent such decrease is greater than that required by this Consent Decree. The aforesaid shall not apply to the Emission Reduction Credits created in accordance with Paragraph 39, *supra*.

V. PERMITS AND RESOLUTION OF CLAIMS

A. Permits

42. In any instance where otherwise applicable law or this Consent Decree requires Mirant to secure a permit or certificate to authorize constructing or operating any device under this Consent Decree, Mirant shall take all such measures within its control needed to successfully obtain such permit or certificate in a diligent manner. Such applications shall be completed and submitted to the appropriate authorities to allow sufficient time for all legally required processing and review of the permit or certificate request.

43. Mirant shall apply for amendments to its Title V Operating Permit for the Lovett plant as necessary to include in such Title V permit all applicable requirements from this Consent Decree that are consistent with the State Title V program, including all performance, operational, maintenance, and control technology requirements.

B. Resolution of Past Claims

44. The State covenants not to sue and releases Mirant for all of the civil claims that were or could have been brought by the State against Mirant for violations at Lovett Units 4 and 5 (and Unit 3 if Mirant completes repowering of Unit 3 by September 30, 2006), prior to and including the date of entry of this Consent Decree, of:

A. the Prevention of Significant Deterioration or Non-Attainment NSR provisions of Parts C and D of the Clean Air Act and 40 C.F.R. § 52.21, and the New Source Performance Standards of 42 U.S.C. § 7411 and 40 C.F.R. Part 60;

B. 6 NYCRR § 200.10 (to the extent it incorporates the federal regulations at 40 C.F.R. § 52.21 and 40 C.F.R. Part 60) and Part 231; and

C. related claims at common law, including public nuisance law, pertaining to emissions of NO_x, SO₂, and particulate matter.

D. This covenant not to sue specifically includes any claims for violations of the provisions identified in this Paragraph 44 related to the Mirant's repair of Unit 5 performed as a result of a May 16, 2001 incident at that Unit.

C. Resolution of Future Claims

45. The State covenants not to sue Mirant for civil claims under the Prevention of Significant Deterioration or Non-Attainment NSR provisions of Parts C and D of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; the New Source Performance Standards of 40 C.F.R. Part 60, subpart D or Da, as applied to modifications as defined by 40 C.F.R. § 60.14; 6 NYCRR § 200.10 (to the extent it incorporates the federal regulations at 40 C.F.R. § 52.21 and Part 60, subpart D, as applied to modifications as defined by 40 C.F.R. § 60.14), and 6 NYCRR Parts 201 and 231, at Lovett Units 4 and 5 (and Unit 3 if Mirant completes repowering of Unit 3 by September 30, 2006), to the extent such claims are based on failure to obtain PSD or nonattainment NSR permits for, or undertaking modifications as defined by 40 C.F.R. §§ 60.14 and 52.21, regarding:

A. work that this Consent Decree expressly directs Mirant to undertake or which is required to accommodate such work, regardless of when such work is undertaken; or

B. repairs, replacement or maintenance or other changes to Units 4 and 5 not required by this Consent Decree (and Unit 3 if Mirant completes repowering of Unit 3 by September 30, 2006) if:

(i) such change is commenced after the entry of this Consent Decree,
(ii) such change is commenced during the time this Consent Decree applies to the Unit at which this change has been made, is commenced prior to December 31, 2008 and is completed prior to December 31, 2009;

(iii) Mirant is otherwise in material compliance with this Consent Decree; and

(iv) hourly emission rates of NO_x and SO₂ at the changed Unit(s) do not exceed their respective maximum hourly emission rates prior to the change, as measured by 40 C.F.R. § 60.14(h).

46. The provisions of Paragraph 45 shall terminate on December 31, 2009; provided, however, that the State may not sue Mirant at any time thereafter for work encompassed within Subparagraphs 45.A and B(ii), above.

VI. STIPULATED PENALTIES AND REMEDIES

47. For purposes of this Consent Decree, within thirty days after written demand from the State, and subject to the provisions of Sections XI (Force Majeure) and XII (Dispute Resolution), Mirant shall pay the following stipulated penalties to the State for each failure by Mirant to comply with the terms of this Consent Decree:

A. 1. For failure to complete installation of the emission controls on Unit 4 by April 30, 2008 after having elected to install such controls: \$5,000 for each day after April

30, 2008 but before June 1, 2008 that such installation has not been completed, and \$10,000 for each day after May 31, 2008 that such installation was not been completed; however, no stipulated penalties shall be payable if Mirant does not operate Unit 4 after April 30, 2008 after having elected to install such controls, and resumes operation only after completing installation of such controls.

