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8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 NORTHERN DIVISION

11 **WILD EQUITY INSTITUTE**, a) Case No. 3:14-cv-01391
12 non-profit corporation,)
13 Plaintiff,)
14 v.) **COMPLAINT FOR**
15 **GINA MCCARTHY**, in her official) **DECLARATORY AND**
16 capacity as United States Environmental) **INJUNCTIVE RELIEF**
17 Protection Agency Administrator, and)
18 **JARED BLUMENFELD**, in his)
19 official capacity as the United States)
20 Environmental Protection Agency Regional)
21 Administrator, Region 9)
22 Defendants.)

22 INTRODUCTION

23 1. This case under the Clean Air Act (“CAA” or “Act”) challenges the U.S.
24 Environmental Protection Agency Administrator’s (“Administrator” or “EPA”) failure to
25 perform her non-discretionary duty to grant or deny Wild Equity Institute’s (“Wild Equity”)
26 petition filed under 42 U.S.C. § 7661d(b)(2) (“Petition”). See 42 U.S.C. § 7604(a)(2). Wild
27 Equity submitted the Petition on September 3, 2013, requesting that EPA object to Gateway
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1 Generating Station's ("Gateway") permit under title V of the CAA ("Title V Permit"), issued
2 by the Bay Area Air Quality Management District ("BAAQMD").¹

3 2. The CAA requires the Administrator to either grant or deny the Petition within 60 days.
4 42 U.S.C. § 7661d(b)(2).

5 3. 60 days has passed without a response from the Administrator, therefore she is in
6 violation of her nondiscretionary duty under the CAA. Accordingly, Wild Equity seeks a
7 declaration that the Administrator is in violation of the CAA, an order compelling the
8 Administrator to grant or deny Wild Equity's Petition, and an order awarding Wild Equity its
9 costs of litigation, including reasonable attorneys' fees.

10 **JURISDICTION AND VENUE**

11 4. The Court has jurisdiction over this action under 28 U.S.C. § 1331 and 42 U.S.C. §
12 7604(a) because Plaintiffs allege violations of the federal Clean Air Act. The Court is
13 authorized to provide declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 - 2202.

14 5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(1). EPA
15 maintains a Regional Office in San Francisco, CA. This Regional Office has oversight
16 responsibility for BAAQMD air quality programs and is in large part responsible for ensuring
17 that EPA performs the nondiscretionary duty at issue in this Complaint. In addition, a
18 substantial part of the events or omissions giving rise to Wild Equity's claims occurred in
19 EPA's San Francisco office.

20 **INTRADISTRICT ASSIGNMENT**

21 6. Assignment of this action to the San Francisco or Oakland Division is proper pursuant
22 to Local Rule 3-2(c). The action arises from activities in Contra Costa and San Francisco
23 Counties.

24 **NOTICE**

25 7. As required under 42 U.S.C. § 7604(b), Wild Equity provided the Administrator with
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27 ¹ BAAQMD is the state agency that issues federal title V permits pursuant to a delegation
28 agreement between EPA and BAAQMD. *See* Clean Air Act Full Approval of 34 Operating
Permits Programs in California, 66 Fed. Reg. 63503 (Dec. 7, 2001).

1 written notice of its intent to sue on December 17, 2013. *See* Exhibit A. The Administrator has
2 not remedied the violations set out in the 60-day notice.

3 **PARTIES**

4 8. Plaintiff Wild Equity Institute is a non-profit organization based in San Francisco,
5 California. Wild Equity unites the grassroots conservation and environmental justice
6 movements into a powerful force that builds a healthy and sustainable global community for
7 people and the plants and animals that accompany us on Earth. Wild Equity accomplishes this
8 by working on projects that highlight and redress the inequitable relationships across our
9 human communities while improving our relationship to the lands in which we live.

10 9. Wild Equity is a “person” within the meaning of 42 U.S.C. § 7602(e). As such,
11 Wild Equity may commence a civil action under 42 U.S.C. § 7604(a).

12 10. Wild Equity, its members, its staff, and its board of directors have long-standing
13 interests in environmental protection in and around Antioch, California, where Gateway is
14 located. Air pollution from Gateway impacts local communities and endangered species such
15 as the Lange’s Metalmark Butterfly, the Contra Costa Wallflower, and the Antioch Dunes
16 Evening Primrose, all of which Wild Equity strives to protect.

17 11. Wild Equity’s members, staff, and Board of Directors often engage in public
18 participation processes to protect the area’s air quality, and have interests in preserving the
19 integrity of these processes and strictly enforcing deadlines.

20 12. The Title V Permit allows Gateway to release harmful air pollutants without
21 compliance with and disclosure of all air quality requirements.

