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California Energy Commission
Docket Unit,
1516 Ninth Street, MS-4
Sacramento, CA 95814

DOCKET	
08-AFC-3	
DATE	<u>AUG 23 2010</u>
RECD.	<u>AUG 23 2010</u>

RE: Docket No. 08-AFC-3, Presiding Member's Proposed Decision for the Marsh Landing Generating Station, July 2010.

The Department of Toxic Substances Control (DTSC), has reviewed the California Energy Commission's July 2010 "Presiding Member's Proposed Decision" (PMPD) for the Marsh Landing Generating Station (MLGS) in Antioch, CA. We hereby respectfully offer the following comments:

1. DTSC disagrees with the conclusion that the Revised Staff Assessment (RSA) provides a thorough analysis of ALL potential environmental impacts associated with the Marsh Landing Project. The proposed site remediation DTSC currently evaluates for the MLGS Site is a Project subject to CEQA that will most likely impact the environment even if momentarily, or in a relatively insignificant way. The potential impacts of MLGS site remediation might have on the environment have not been identified, evaluated or addressed in the RSA.
2. DTSC disagrees with the conclusion that the RSA adequately evaluated compliance with applicable Laws, Ordinances, Regulations and standards (LORS).
 - a. The RSA assumes DTSC will certainly authorize remediation of the MLGS site. DTSC cannot approve MLGS Remediation until its potential environmental impacts are properly addressed by the CEQA functionally equivalent process the CEC is undertaking. (Title 14, California Code of Regulations, Section 15357). That process so far, has not addressed these impacts in a CEQA functionally equivalent way. Conducting environmental remediation at the MLGS project site without DTSC approval would be in violations of Federal and State laws. The RSA did not address this compliance issue.

- b. The RSA's failure to identify the cleanup as an integral part of the project whose potential impacts must be evaluated under CEQA, or a CEQA functionally equivalent process, is in conflict with CEQA's definition of "Project". (Title 14, California Code of Regulations, Section 15378(a)). The RSA did not address this compliance issue.
3. DTSC disagrees with the conclusion that The Marsh Landing Project is described at a level of detail sufficient to allow review in compliance with the provisions of the California Environmental Quality Act (CEQA)
 - a. The RSA failed to describe MLGS Site Remediation as an integral part of the project whose potential impacts must be evaluated under CEQA, or a CEQA functionally equivalent process.
 - b. The RSA failed to identify or describe the type of environmental remedy to be implemented at the MLGS project site as it would be required under CEQA.
 - c. The RSA did not identify, describe or evaluate potential impacts the environmental remedy to be implemented at the MLGS project might have on the environment as it is required under CEQA.

Rationale:

Remediation of the MLGS site meets the definition of a discretionary project under CEQA (Title 14, California Code of Regulations, Section 15357). DTSC cannot approve remediation of the MLGS project area until potential environmental impacts specifically associated with DTSC approved cleanup activities are addressed pursuant to CEQA.

Since the "Project", including site cleanup, site preparation, and construction and operation of the Generating Station cannot be segmented under CEQA (Title 14, California Code of Regulations, Section 15378(a)) and since CEC is the CEQA official lead-agency for this project, DTSC has to address CEQA under CEC's currently ongoing CEQA-functionally-equivalent process.

Whether Mirant, PG&E, or a private contractor undertakes the cleanup at the MLGS project area is immaterial: the remedy will be part of the project and potential impacts of remedy related activities have to be addressed under CEQA regardless of who undertakes them.

Only eighteen days ago (August 5, 2010), DTSC received the first draft of the decision-making document that outlines the proposed remedy for the MLGS project site. This document titled "Corrective Measures Study, August 5, 2010" (CMS) is still under review, but the remedy proposed in it seems to be viable to DTSC and the document offers sufficient detail to allow us to estimate potential impacts associated with the proposed cleanup activities. Unfortunately, after carefully evaluating CEC's July 6,

2010 Staff Assessment (SA) DTSC has determined that the SA does not sufficiently address this project component to satisfy applicable CEQA requirements.

In order for DTSC to approve MLGS site remediation, the RSA would have to at a minimum:

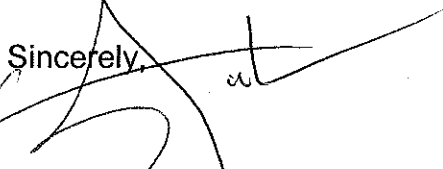
1. Explicitly disclose that the DTSC approved cleanup will be an integral component of the project,
2. Disclose the authorities under which DTSC has oversight of the cleanup.
3. Disclose and describe the type of remedy that will be implemented (excavation, and removal of 250-300 cubic yards of contaminated soil)
4. identify, evaluate, and address potential environmental impacts associated with MLGS remediation in sufficient detail to address applicable CEQA requirements.
5. Include cleanup-specific impacts in applicable cumulative impacts analysis discussions.

The good news is that the activities associated with the proposed remedy seem to be minor relative to the rest of the entirety of the project. Measures and mitigation already included in the SA will probably address the impacts of the cleanup itself. But again, that would have to be explained explicitly in the SA in order to satisfy CEQA requirements.

Finally, please note that DTSC's approval of the cleanup and its determination that applicable CEQA requirements have been complied with will be subject to public review, including a minimum 30-day public comment period. Potential revisions to the RSA might seem inconvenient right now, but the potential consequences of not demonstrating clear, unequivocal CEQA compliance could be a far greater set back for the project.

If you have any questions, please call me at 510-540-3757. Thanks again for your time and attention to this matter.

Sincerely,



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