2. For failure to discontinue operation of Unit 4 by April 30, 2008 after having elected to do so: \$27,500 for each day after April 30, 2008 that Unit 4 operates without emission controls.

B. 1. For failure to complete installation of the emission controls required on Unit 5 by April 30, 2007 after having elected to install such controls: \$5,000 for each day after April 30, 2007 but before June 1, 2007 that such installation has not been completed, and \$10,000 for each day after May 31, 2007 that such installation has not been completed; however, no stipulated penalties shall be payable if Mirant does not operate Unit 4 after April 30, 2007 after having elected to install such controls and resumes operation only after completing installation of such controls.

2. For failure to complete conversion of Unit 5 by April 30, 2007 after having elected to convert: \$5,000 for each day after April 30, 2007 but before June 1, 2007 that such conversion has not been completed, and \$10,000 for each day after May 31, 2007 that such conversion has not been completed; however, no stipulated penalties shall be payable if Mirant does not operate Unit 5 after April 30, 2007 after having elected to convert and resumes operation only after completing conversion of the unit.

3. For failure to discontinue operation of Unit 5 by April 30, 2007

after having elected to do so: \$27,500 for each day after April 30, 2007 that Unit 4 operates without emission controls.

C. For failure to permanently retire SO₂ allowances in accordance with Paragraph 40: \$1,500 per day plus, (i) if the allowances are sold, the value of any consideration received and (ii) if the allowances are used, the value of the allowances used.

D. For violation of any Consent Decree provisions relating to use of ERCs as provided in Paragraph 41: double the value of any consideration received by Mirant for any sale or transfer of each ERC.

E. For purposes of this Consent Decree, each failure to comply with the maximum permissible emission rate for a thirty day rolling average period constitutes a single “occurrence” of a failure to comply with the maximum permissible emission rate. Violation of the thirty day rolling average emission limit is a violation on every day of the thirty day period on which the average is based; however, when a new occurrence of a violation of the thirty day rolling average emission limit occurs within less than thirty days, Mirant shall not pay a daily stipulated penalty for any day of the new occurrence for which a stipulated penalty has already been paid. No penalties shall be payable under this Subparagraph 47.E for a thirty day rolling average period that contains one or more “missing data periods,” as 40 C.F.R. 75.33 uses that term if, after the missing data period or periods are excluded from the determination of the emission rate for that thirty day rolling average period, there is no exceedance of the maximum permissible emission rate for that thirty day rolling average period.

1. In the event of a NO_x exceedance involving Unit 5 during the period May 1, 2007 to April 30, 2008, inclusive dates; and in the event of a NO_x exceedance involving

Unit 4 during the period May 1, 2008 to April 30, 2009, inclusive dates:

If the number of the occurrence of the failure is as noted below, irrespective of the percentage by which the maximum permissible emission rate was exceeded:

then the per-day penalty for that occurrence is as shown below, based upon the percentage by which the maximum permissible emission rate was exceeded:

	Less than 5%	More than 5% but less than 10%	10% or more
1 st through the 30 th	\$200	\$400	\$800
31 th through the 35 th	\$400	\$600	\$900
36 th and on	\$500	\$900	\$1000

2. In the event of an SO₂ exceedance involving Unit 5 during the period May 1, 2007 to April 30, 2008, inclusive dates; and in the event of an SO₂ exceedance involving Unit 4 during the period May 1, 2008 to April 30, 2009, inclusive dates:

If the number of the occurrence of the failure is as noted below, irrespective of the percentage by which the maximum permissible emission rate was exceeded:

then the per-day penalty for that occurrence is as shown below, based upon the percentage by which the maximum permissible emission rate was exceeded:

	More than 10%
1 st through the 30 th	\$500
31 th through the 35 th	\$600
36 th and on	\$700

F. For exceedance of the annual NO_x emission limits identified in Paragraph 29 of this Consent Decree: \$2,000 per excess ton emitted.