22 13. The interests of Wild Equity’s members, staff, and Board of Directors in breathing
23 clean air and observing, studying, and otherwise enjoying the Antioch Dunes National
24 Wildlife Refuge’s endangered species—which the U.S. Fish and Wildlife Service has
25 repeatedly found are threatened by air pollution—have, and continue to be, harmed by EPA’s
26 refusal to grant or deny Wild Equity’s Petition regarding Gateway’s Title V Permit, in
27 violation of federal law.

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1 14. EPA's failure to respond to Wild Equity's Petition further deprives Wild Equity and its
2 members, staff, and Board of Directors of procedural rights and protections to which they are
3 entitled. During the permitting process for Gateway, Wild Equity provided comments critical
4 of the Title V Permit and then petitioned EPA to object to BAAQMD's issuance of the Title V
5 Permit.

6 15. For example, Wild Equity Institute member Liam O'Brien regularly visits Antioch and
7 views the Lange's Metalmark Butterfly, the Contra Costa Wallflower, and the Antioch Dunes
8 Evening Primrose at the Antioch Dunes National Wildlife Refuge. As a member of the
9 Lepidopterists' Society, he also engages in studying and surveying the Butterfly, and will
10 continue to do so regularly. His personal, aesthetic, recreational, and commercial interests in
11 the Lange's Metalmark Butterfly and its habitats have been and continue to be harmed by
12 EPA's failure to respond to the Petition.

13 16. Wild Equity Institute member Paul Seger lives within 4 miles of Gateway, regularly
14 engages in recreational activities at or near his home and Gateway, and regularly engages in
15 public participation processes to protect the area's air quality, and will continue to do so
16 regularly. His personal, recreational, and procedural interests in protecting the area's air
17 quality and preserving the integrity of public participation processes and strictly enforcing
18 deadlines have been and continue to be harmed by EPA's failure to respond to the petition.

19 17. EPA's failure to take action on Wild Equity's Petition within 60 days, as required
20 under the CAA, prevents Wild Equity from advocating for clean air on behalf of members like
21 Mr. O'Brien and Mr. Seger. In the absence of a response from the Administrator, Wild Equity
22 cannot evaluate the Administrator's substantive response to the petition, nor advance
23 challenges to the Title V permit. Meanwhile, Gateway is authorized to continue operating in a
24 manner that injures the legally protected interests of Wild Equity and its members, without
25 regard to the concerns raised in Wild Equity's Petition.

26 18. These injuries can be redressed by an order from this Court that compels the EPA to
27 respond to the Petition. If the EPA does in fact object to the Title V permit, Gateway may be
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1 required to improve its pollution control technologies, change its operation behavior, and/or
2 mitigate its air pollution impacts. Indeed, a consent decree issued by this court just a few
3 months ago required a similarly situated power plant, the Oakley Generating Station, to
4 provide \$2,000,000 in benefits to endangered species restoration efforts and community health
5 programs in response to the very concerns Wild Equity has raised in its Title V Petition here.

6 19. Regina McCarthy is the EPA Administrator and is responsible for implementing the
7 Clean Air Act, including the requirement to grant or deny Wild Equity's Petition within 60
8 days. Ms. McCarthy is sued in her official capacity.

9 20. Jared Blumenfeld is the EPA Regional Administrator for Region 9 and is responsible
10 for implementing the Clean Air Act in Region 9, including oversight responsibility for
11 BAAQMD air quality programs and responsibility for ensuring that EPA fulfill its requirement
12 to grant or deny Wild Equity's Petition within 60 days. Mr. Blumenfeld is sued in his official
13 capacity.

14 **LEGAL BACKGROUND**

15 **Title V Program**

16 21. The title V permit program was enacted to make the Clean Air Act permitting process
17 more transparent. *See Com. of VA v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) ("The permit
18 is crucial to the implementation of the Act: it contains, in a single, comprehensive set of
19 documents, all CAA requirements relevant to the particular polluting source.") (citations
20 omitted). Major sources of air pollution must obtain a valid title V permit, which records
21 applicable air pollution control requirements in a single document. *See* 42 U.S.C. §§ 7661a(a),
22 7661c(a).

23 22. Under the CAA, the EPA Administrator may approve state programs to administer the
24 title V permitting program. *See* 42 U.S.C. § 7661a(d). The Administrator approved
25 BAAQMD's administration of its title V permit program in 2001. *See* Clean Air Act Full
26 Approval of 34 Operating Permits Programs in California, 66 Fed. Reg. 63503 (Dec. 7, 2001).

