

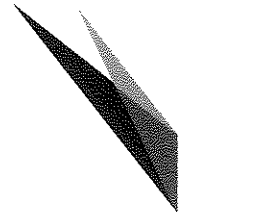
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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

Informational Proceeding on Methods for Satisfaction of California Environmental Quality Act Requirements Relating to Greenhouse Gas Emissions Impacts of Power Plants.

Docket Number 08-GHG OII-1
Order No. 08-1008-11

MIRANT'S COMMENTS ON ORDER INSTITUTING INFORMATIONAL PROCEEDING

At its business meeting on October 8, 2008, the California Energy Commission ("Commission") issued an Order Instituting Informational Proceeding ("OII"), Docket Number 08-GHG OII-1, entitled "Informational Proceeding on Methods for Satisfaction of California Environmental Quality Act Requirements Relating to Greenhouse Gas Emission Impacts of Power Plants." Through this OII, the Commission seeks comments from interested parties regarding the manner in which the Commission should evaluate and account for greenhouse gas ("GHG") emissions in fulfilling its obligations under the California Environmental Quality Act ("CEQA") in connection with the Commission's power plant siting process.

Mirant California, LLC; Mirant Delta, LLC; Mirant Potrero, LLC; Mirant Marsh Landing, LLC; and Mirant Willow Pass, LLC (collectively, "Mirant") hereby respond to the initial questions posed by the Commission in Attachment A to its October 8, 2008 Notice of Committee Workshop. Two of the Mirant companies, Mirant Marsh Landing, LLC, and Mirant Willow Pass, LLC currently have Applications for Certification ("AFCs") on file and pending before the Commission: (1) Marsh Landing Generating Station (08-AFC-03); and (2) Willow Pass Generating Station (08-AFC-06). Accordingly, the manner in which the Commission decides to address GHG emissions in the siting process will directly affect Mirant. Mirant supports an expeditious resolution of this OII to avoid any ambiguity or delay in the processing of its two pending AFCs.

In Mirant's view, two fundamental factors must be considered and accounted for in assessing possible approaches to evaluating potential GHG and global climate change impacts under CEQA.

First, CEQA is not structured to serve as an effective tool to reduce GHG emissions in the electricity sector. By its terms, when CEQA is applied to the electricity sector it applies only to discretionary permits issued for new or modified generating facilities in California. This means that emissions from existing facilities in California, and all facilities outside California, cannot be affected by CEQA. In addition, new and modified generating units built in California will be the most fuel efficient, lowest emitting units in the mix of fossil resources serving California. If CEQA is applied to these facilities in a manner that results in substantial additional costs for CEQA compliance, those incremental costs would make new generation less attractive economically. CEQA should not discourage or create additional obstacles to building new, more fuel efficient power plants. Given the Commission's recognition of the need for additional reliable generating resources to meet California's increasing demand for electricity, the Commission must ensure that the policies it adopts as a result of this proceeding do not impede the construction of new power plants that would generate less GHG per unit of electricity produced. In Mirant's view, the best approach to reducing GHG emissions is a national, multi-sector cap-and-trade program, because such a program would reduce emissions from new and existing electric generating facilities as well as from the range of other sources outside of the energy sector.

Second, the combination of the existing Greenhouse Gas Emission Performance Standard ("EPS") (and any future energy efficiency standards applicable to electric generating facilities) in conjunction with the upcoming adoption and implementation of AB 32 standards and the anticipated multi-sector GHG cap and trade program, essentially make application of CEQA to power plant GHG emissions unnecessary. The EPS assures that new commitments for power from fossil generation to be sold in California will have the lowest feasible GHG emissions per megawatt hour. This satisfies the CEQA standard for application of feasible mitigation measures to minimize potential environmental impacts. In addition, the projects now under review by the Commission will almost certainly not become operational until either immediately before or after the AB 32 regulatory program for the electricity sector becomes effective in 2012, which means that these projects would emit GHGs outside of a GHG emission control program only briefly, if at all. For example, the two Mirant plants for which AFCs were filed earlier this year have anticipated commercial operation dates no sooner than summer of 2012 – after the effective date of AB 32 emission standards (although the peaker units proposed for the Marsh Landing facility could be online somewhat earlier, in Summer 2011). AB 32 requires that the Air Resources Board's ("ARB's") implementing regulations achieve the maximum technologically feasible and cost-effective GHG emission reductions. In ARB's October 2008 "Climate Change Proposed Scoping Plan" under AB 32 ("Proposed Scoping Plan"), GHG emissions from the electricity sector are planned to be reduced through implementation of seven general approaches: a California cap-and-trade program linked to the regional cap-and-trade program of the Western Climate Initiative; a variety of energy efficiency measures; solar water heating; increasing combined heat and power; the Renewables Portfolio Standard; and the Million Solar Roofs initiative. See Proposed Scoping Plan, Appendix C-5. Given this requirement, there will not be any further feasible mitigation that could be applied pursuant