G. For any other violation of this Consent Decree, other than a NO_x

exceedance or a SO_x exceedance involving Unit 5 after April 30, 2008 or of such an exceedance involving Unit 4 after April 30, 2009: \$2,500 per day, per violation. Any NO_x exceedance or SO_x exceedance involving Unit 5 after April 30, 2008 or any such an exceedance involving Unit 4 after April 30, 2009 shall be enforceable as a violation of the applicable permit, and the State shall not be required nor prohibited from considering the number of occurrences of any failures as set forth in Subparagraph 47.E.1 or 47.E.2 of this Consent Decree in assessing any penalty for such violation of the applicable permit.

48. Should Mirant dispute its obligation to pay part or all of a demanded stipulated penalty, it may avoid the imposition of a separate stipulated penalty for the failure to pay the disputed penalty by depositing the disputed amount in a commercial escrow account pending resolution of the matter and by invoking the Dispute Resolution provisions of this Consent Decree within the time provided in this Section VI of this Consent Decree for payment of the disputed penalty. If the dispute is thereafter resolved in Mirant's favor, the escrowed amount plus accrued interest shall be returned to Mirant. If the dispute is resolved in favor of the State, then the State shall be entitled to the escrowed amount determined to be due by the Court, plus accrued interest. The balance in the escrow account, if any, shall be returned to Mirant.

49. The State reserves the right to pursue any additional injunctive relief for Mirant's violations of this Consent Decree. Mirant shall not be required to remit any stipulated penalty that is disputed in compliance with Section IX of this Consent Decree until the dispute is resolved in favor of the State. However, nothing in this Paragraph 49 shall be construed to cease the accrual of the stipulated penalties until the dispute is resolved.

VII. RIGHT OF ENTRY

50. Any authorized representative of DEC or the Office of the Attorney General, including independent contractors, upon presentation of credentials, shall have a right of entry upon the premises of the Lovett plant at any reasonable time for the purpose of monitoring compliance with the provisions of this Consent Decree, including inspecting plant equipment and inspecting and copying all records maintained by Mirant required by this Consent Decree; and Mirant shall not unreasonably interfere with such access. Mirant shall retain such records for a period of two (2) years from the termination of this Consent Decree.

VIII. FORCE MAJEURE

51. A. Mirant shall not suffer any penalty under this Consent Decree, or be deemed to be in violation hereof or be subject to any proceeding or action, if Mirant's compliance with any requirements hereof, including compliance with emission rates, is delayed or rendered impossible by a natural event, war, strike, work stoppage, riot, catastrophe, delays in the issuance of permits or other authorizations (despite Mirant's diligent efforts to obtain such permits and authorizations in accordance with Paragraph 42) or any other event or circumstance as to which negligence or misconduct on the part of Mirant was not the proximate cause; provided, however, that Mirant shall make diligent efforts to comply nonetheless, or minimize such delay, and shall promptly notify the State by telephone and in writing, pursuant to the notice provision of this Consent Decree, after it obtains knowledge of any such condition or event, and request an appropriate extension or modification of this Consent Decree.

B. For purposes of this Consent Decree, Mirant will not suffer any penalties for failure to meet the emission rate requirements of this Consent Decree if, in accordance with 6 NYCRR 201-1.4, (i) such failure is caused by the sudden and unavoidable malfunction of

emission control technology beyond Mirant's control; (ii) Mirant submits, within thirty days thereafter, a written report to the State describing the information required by 6 NYCRR § 201-1.4(c) and, (iii) if applicable, the requirements of 6 NYCRR § 201-1.4(d) are met.

C. Mirant shall be entitled to an extension of any deadline for any requirements of this Consent Decree for a period equal to any delay caused by a Force Majeure event. Nothing in this Subparagraph 51.C of this Consent Decree shall preclude Mirant from seeking additional extensions subject to DEC's consent.

52. Unanticipated or increased costs or expenses associated with the performance of Mirant's obligations under this Consent Decree shall not constitute circumstances beyond the control of Mirant or serve as a basis for an extension of time under this Section.