1 23. Before a state agency with an approved title V permit program may issue a title V
2 permit, the agency must present the proposed title V permit to EPA. 42 U.S.C. §
3 7661d(a)(1)(B). EPA then has 45 days to review the proposed permit. 42 U.S.C. § 7661d(b).
4 EPA must object to the state agency's issuance of the permit if EPA finds that the permit does
5 not comply with all applicable provisions of the Clean Air Act. 42 U.S.C. § 7661d(b)(1).

6 24. After EPA's 45-day review period expires, if no objection has been made, "any person
7 may petition the Administrator within 60 days" to object to the title V permit. 42 U.S.C. §
8 7661d(b)(2). The CAA requires that "[t]he Administrator shall grant or deny such petition
9 within 60 days after the petition is filed." 42 U.S.C. § 7661d(b)(2). This provision imposes a
10 mandatory, nondiscretionary duty upon EPA to act within 60 days of the filing of a petition
11 under this section.

12 25. If EPA objects to a permit, the permitting authority may not issue the permit unless
13 EPA's objections are adequately addressed. 42 U.S.C. § 7661d(b)(3). If the permitting
14 authority issues a permit prior to receipt of an objection by the Administrator, the
15 Administrator shall modify, terminate, or revoke such permit. *Id.*

16 26. If EPA fails to comply with a nondiscretionary duty, such as acting on a petition within
17 the statutorily mandated timeframe, the CAA allows any person to bring suit to compel EPA
18 to perform its duty. *See* 42 U.S.C. § 7604(a).

19 **Prevention of Significant Deterioration Program**

20 27. Air pollution control requirements in a title V permit include requirements imposed on
21 a facility through the CAA's Prevention of Significant Deterioration ("PSD") permitting
22 program, to which any major new source of pollution, or modification thereof, is subject.

23 28. The federal PSD regulations provide that EPA may delegate its authority to conduct
24 PSD source review and issue PSD permits. 40 CFR 52.21(u). While the EPA has delegated its
25 PSD permitting program to BAAQMD, the EPA's consultation obligations under the
26 Endangered Species Act ("ESA") remain non-delegable. *See* Exhibit B, EPA Letter to Fish
27 and Wildlife Service, May 30, 2001.

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1 29. Accordingly, any agency action that may affect listed species is subject to consultation
2 requirements under Section 7 of the ESA. Thus, any PSD permit is subject to Section 7 of the
3 ESA.

4 30. As BAAQMD has acknowledged, ESA consultation can lead to substantive
5 requirements being imposed on the facility through the PSD permit when it is issued in order
6 to protect listed species, and those requirements must then be included in a title V permit.

7 **FACTUAL BACKGROUND**

8 31. The Gateway Generating Station is a natural gas-fired power plant located in Antioch,
9 California. The California Energy Commission approved Gateway in 2001, but construction
10 was halted in 2003 and recommenced again in 2007.

11 32. On February 20, 2007, BAAQMD received from Gateway an application for a Title V
12 Permit.

13 33. Gateway has been in operation since 2008, but was the target of an enforcement action
14 brought by the EPA in 2009 for failure to acquire a PSD permit, delaying ongoing permitting
15 processes.

16 34. The PSD enforcement action was resolved by an approved consent decree dated March
17 3, 2011, and new PSD requirements were imposed through the consent decree.

18 35. On May 22, 2013, BAAQMD issued a proposed Title V Permit for public notice and
19 comment with a deadline of June 30, 2013. BAAQMD also presented the proposed Title V
20 Permit to EPA for its review with a 45-day deadline to object.

21 36. On June 30, 2013, Wild Equity submitted timely comments on that proposed Title V
22 Permit to BAAQMD.

23 37. Following the 45-day EPA review period ending July 11, 2013, during which EPA did
24 not object to the proposed Title V Permit, Wild Equity filed a Petition under Section
25 505(b)(2), requesting that EPA object to Gateway's proposed Title V Permit.

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1 38. The Petition was filed on September 3, 2013, within the 60-day deadline for filing such
2 petitions, and was properly based on issues raised in the prior comments to BAAQMD on the
3 proposed Title V Permit for Gateway.

4 39. Specifically, as Wild Equity prior comments and Petition explained, EPA should have
5 objected to the proposed Title V Permit because its terms do not include a legal requirement
6 that is applicable to this power plant's air pollution limits: the incidental take authorization
7 process, which requires the EPA to consult with the U.S. Fish and Wildlife Service and
8 modify Gateway's ongoing and proposed air pollution so that it does not jeopardize the
9 continued existence of endangered species that are only found adjacent to the Gateway
10 facility.

11 40. The title V program requires every permit to include all applicable requirements.

12 41. CAA, its regulations, and governing agreements between EPA and BAAQMD make
13 such substantive requirements resulting from consultation and incidental take authorization
14 from the U.S. Fish and Wildlife Service an applicable requirement under title V.