to CEQA. Hence, the exercise of determining whether GHG emissions from new generating units are “significant” would be superfluous.

Accordingly, Mirant recommends that if the Commission determines that it must evaluate GHG emissions in the context of CEQA review of proposed new generating projects, CEQA should be applied programmatically rather than on a case-by-case basis. Specifically, emissions from projects that are permitted to contract with a Load Serving Entity under the EPS rules (including those units with a capacity factor under 60%) should be considered to make a less than significant cumulative contribution to global climate change, so that further CEQA analysis and mitigation is unnecessary. In the alternative, these units should be deemed to have applied all feasible mitigation measures, since under AB 32 they will be subject to requirements that must achieve the “maximum technologically feasible and cost-effective” reductions in GHG emissions. See, e.g., Health and Safety Code section 38560(c).

With these overarching considerations in mind, Mirant offers the following responses to the Commission’s questions.

1. GHG emissions have a cumulative impact on climate change that is global by nature. Are such global impacts appropriately subject to CEQA?

Response: The effects of GHG emissions from new natural gas-fired turbines should not be subject to a case-by-case CEQA analysis. As described above, GHGs and climate change are not an issue that can be addressed by evaluating and requiring mitigation only from new projects, since emissions from existing facilities (which are not subject to CEQA) are a much larger portion of California’s total greenhouse gas emission inventory than are emissions from new facilities undergoing the Commission’s siting process. Therefore, a broad-based, national, programmatic, multi-sector approach to addressing GHG emissions and climate change is preferred -- not a case-by-case CEQA approach with a much narrower scope of applicability.

2. Assuming CEQA does apply, what should be the CEQA “threshold of significance” for GHG emissions from a given project?

A. CEQA requires that a cumulative impact be “cumulatively considerable” for it to be significant, and air districts typically set quantitative thresholds for criteria pollutants based on this concept. What GHG emissions levels are less than “cumulatively considerable?”

-- power plant construction emissions?

-- “peaking” gas-fired power plants (however defined)

-- Emissions from power plants that do not exceed limits set by AB (sic) 1368 regulations?

Response: If CEQA is applied to GHG emissions from new generating units, in identifying the threshold of significance applicable to the construction of a new gas powered plant, the Commission should rely on the Emission Performance Standards criteria adopted by the California Public Utilities Commission (“CPUC”) in D.07-01-039 (January 25, 2007) as mandated by SB 1368 (Stats. 2006, ch. 598). The Commission should not look to metrics such as total mass emissions. Instead, any metric should be in the units of GHG emissions per unit of energy input, as in the EPS. To the extent that facilities meeting the EPS are dispatched before less efficient facilities, this approach will reduce GHG emissions on an absolute basis, thereby mitigating adverse impacts on the environment. Accordingly, if a power plant proposed in an AFC satisfies the EPS adopted by the CPUC, then it should be determined that such project does not have a significant impact on the environment in the context of GHG emissions.

B. Have other agencies adopted thresholds of significance for GHG emissions?

Response: Mirant is not aware of any agency that has adopted a threshold of significance directly applicable to the operation of power plants. ARB is developing threshold of significance criteria that would apply to other sectors of the economy. The South Coast Air Quality Management District and the San Joaquin Valley Air Pollution Control District are in the process of developing GHG significance thresholds that would apply to projects in those districts.

3. What is the proper CEQA “baseline” for determining the significance of GHG emissions?

A. Are all new power plant projects with emissions that exceed some threshold level “cumulatively considerable” (so called “zero baseline”)?

--If so, would the zero baseline apply to solar facilities that burn some natural gas for startup or for generation augmentation?