53. THIRD PARTY LITIGATION

53.I. The following pertains to only that unit, or units, Mirant elects to convert or control under the provisions of this Consent Decree:

A. Subject to the conditions set forth in Subparagraph B of this Paragraph 53.I, if an action is commenced in any court or in any administrative tribunal by any person, including the United States or a governmental agency, against Mirant that challenges the sufficiency of the emission rates, controls, or limitations or the schedule or other implementation or operation requirements for such rates, controls, or limitations set forth in this Consent Decree for Unit 4 or 5, or which, in the case of the United States or a governmental agency, seeks to impose financial penalties or other financial undertakings on Mirant in connection with the actions which are the subject of this Consent Decree, such action shall have the effect of tolling Mirant's obligations in this Consent Decree to satisfy such rates and limitations and to install and operate the controls

prescribed in this Consent Decree for both units including (1) the dates for both units concerning when the purchase agreements for such controls shall be awarded, (2) the dates for both units concerning when installation of those controls shall be completed and the controls operated, and (3) any and all interim dates in this Consent Decree associated with such controls.

B. If such an action described in Subparagraph A of this Paragraph 53.I is commenced, Mirant shall timely file and diligently prosecute a motion to dismiss the action. The deadlines applicable to a unit shall be extended as follows:

1. If such an action is commenced prior to the date in this Consent Decree by which Mirant is required to award a purchase agreement for any control or conversion applicable to the unit that is the subject of the action, Mirant's obligations shall not be tolled as set forth in Subparagraph A of this Paragraph 53.I unless and until such action remains pending (including any appeals) after not less than 60 days before the aforementioned date. Under such circumstances, the deadline for awarding purchase agreements shall be the date sixty days after the date of dismissal, termination, or discontinuance of such action (including any appeals therefrom). The deadlines for installation and operation of controls and any and all dates identified in Subparagraphs 28.D and 31.D of this Consent Decree and all dates for satisfying emission rates and emission limitations shall be extended for a period of time equal to the period, if any, that the deadline for awarding of purchase agreements is extended, plus any such additional period as DEC, after consultation with Mirant, reasonably determines is needed to allow Mirant to complete construction in an expeditious manner.

2. If such an action is commenced after the purchase contract has been awarded, the deadlines for installation and operation of controls and any and all dates for

satisfying emission rates and emission limitations and any and all interim dates (*see* Subparagraphs 28.D and 31.D of this Consent Decree) shall be extended for a period of time equal to the period, if any, that the action (including any appeals therefrom) is pending, plus any such additional period as DEC, after consultation with Mirant, reasonably determines is needed to allow Mirant to complete construction in an expeditious manner.

C. To the extent Mirant complies with the extended deadlines, Mirant shall not be liable for stipulated penalties under this Consent Decree.

D. If such an action is commenced on or after April 30, 2007, this Paragraph 53.I. shall have no effect with respect to Unit 5 and if such an action is commenced on or after April 30, 2008, this Paragraph 53.I shall have no effect with respect to Unit 4.

53.II. The following paragraph applies in the event that a governmental entity issues an order or directive, or an action is commenced, requiring Mirant to continue operating or resume operation of a unit or units for which Mirant has discontinued operation or has advised the State, pursuant to Paragraphs 27 and/or 30 of this Consent Decree, that it is discontinuing operation.

A. If a governmental entity issues a directive or order requiring Mirant to continue or resume operation of a unit or units in contravention of the requirements of this Consent Decree, Mirant shall immediately (i) notify the State of the order or directive in accordance with Paragraph 65; (ii) seek to implead the entity issuing such order into this action to enable this Court to determine the validity of the directive or order or, if doing so is not possible, commence an action seeking to void the portion of the directive or order in conflict with this Consent Decree; and (iii) assert the requirements of this Consent Decree as a defense to such

directive or order. During the period that any such governmental order or directive is in force, including any such time a court is considering the validity of the governmental order or directive, which requires Mirant to continue or resume operation of a unit or units in contravention of the requirements of this Consent Decree, such governmental order or directive shall be considered a force majeure event and the provisions of Subparagraph 51.A. shall apply and govern Mirant's liability for stipulated penalties and other remedies for noncompliance with this Consent Decree.