15 42. EPA had 60 days from September 3, 2013, to grant or deny Wild Equity's Petition. As
16 of the date of filing of this complaint, EPA has not yet granted or denied the Petition.

17 43. On October 30, 2013, BAAQMD issued a final Title V Permit for Gateway. On
18 November 7, 2013, BAAQMD sent Wild Equity a notification of its decision to issue the Title
19 V Permit and a response to Wild Equity's comments filed during the public comment period.

20 44. On December 17, 2013, Wild Equity provided notice to the EPA Administrator that it
21 intended to file a lawsuit for failure to grant or deny its Petition. *See Exhibit A.*

22 **CLAIM FOR RELIEF**

23 45. Wild Equity incorporates the allegations in all preceding paragraphs of this Complaint
24 as if set forth in full herein.

25 46. The Administrator had a mandatory duty to grant or deny Wild Equity's Petition
26 within 60 days after it was filed. *See* 42 U.S.C. § 7661d(b)(2) ("The Administrator shall grant
27 or deny such petition within 60 days after the petition is filed").

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1 47. The 60-day deadline has since passed and as of date of filing this Complaint, the
2 Administrator has not granted or denied Wild Equity's Petition.

3 48. Therefore, the Administrator has violated and continues to violate the Clean Air Act,
4 42 U.S.C. § 7661d(b)(2).

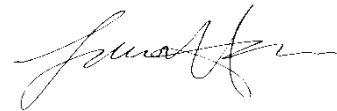
5 49. This Clean Air Act violation constitutes a "failure of the Administrator to perform any
6 act or duty under this chapter which is not discretionary with the Administrator" within the
7 meaning of the Clean Air Act's citizen suit provision. 42 U.S.C. § 7604(a). EPA's violation is
8 ongoing, and will continue unless remedied by this Court.

9 **REQUEST FOR RELIEF**

10 WHEREFORE, Wild Equity respectfully requests that this Court enter judgment providing the
11 following relief:

- 12 1. Declare that Defendant is violating the Clean Air Act by failing to grant or deny Wild
13 Equity's Petition requesting that EPA object to the Title V Permit for Gateway Generating
14 Station;
- 15 2. An order compelling Defendant to perform its mandatory duty to grant or deny Wild
16 Equity's Petition by a date certain;
- 17 3. An order awarding Wild Equity its costs of litigation, including reasonable attorneys'
18 fees; and
- 19 4. Such other and further relief as the Court deems just and proper.
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23 Respectfully submitted,

24 

25 March 26, 2014

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EXHIBIT A

WILD Equity INSTITUTE

*Building a healthy and sustainable global community for people
and the plants and animals that accompany us on Earth*

December 17, 2013

Gina McCarthy
EPA Administrator
Mail Code 4101M
USEPA Ariel Rios Building (AR)
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

Jared Blumenfeld
Regional Administrator
EPA, Region 9
75 Hawthorne Street
San Francisco, CA, 94105

RE: 60-Day Notice of Intent to Sue for Violation of Section 505(b)(2) of the Clean Air Act

Dear Secretary McCarthy and Administrator Blumenfeld:

I write to inform you that the Wild Equity Institute intends to commence an action against the Environmental Protection Agency (“EPA”) and the EPA Administrator for the failure to perform a nondiscretionary duty pursuant to Section 505(b)(2) of the Clean Air Act (“CAA”), namely, to either grant or deny Wild Equity Institute’s petition requesting that the EPA object to the proposed Title V permit for the Gateway Generating Station in Antioch, California. Title V of the CAA allows members of the public to petition the EPA and request that the agency object to certain proposed permits issued by state agencies. 42 U.S.C. § 7661d(b)(2). Wild Equity timely filed a petition under that section and EPA has yet to grant or deny the petition, despite a nondiscretionary duty to do so within a 60-day deadline that has since passed. *Id.*

This 60-day notice is provided pursuant to CAA Section 304, which authorizes citizen suits against the EPA Administrator for failure to perform a nondiscretionary duty and requires a 60-day notice prior to commencing an action. 42 U.S.C. § 7604(a), (b).

The Wild Equity Institute.

The Wild Equity Institute unites the grassroots conservation movement and the environmental justice movement in campaigns that redress inequity, both across our human communities and towards the lands in which we live.

The Wild Equity Institute, its members, its staff, and its board of directors have long-standing interests in the Lange’s Metalmark Butterfly, the Contra Costa Wallflower, and the Antioch Dunes Evening Primrose, as well as long-standing ties to the communities in Antioch, California and interests in the quality of the air the community breathes. Wild Equity’s members, staff, and Board of Directors often engage in public participation processes in support of these species and the protection of the area’s air

quality, which impacts both species and communities, and have interests in preserving the integrity of these processes and strictly enforcing deadlines.