Response: Mirant opposes the use of a zero baseline approach, and such an approach would be unnecessary if the Commission relies on the EPS as the threshold of significance or determines that CEQA analysis of GHG emissions is unnecessary for power plant projects. The construction of new, GHG-efficient power plants can help California meet its GHG reduction goals. Simply because a new power plant emits some amount of GHGs does not mean that such emissions are cumulatively considerable when the plant emits at levels at or below the EPS adopted by the CPUC (or below the collective emission rate of existing fossil generation). For the reasons described above, such plants will help reduce the overall level of GHG emissions even though they are themselves emitters. This is the same concept as relying on fleet turnover to improve overall mileage and reduce emissions of traditional air pollutants from motor vehicles, even though a new vehicle also has emissions.

B. Alternatively, should the baseline be the current GHG emissions of the entire electricity generation “system” comprised of all in-state generation and all out-of-state imports? In other words, if the new power plant reduces the State’s overall GHG emissions, would this make the impact less than significant? If this “system” perspective has merit, what analyses might be required to demonstrate, to the degree appropriate, that there is no significant “system” impact from a facility?

Response: Mirant is concerned that analyzing a “system” GHG level and trying to identify concretely whether a particular project will reduce that GHG level will lead to uncertainty and litigation. Measuring the GHG emissions of the system is not practical as electricity is fungible. Hence, the more appropriate measure would be the project’s GHG emissions per unit of energy input (i.e., the EPS). Accordingly, as discussed above, Mirant supports applying the CPUC’s EPS for determining whether a project’s GHG emissions are significant.

C. Should certain generation technologies be considered categorically less than significant?

--Solar or other renewable facilities?

--Gas-fired peakers that help integrate renewable?

--Re-powered coastal gas-fired facilities that are more efficient than existing facilities and eliminate once-through cooling impacts on the marine environment?

--Gas-fired plants found needed to protect system reliability?

Response: As described above, new gas fired units that achieve the EPS should be considered to have a less than significant impact. However, it would be appropriate for the Commission to establish categorical exemptions, i.e., those projects that are exempt from the CEQA process. The projects identified in this sub-question would be appropriately considered for inclusion in categorical exemptions from the CEQA process for the narrow topic of GHG emissions. However, we suggest that for the purpose of determining whether a project’s GHG emissions are significant, the Commission rely on the existing EPS, as discussed above, as matters such as once-through cooling and system reliability are not relevant to determining whether a project’s GHG emissions are significant. This sub-question highlights the merits of Mirant’s recommendation to rely on the EPS: use of the EPS to determine significance avoids introduction of complicating factors and judgments regarding the relative environmental benefits of different types of projects.

4. If an individual power plant is found to have a significant cumulative impact due to GHG emissions, is it feasible to mitigate this cumulative impact? (CEQA defines “feasible” to mean “capable of being accomplished in a successful manner within a reasonable period of time taking into account economic, environmental, legal, and technological factors.”)

A. Must mitigation meet the standards that apply to criteria pollutants – e.g., that such mitigation must be certain, enduring, and not duplicative of other measures.

B. Must mitigation be “pound for pound?”

C. What feasible mitigation should be required for power plants? [If net system increases from a project are too uncertain to be quantified, should this affect either the measure or the kind of mitigation?]

- D. If the Commission were to find a power plant’s cumulative impact to be significant, and if impacts cannot feasibly be mitigated to a less than significant level, what if any basis should support CEQA “override” findings to allow project approval?**

Response: As mentioned previously, CEQA is not the right tool for achieving significant GHG emission reductions from the electricity sector in particular, or from the economy in general. Accordingly, Mirant recommends that for the purposes of this OII, the Commission rely on a programmatic approach to reduction of GHG emissions, to the extent a project is deemed to contribute a cumulatively significant impact and is not categorically exempt. Specifically, the programmatic approach should consist of reliance on the measures recommended jointly by the Commission and the CPUC for the reduction of GHGs from sources in the electricity sector (including a regional multi-sector cap and trade program) which, based on the current Proposed Scoping Plan released by the ARB, are likely to be part of the final AB 32 regulatory program adopted by the ARB. The resulting regulations are expected to take effect as of January 1, 2012.

As might be expected from Mirant’s view that AB 32 measures should be the sole state regulatory program for GHG emissions, the Commission should not adopt a “pound for pound” approach to mitigation. Given the extent of the anticipated AB 32 regulatory program as set forth in the Proposed Scoping Plan, such an approach is not likely to be practical or feasible.