B. If an action is commenced by any person seeking to require Mirant to continue or resume operation of a unit or units in contravention of the requirements of this Consent Decree, Mirant shall immediately (i) notify the State of the action in accordance with Paragraph 65; (ii) seek to remove the lawsuit to federal court (if filed in state court) and seek to consolidate said lawsuit with this action; and (iii) assert the requirements of this Consent Decree as a defense to such lawsuit. In the event of such an action covered by this Subparagraph 53.II.B, Mirant shall continue to comply with the requirements of this Consent Decree unless it is ordered by a court of competent jurisdiction to continue or resume operation of the unit at issue in contravention of the requirements of this Consent Decree. If a court issues an order in such action requiring Mirant to continue or resume operation of a unit or units in contravention of the requirements of this Consent Decree, such order shall be considered a force majeure event and the provisions of Subparagraph 51.A. shall apply and govern Mirant's liability for stipulated penalties and other remedies for noncompliance with this Consent Decree. In the event of any perceived conflict between this Subparagraph and Subparagraph 53.II.A above, Subparagraph 53.II.A shall control.

C. If such court or governmental order or directive is, or by its terms will be,

in force for more than six months, Mirant and the State shall enter into expedited good faith negotiations regarding this Consent Decree. Such negotiations shall not address any other issues resolved by this Consent Decree other than the court or governmental order or directive to operate the facility in contravention of the terms of this Consent Decree and shall not seek to impose any financial penalties on Mirant for such operation or to impose limitations or operational requirements more onerous than are contained in this Consent Decree.

IX. DISPUTE RESOLUTION

54. The dispute resolution procedure provided by this Section IX of this Consent Decree shall be available to resolve all disputes arising under this Consent Decree, provided that the Party making such application has first made a good faith attempt to resolve the matter with the other Party.

55. The dispute resolution procedure required in this Section IX of this Consent Decree shall be invoked by one Party to this Consent Decree giving written notice to the other advising of a dispute sought to be resolved pursuant to this Section. The notice shall describe the nature of the dispute and shall state the noticing Party's position with regard to such dispute. The Parties shall expeditiously schedule a meeting to discuss the dispute informally not later than fourteen (14) days following receipt of such notice.

56. Disputes submitted to dispute resolution under this Section shall, in the first instance, be the subject of informal good faith negotiations between the Parties. Such period of informal negotiations shall not extend beyond thirty calendar days from the date of the first meeting among the Parties' representatives unless they agree in writing to shorten or extend this period.

57. If the Parties are unable to reach agreement during the informal negotiation period, the State shall provide Mirant with a written summary of its position regarding the dispute. The written position provided by the State shall be considered binding unless, within thirty calendar days thereafter, Mirant files with this Court a petition which describes the nature of the dispute and seeks resolution. The State may respond to the petition within forty-five calendar days of filing.

58. Where the nature of the dispute is such that a more timely resolution of the issue is required, the time periods set out in this Section may be shortened upon motion of one of the Parties to the dispute.

59. As part of the resolution of any dispute under this Section, in appropriate circumstances the Parties may agree to, or this Court may order, an extension or modification of the schedule for completion of work under this Consent Decree to account for the delay that occurred as a result of dispute resolution.

X. GENERAL PROVISIONS

60. Effect of Settlement. This Consent Decree is not a permit; and except as specifically provided by this Consent Decree, nothing in this Consent Decree shall relieve Mirant of its obligation to comply with all applicable Federal, State and Local laws and regulations. Subject to Paragraphs 44, 45, and 46 of this Consent Decree, nothing contained in this Consent Decree shall be construed to prevent or limit the State's rights to obtain penalties or injunctive relief under the Clean Air Act or other federal, state or local statutes, regulations or causes of action existing now or to be enacted in the future.

61. Third Parties. This Consent Decree does not limit, enlarge or affect the rights of

any Party to this Consent Decree as against any third parties. Specifically, this Consent Decree does not limit or restrict the State's right to take action against Orange & Rockland Co. or Consolidated Edison Co., or any of their successors in interest, for the claims alleged in the Complaint, all of which are specifically reserved.