The interests of Wild Equity Institute's members, staff, and Board of Directors in observing, studying, and otherwise enjoying endangered species at the Antioch Dunes National Wildlife Refuge and breathing clean air have been, and continue to be, harmed by EPA's refusal to grant or deny Wild Equity's petition regarding Gateway's Title V permit, in violation of federal law.

The Antioch Dunes National Wildlife Refuge.

During an inter-glacial period approximately 140,000 years ago a network of sand dunes and desert environments stretched from the location of the modern-day Mojave Desert across the Central Valley to the San Joaquin River. As the climate changed, the deserts retreated, but left behind a stretch of sand dunes in Antioch, California, known today as the Antioch Dunes. These dunes were subsequently nourished, at least in part, by sandy soils scrubbed from the Sierra Nevada Mountains by retreating glaciers. These sandy soils were delivered to the Dunes by the Sacramento and San Joaquin River Systems.

The isolation of this area in Antioch from other desert systems allowed species found at the Antioch Dunes to evolve into unique forms of life found nowhere else on Earth. Today the Antioch Dunes National Wildlife Refuge in Contra Costa County protects the remnants of these habitats, upon which three federally protected species depend: the Contra Costa Wallflower, the Antioch Dunes Evening Primrose, and the Lange's Metalmark Butterfly.

Prior to European settlement, the Antioch Dunes were probably several hundred acres in size. Currently, because of past sand mining, agriculture, and urban development, only about 70 acres of the sand dune habitat remains, all within the Antioch Dunes National Wildlife Refuge.

The Lange's Metalmark Butterfly.

The Lange's Metalmark Butterfly (*Apodemia mormo langei*) is a brightly colored, fragile, and highly endangered butterfly that has been protected by the Federal Endangered Species Act since 1976. 41 Fed. Reg. 22,041 (June 1, 1976). The species is endemic to the Antioch Dunes, which contains the only known extant population of the species.

Between 50 to 100 years ago, the population size of the Lange's Metalmark Butterfly at the Antioch Dunes is estimated to have been approximately 25,000 individuals. However, by 2006, the number had plummeted to a total of 45 adults. For the past seven years, the number of adults observed in the wild has continued to remain at critically low levels.

The sole food plant for the larval (caterpillar) stage of the butterfly is the naked-stemmed buckwheat (*Eriogonum nudum* ssp. *auriculatum*), which grows best in areas with good drainage and nutrient-poor soils. The Lange's metalmark butterfly is entirely dependent on the population of naked-stemmed buckwheat at the Antioch Dunes, and there is a direct positive correlation between the population size of this plant and the population of the butterfly.

However, today the buckwheat is only found in a limited portion of the Antioch Dunes National Wildlife Refuge, and this remaining area is threatened with extirpation due to the prolific overgrowth of non-native, invasive plant species, none of which provide food for the butterfly's caterpillar stage. Although the naked-stemmed buckwheat is not threatened with global extinction, the loss of the plant at the Antioch Dunes National Wildlife Refuge will surely lead to the extinction of the Lange's Metalmark Butterfly.

The Antioch Dunes Evening Primrose and the Contra Costa Wallflower.

The Antioch Dunes Evening Primrose (*Oenothera deltoids* ssp. *howellii*) is a beautiful perennial plant. It has white flower petals with long yellow stamens, and is host to a rare sweat bee species. The Contra Costa Wallflower (*Erysimum capitatum* var. *angustatum*) is a fragrant and highly structured wildflower with yellow petals. Both species have been protected as endangered under the Federal Endangered Species Act since 1978, 43 Fed. Reg. 7,972 (April 26, 1978), and critical habitat has been protected for both species since 1978 as well. 43 Fed. Reg. 39,042 (Aug 31, 1978).

Like the Lange's Metalmark Butterfly, the Contra Costa Wallflower and the Antioch Dunes Evening Primrose are endemic to the Antioch Dunes National Wildlife Refuge. Although the population sizes of these plants fluctuate greatly, the long-term trend indicates both species are in decline. In both cases, the overgrowth of invasive non-native plant species is reducing the available area for colonization and growth of these endangered species.

Title V.

Title V was enacted to make the CAA permitting process more transparent. *See Com. of VA v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) ("The permit is crucial to the implementation of the Act: it contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular polluting source.") (citations removed). Under Title V, major sources of air pollution, such as Gateway, must obtain a valid Title V operating permit. *See* 42 U.S.C. §§ 7661a(a), 7661c(a).

