

City of Alexandria, Virginia

MEMORANDUM

TO: THE CHAIRMAN AND MEMBERS
OF THE PLANNING COMMISSION

FROM: IGNACIO PESSOA
CITY ATTORNEY

DATE: SEPTEMBER 30, 2004

SUBJECT: SPECIAL USE PERMIT # 2004-0089
1300 & 1400 NORTH ROYAL STREET
MIRANT POTOMAC RIVER GENERATING STATION

SPECIAL USE PERMIT # 2004-0090
1300 & 1400 NORTH ROYAL STREET
MIRANT POTOMAC RIVER GENERATING STATION

REVOCATION OF SPECIAL USE PERMITS

ISSUE: Consideration of the revocation of Special Use Permit No. 2296, granted in 1989, which approved the construction and use of 18,000 square feet of new administrative offices, laboratories, conference, training and other space, at the Mirant Potomac River Generating Station, and Special use Permit No. 2297, also granted in 1989, which approved the Transportation Management Plan required for the continued operation of the Generating Station.

RECOMMENDATION: That Special Use Permit Nos. 2296 and 2297 be revoked.

DISCUSSION: In 1989, the City approved two special use permits in connection with Pepco's then contemplated expansion of the Potomac River Generating Station.¹ The first, SUP No. 2296, approved a Transition SUP for 18,000 square feet of new administrative offices, laboratories, conference, training and other space.² This physical expansion triggered the requirement for a Transportation Management Plan for the plant, which was approved by SUP No. 2297. Under then existing as well as current law, both permits were approved "subject to compliance with all applicable codes and ordinances," and the provision, now codified as Zoning Ordinance Section 11-506(A), that SUP's are revocable for "failure to comply with any law."

¹ The generating station was acquired by Mirant from Pepco in 2000, and Mirant succeeded to Pepco's rights and obligations under these two SUP's.

² A Transition SUP was required for this expansion of the existing use under interim regulations in effect as the City was proceeding with adoption of the 1992 Master Plan and Zoning Ordinance.

The plant is a noncomplying use located in the UT/Utilities and Transportation Zone, in which this use is permitted as an “electrical power generating plant” only by special use permit. Zoning Ordinance Section 4-1303(B).³ All uses operating in the UT Zone are subject to the “Use Limitations” set forth in Section 4-1306(A), which provides as follows:

No use shall be conducted in any manner which would render it noxious or offensive by reason of dust, refuse matter, odor, smoke, gas, fumes, noise, vibration or glare.

Implicit in this standard is that the failure to comply with applicable federal and state environmental regulations may constitute a violation of Section 4-1306(A), and may justify revocation under Section 11-505(A). In addition, operational discharges which are not federal or state violations, but which are nonetheless noxious or offensive as contemplated by Section 4-1306(A) may constitute separate and independent violations of the Zoning Ordinance, and warrant SUP revocation.

A review of the U.S. Environmental Protection Agency’s *Enforcement and Compliance History Online*(ECHO) report for this facility, Attachment 1, reveals a persistent pattern of noncompliance with three significant federal environmental statutes: the Clean Air Act (reported 8 out of 8 quarters in the two year reporting period, and “High Priority Violator” status for this facility), the Clean Water Act (reported 6 of 8 quarters), and the Resource Conservation and Recovery Act (reported 8 of 8 quarters).⁴ This record includes one formal enforcement case predicated on the plant’s discharge of 2,139 tons of NO_x, in 2003, more than double the permit limit of 1,019 tons.⁵ Attachment 2.

A review of the EPA’s *Toxics Release Inventory* for the Potomac River Station, Attachment 3, discloses that in 2002, the most recent reporting year, the plant, as reported to EPA by Mirant, discharged more than 2.7 million pounds of toxic inventory chemicals into the air, and more than 2,500 pounds into the Potomac River. The highest levels reported were 3.3 million pounds into the atmosphere in 1999, and 172,000 pounds into the river in 1998. City staff have noted minor incidental oil spills into the Potomac, on June 10, 2004 and January 7, 1996.

³ As explained more fully in the discussion of Text Amendment No. 2004-0008, the plant, which was constructed between 1949 and 1957, predates the SUP requirement and is presently categorized as a noncomplying use. The possible revocation of its noncomplying use status does not affect the revocation of these special use permits, nor does the possible revocation of these permits affect the revocation of its noncomplying use status.

⁴ In March, 2003, Mirant challenged the accuracy of some of the data in the then pilot program ECHO Report for the Potomac River Station. However, the data base includes formal error correction and reporting functions in order to help assure accuracy of the data, and the attached EPA report contains the agency’s data updated through the beginning of September, 2004.

⁵ This violation forms the basis for the Consent Decree discussed in the materials related to Text Amendment No. 2004-0008.

Based upon this environmental compliance history for the Mirant Potomac River Generating Station, I conclude that revocation of these two SUP's is warranted.

Revocation would prohibit, as a violation of the Zoning Ordinance, the continued use of the designated administrative and related office space, as well as the operation of the entire plant without a valid Transportation Management Plan. Given the nature of the plant's public utility function, and the limited scope of these special use permits, it would be unrealistic to expect that revocation could lead to the immediate closure of the plant. Upon revocation the plant would be categorized as an illegal use, and no City permits for construction or upgrades could be approved. However, the operator could seek to cure the illegal status of the use by seeking from City Council new special use permits, subject to appropriate and reasonable new conditions. Under current practice, any such new SUP's would apply to and regulate the entire plant, including the five power generating units.

Attachment 1: EPA Enforcement and Compliance History on Line

Attachment 2: Enforcement Case Report

Attachment 3: Toxics Release Inventory

Attachment 4: SUP No. 2296

Attachment 5. SUP No. 2297