62. Summary Abatement. If the Commissioner or her duly authorized representative finds, after investigation, that Mirant is causing, engaging in, or maintaining a condition or activity which, in her judgment, presents an imminent danger to the health or welfare of the people of this State or results or is likely to result in irreversible or irreparable damage to natural resources and relates to the prevention and abatement powers of the Commissioner and it therefore appears to be prejudicial to the interests of the people of this State to delay action until an opportunity for a hearing can be provided, the terms of this Consent Decree shall not be construed to prohibit the Commissioner or her duly authorized representative, pursuant to ECL §71-0301, from ordering Mirant by notice, but without prior hearing, to discontinue, abate, or alleviate such condition or activity.

63. Indemnification. Mirant shall indemnify and hold DEC, the State, and their representatives and employees harmless for all claims, suits, actions, damages and costs of every name and description (except for claims that may be raised in a citizen suit which seeks to challenge, modify, or add to the penalties or remedies in this Consent Decree) arising out of or resulting from the fulfillment or attempted fulfillment of this Consent Decree by Mirant, its directors, officers, employees, servants, agents, successors or assigns; provided, however, that Mirant shall not be liable for any costs related to the defense of any such claims, suits, or actions including attorneys fees and other such costs.

64. Costs. Each Party to this action shall bear its own costs and attorneys fees.

65. Notice. Unless otherwise provided in this Consent Decree, notifications to or communications with the State or Mirant shall be deemed submitted on the date they are postmarked and sent either by overnight mail, return receipt requested, or by certified or registered mail, return receipt requested. Notifications shall be sent to the following representatives for each mail by electronic mail and overnight, certified or registered mail at the addresses set forth below:

A. State:

1. J. Jared Snyder
State of New York Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
2. Charles E. Sullivan, Jr.
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500

B. Mirant:

1. President
Mirant New York, Inc.
4 Executive Boulevard, Suite 100
Suffern, New York 10901
2. Vice President, Environmental, Safety and Health
Mirant Corporation
1155 Perimeter Center West
Atlanta, Georgia 30338-5416
3. General Counsel
Mirant Corporation
1155 Perimeter Center West
Atlanta, Georgia 30338-5416

66. Modification. Except as otherwise allowed by law, there shall be no modification of this Consent Decree without written approval by the Parties and, unless the parties agree that the changes are minor, approval of such modification by the Court.

67. Continuing Jurisdiction. The Court shall retain jurisdiction of this case after entry of this Consent Decree to enforce compliance with the terms and conditions of this Consent Decree and to take any action necessary or appropriate for its interpretation, construction, execution, or modification. During the term of this Consent Decree, any Party may apply to the Court for any relief necessary to construe or effectuate this Consent Decree.

68. Complete Agreement. This Consent Decree constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

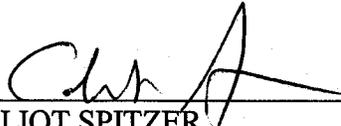
XI. TERMINATION

69. This Consent Decree shall be subject to termination upon motion by the Parties after Mirant satisfies the material requirements of this Consent Decree (other than those requirements set forth in Paragraphs 40 and 50, the requirements set forth therein surviving as enforceable provisions beyond termination of this Consent Decree), including payment of all stipulated penalties that may be due, installation of control technology systems as specified herein, the receipt of all permits specified herein, and securing modifications to the Title V Operating Permits for the Lovett plant that incorporates all operational limits established under this Consent Decree.

70. If Mirant believes it has achieved compliance with the material requirements of this Consent Decree (excluding those requirements set forth in Paragraphs 40 and 50, as of the date of such certification), then Mirant shall so certify to the State. Unless the State objects in writing with specific reasons within sixty days of receipt of Mirant's certification, the Court shall order that this Consent Decree be terminated on Mirant's motion. If the State objects to Mirant's certification, then the matter shall be submitted to the Court for resolution under Section IX of this Consent Decree.

Dated: 6/11, 2003

FOR THE PLAINTIFFS:



ELIOT SPITZER
Attorney General of the State of New York



ERIN M. CROTTY, Commissioner
New York State Department of
Environmental Conservation
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Of counsel

FOR MIRANT NEW YORK, INC. and
MIRANT LOVETT, L.L.C.


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GORDON R. ALPHONSO

Troutman Sanders LLP
Bank of America Plaza
600 Peachtree Street N.E., Suite 5200
Atlanta, GA 30308-2216

SO ORDERED, THIS _____ DAY OF _____, 2003.