Under the CAA, the EPA Administrator may approve state programs to administer the Title V permitting program. *See* 42 U.S.C. § 7661a(d). The Administrator approved BAAQMD's administration of its Title V permit program in 2001. *See* Clean Air Act Full Approval of 34 Operating Permits Programs in California, 66 Fed. Reg. 63503 (Dec. 7, 2001). Before a state agency with an approved Title V permit program may issue a Title V permit, the agency must present the proposed Title V permit to EPA. 42 U.S.C. § 7661d(a)(1)(B). EPA then has 45 days to review the proposed permit. 42 U.S.C. § 7661d(b). EPA must object to the issuance of the permit if EPA finds that the permit does not comply with all applicable provisions of the Clean Air Act. 42 U.S.C. § 7661d(b)(1).

After EPA's 45-day review period expires, if no objection has been made, "any person may petition the Administrator within 60 days" to object to the Title V permit. 42 U.S.C. § 7661d(b)(2). The Clean Air Act requires that "[t]he Administrator shall grant or deny such petition within 60 days after the petition is filed." 42 U.S.C. § 7661d(b)(2). This provision imposes a mandatory, nondiscretionary duty upon EPA to act within 60 days of the filing of a petition under this section. If EPA objects to a permit, the permitting authority may not issue the permit unless the EPA's objections are adequately addressed. 42 U.S.C. § 7661d(b)(3). If the permitting authority has issued a permit prior to receipt of an objection by the Administrator, the Administrator shall modify, terminate, or revoke such permit. *Id.*

If EPA fails to comply with a nondiscretionary duty, such as acting on a petition within the statutorily mandated timeframe, the CAA allows any person to bring suit to compel EPA to perform its duty. *See* 42 U.S.C. § 7604(a).

Gateway Generating Station.

The Gateway Generating Station in Antioch, California, was approved by the California Energy Commission in 2001. Construction was halted in 2003 and recommenced in 2007. On February 20, 2007, BAAQMD received from Gateway an application for a Title V permit. The facility has been in operation since 2008 but was the target of an enforcement action brought by the EPA in 2009 for failure to acquire a Prevention of Significant Deterioration permit, affecting permitting processes such as the 2007 Title V permitting process at issue here.

In May 22, 2013, BAAQMD issued a proposed Title V permit for public notice and comment with a deadline of June 30, 2013. BAAQMD also provided the proposed Title V permit to EPA for its review with a 45-day deadline to object. On June 30, 2013, Wild Equity submitted timely comments on that proposed Title V permit to BAAQMD. Following the 45-day EPA review period ending July 11, 2013, during which EPA did not object to the proposed Title V permit, Wild Equity filed a petition under Section 505(b)(2), requesting that EPA object to Gateway's proposed Title V permit. The petition was filed on September 3, 2013, within the 60-day deadline for filing such petitions.

Wild Equity's petition to EPA was properly based on issues raised in the prior comments to BAAQMD on the proposed Title V permit for Gateway. Specifically, Wild Equity's petition sought EPA objection on the basis that the proposed Title V permit failed to address the necessity for obtaining incidental take authorization for listed species affected by Gateway's ongoing and proposed air pollution. The petition argued that because Title V requires every major facility review permit to include all "applicable requirements," 42 U.S.C. § 7661d(b)(1), and because CAA, its regulations, and governing agreements between EPA and BAAQMD make such incidental take authorization from the Fish and Wildlife Service an applicable requirement, the EPA should object to Gateway's Title V permit until the incidental take authorization is obtained and incorporated into the permit conditions.

On October 30, 2013, BAAQMD issued a final Title V permit for Gateway. On November 7, 2013, Wild Equity received a notification from BAAQMD of the decision to issue the permit as well as a response to Wild Equity's comments filed during the public comment period.

Conclusion.

As stated above, Wild Equity filed a timely petition to object to the proposed Title V permit for Gateway and the EPA Administrator had 60 days to grant or deny the petition. As of today's date, the Administrator has not yet granted or denied the petition. Therefore, the Administrator has failed to perform the nondiscretionary duty to grant or deny Wild Equity's petition and is in violation of CAA § 505(b)(2).

The CAA requires citizens to provide the Administrator with 60 days notice prior to bringing an action under Section 304(a)(2). 42 U.S.C. § 7604(b)(2); *see also* 40 C.F.R. 54.2(a). Accordingly, Wild Equity hereby notifies EPA and the Administrator of its intent to file suit against EPA and the Administrator of

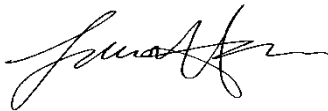
the EPA, under CAA Section 304(a)(2) for failing to perform the nondiscretionary duty of granting or denying Wild Equity's petition to object to the proposed Title V permit for Gateway Generating Station.