With regard to the portion of the question concerning CEQA override findings, if the Commission adopts the framework recommended by Mirant, it is not necessary to identify specific circumstances under which the Commission may make an “override” determination (finding of overriding considerations) as permitted under CEQA.

- 5. CEQA provides for the use of programmatic approaches for addressing cumulative impacts, such as for air quality criteria pollutant reduction plans, or water quality emission plans. Is it more appropriate to mitigate power plant GHG emissions case-by-case or with a more encompassing program?**

- A. Could CARB’s AB 32 program be such a programmatic approach?**
- B. If a power plant is consistent with an adopted programmatic approach, should the Commission find that GHG impacts from such a facility are less than “cumulatively considerable?” (See CEQA Guideline Section 15064(h)(3).)**
- C. [No question labeled “C”.]**
- D. If CARB should require a “cap and trade” program pursuant to AB 32, should the adoption of such program change or negate Commission project-by-project mitigation?**

--Should the Commission be focusing on interim mitigation for the period prior to the operative effect of a CARB GHG emissions reduction program?

- E. **Should programmatic mitigation require GHG reductions from “load serving entities” such as utilities rather than from individual in-state power plants?**
- F. **Are there other programs that should be considered?**

Response: Fundamentally, a cap and trade program that includes the electricity sector should obviate the need for any additional CEQA analysis of GHG impacts in the context of power plant siting. It follows, then, that Mirant opposes a CEQA compliance framework that relies on a case-by-case approach. Instead, if CEQA evaluation is determined to be needed for GHG emissions from proposed new powerplants, the Commission should adopt a programmatic approach to GHG emission reduction that relies on the anticipated multi-sector cap and trade program and other AB 32 measures recommended by this Commission and soon to be adopted by ARB, or on a national GHG regulatory program once such a program is in place. Mirant believes that it would be legally permissible for the Commission to conclude that the GHG reduction measures directly applicable to the electricity sector through ARB’s Scoping Plan (including in particular a cap and trade program) would constitute “. . . a previously approved plan or mitigation program which provides specific requirements that will avoid or substantially lessen the cumulative problem . . . within the geographic area in which the project is located” under CEQA Regulation 15064(h)(3) in support of a determination of a lack of significance.

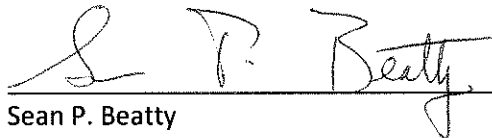
- 6. **The Commission is authorized to certify a facility (Public Res. Code § 25525) even if it does not conform to applicable state, local, or regional standards, ordinances or laws if it determines that the facility “is required for public convenience and necessity.”**
 - A. **Should this general provision of law be understood to allow an override of unmitigated GHG emissions if the Commission believes the facility is “needed.”**
 - B. **If “need” becomes a rationale for certification of unmitigated facilities, is there a limit on the amount of capacity “needed”?**
 - C. **If there is a quantitative limit on need, how might such a limit be established and periodically updated?**

Response: Mirant believes that regulatory certainty, and consequently the avoidance of litigation, in the Commission’s siting decisions should be a paramount goal of this proceeding. For this reason, Mirant is concerned that relying on the “override” authority in CEQA, and in particular on making the complex determinations as to whether a particular power plant is “needed”, will lead to great uncertainty and the promise of litigation. Particularly as California transitions to a competitive market for generation, it will become difficult to differentiate one project as more worthy than another. Ultimately, virtually all new construction will have the potential to reduce GHG emissions as compared to existing facilities and in that sense are needed. Any further analysis along these lines promises to be contentious, resource intensive, and an invitation to litigation.

7. **The Commission has licensed numerous power plants that have not yet been constructed, some of which have had licenses expire and others have been surrendered voluntarily. To what extent should such "failure" to construct and operate a licensed facility be taken into account in determining whether a power plant's emissions are significant?**

Response: Mirant is not aware of any reason why a failure to construct a licensed facility has any bearing on whether a power plant's GHG emissions are significant. However, the issue would be moot if Mirant's proposed framework based on the EPS is adopted. Under that scenario, the Commission is not placed in the position of estimating system-wide GHG emissions or emissions rates, and, therefore, the status of pending, expired or surrendered licenses would have no impact on CEQA compliance.

Dated this 7th day of November, 2008, at Pittsburg, CA.



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