In light of this evidence, an appropriate response to this letter would be for EPA to take action to grant or deny Wild Equity's petition. If no action is taken, Wild Equity intends to seek in court the following relief:

1. An order compelling EPA and the Administrator to grant or deny Wild Equity's petitions within 60 days from the date of the order;
2. Attorneys' fees and other litigation costs; and
3. Other appropriate relief as allowed.

If you would like to discuss the matters identified in this letter or offer a proposal for resolving these issues, please contact me using the information above.

Very truly yours,



Laura Horton

cc: Jack P. Broadbent
Chief Executive Officer/Air Pollution Control Officer
Bay Area Air Quality Management District
939 Ellis St.
San Francisco, CA 94109

Pacific Gas & Electric Company
Registered Agent for Service of Process
Linda Y. H. Cheng
77 Beale Street, 32nd Floor
San Francisco, CA 94105

EXHIBIT B

Agreement for Partial Delegation of the
Federal Prevention of Significant Deterioration (PSD) Program
Set Forth In 40 C.F.R. Section 52.21
by the United States Environmental Protection Agency, Region 9
to the Bay Area Air Quality Management District

The undersigned, on behalf of the Bay Area Air Quality Management District (District) and the United States Environmental Protection Agency (EPA), hereby agree to partial delegation of authority to issue Prevention of Significant Deterioration (PSD) initial permits, to modify existing PSD permits, and to extend existing PSD permits, subject to the terms and conditions of this Agreement. This partial delegation is executed pursuant to 40 C.F.R. Section 52.21(u), Delegation of Authority.

I. Background Recitals

1. In accordance with Sections 165 *et seq.* of the Clean Air Act, EPA has adopted regulations that implement the Clean Air Act's Prevention of Significant Deterioration (PSD) program. These regulations are set forth in 40 C.F.R. Section 52.21. These regulations have been incorporated as part of the applicable California State plan for implementation of the New Source Review program under the Clean Air Act pursuant to 40 C.F.R. Section 52.270(a)(3), and they govern the implementation of the Clean Air Act's PSD requirements in the San Francisco Bay Area.
2. EPA's PSD regulations require that certain stationary sources of air pollutant emissions must undergo a PSD source review and obtain a PSD permit before they may be constructed and operated, as set forth in 40 C.F.R. Section 52.21.
3. Under Subsection (u) of EPA's PSD Regulations, 40 C.F.R. § 52.21(u), EPA may delegate its authority to conduct its PSD source review under 40 C.F.R. Section 52.21 to the District for sources within the District's geographical jurisdiction. Pursuant to such delegation, the District "stands in the shoes" of EPA for purposes of conducting the PSD source review and issuing the PSD permit, and in doing so must follow and implement

the same substantive and procedural requirements as EPA would if it were conducting the PSD source review and issuing the PSD permit itself.

4. EPA and the District have entered into several PSD delegation agreements in the past under 40 C.F.R. Section 52.21(u), the most recent of which became effective February 6, 2008. These prior delegation agreements were based on a finding that the PSD portion of District Regulation 2, Rule 2, generally meets the requirements of 40 C.F.R. Section 52.21 for issuing PSD permits, and that District permits issued in accordance with the provisions of District Regulation 2, Rule 2 would therefore be deemed to meet the federal PSD permit requirements in 40 C.F.R. Section 52.21. (These prior delegation agreements did not, however, delegate authority to issue PSD permits using new additional calculation methodologies for determining if a proposed project will result in a major modification and the application of a Plantwide Applicability Limit (PAL), which were promulgated by EPA effective March 3, 2003, (*see* 67 Fed. Reg. 80,186), and were upheld by the United States Court of Appeals for the District of Columbia Circuit on June 24, 2005.)
5. It has now become clear that although the PSD portion of District Regulation 2, Rule 2 may be generally consistent with the Federal PSD requirements in 40 C.F.R. Section 52.21, the District's regulations are not completely consistent with the Federal PSD requirements in every respect. Accordingly, if the District issues PSD permits under its Regulation 2, Rule 2, such permits may not in certain circumstances satisfy all federal PSD requirements in 40 C.F.R. Section 52.21, or all federal procedural requirements for PSD permit issuance in 40 C.F.R. Part 124. EPA and the District are therefore revising their delegation agreement under 40 C.F.R. Section 52.21(u) to clarify that the District must issue PSD permits pursuant to the federal PSD requirements of 40 C.F.R. Section 52.21, and under the provisions of District Regulation 2, Rule 2 only to the extent that that such provisions are consistent with the requirements of 40 C.F.R. Section 52.21.

II. Scope of Partial Delegation

1. This partial delegation of authority to issue, modify and extend PSD permits does not delegate authority to the District to issue new or modified PSD permits based on PALs.
2. For all applications for new, modified, or extended PSD permits other than those described in Paragraph II.1. above, District-issued permits with federal PSD provisions that:

- a. satisfy all of the substantive requirements of the PSD program in 40 C.F.R. Section 52.21, including (without limitation) the federal BACT requirement pursuant to 40 C.F.R. Section 52.21(j) and 40 C.F.R. Section 52.21(b)(12), and the impact analysis requirements pursuant to 40 C.F.R. Section 52.21(k)-(o); and
- b. have been issued in compliance with all of the procedural requirements of the PSD program in 40 C.F.R. Section 52.21 and 40 C.F.R. Part 124;

shall be deemed to meet federal PSD permit requirements pursuant to the provisions of this delegation agreement.

III. Applicability

1. EPA and the District have agreed to this partial delegation of PSD authority to allow the District to issue initial and modified PSD permits and extensions of PSD permits, except for modified permits based on an applicability determination using the methods adopted on December 31, 2002 (*see* 67 Fed. Reg. 80,186). EPA shall make the PSD applicability determination and issue any necessary PSD permits if a source seeks a PSD applicability determination using the methods adopted on December 31, 2002; or seeks a new or modified PSD permits with a PAL. (Modifications include Administrative Amendments, Major Modifications, and non-Major Modifications.)
2. Pursuant to this partial delegation agreement, the District shall have primary responsibility for issuing all new and modified PSD permits and extensions of PSD permits.

3. The authority to issue a PSD permit containing a PAL is not delegated to the District as part of this delegation agreement. If any facility subject to this agreement requests a new permit or permit modification to incorporate conditions for a PAL, as provided in 40 C.F.R. Section 52.21(aa), EPA shall process the application and issue the final PAL permit for the modification.
4. EPA is responsible for the issuance of PSD permits on Indian Lands under Sections 110 and 301 of the Clean Air Act. This agreement does not grant or delegate any authority under the Clean Air Act on Indian Lands to the District.
5. This partial delegation of PSD authority becomes effective upon the date of signature by both parties to this agreement.

IV. General Delegation Conditions

1. The District shall issue PSD permits under this partial delegation agreement in accordance with the requirements of 40 C.F.R. Section 52.21 in effect as of the date the District issues the final permit, except as provided in Subsection III; and, to the extent that the PSD requirements of the District's Regulation 2, Rule 2 are consistent with the requirements of 40 C.F.R. Section 52.21, in accordance with those requirements as well.
2. The District may (but shall not be required to) issue Federal PSD permits in an integrated permit proceeding along with permits required under California law and District regulations, and may include both Federal PSD requirements and California and/or District requirements in a single, integrated permit document. All Federal PSD permit conditions shall be clearly identified in any integrated permit document issued. Nothing in this partial delegation agreement shall be construed to direct or to authorize the District to issue PSD permits in an integrated permit proceeding that are inconsistent with Federal PSD requirements, however. Any provisions that are included in an integrated permit document under California law or District regulations that are not consistent with or authorized by the Federal PSD requirements shall not be considered part of the Federal PSD permit.

3. This partial delegation agreement may be amended at any time by the formal written agreement of both the District and the EPA, including amendments to add, change, or remove terms and conditions of this agreement.
4. EPA may review the PSD permit(s) issued by the District to ensure that the District's implementation of this delegation agreement is consistent with federal PSD regulations for major sources, major modifications, and permit extensions as set forth in 40 C.F.R. Section 52.21 and 40 C.F.R. Part 124.
5. If EPA determines that the District is not implementing or enforcing the PSD program in accordance with the terms and conditions of this partial delegation agreement, 40 C.F.R. Section 52.21, 40 C.F.R. Part 124, or the Clean Air Act, EPA may after consultation with the District revoke this partial delegation agreement in whole or in part. Any such revocation shall be effective as of the date specified in a Notice of Revocation to the District.
6. Revocation of this partial delegation agreement as specified in Paragraph IV.5. above shall be the sole remedy available for any failure by the District to implement or enforce the PSD program in accordance with the terms and conditions of this partial delegation agreement, 40 C.F.R. Section 52.21, 40 C.F.R. Part 124, or the Clean Air Act. The District's agreement to implement the Federal PSD program on EPA's behalf, and EPA's agreement to delegate its authority for the Federal PSD program to the District under 40 C.F.R. Section 52.21(u), is not intended and shall not be construed to alter or expand the statutory limits on the imposition of sanctions against the District under the Clean Air Act for failure to administer and enforce federal regulatory requirements as described in *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977), and *Brown v. EPA*, 566 F.2d 665 (9th Cir. 1977).
7. If the District determines that issuing a PSD permit or permits in accordance with the terms and conditions of this partial delegation agreement, 40 C.F.R. Section 52.21, 40 C.F.R. Part 124, and the Clean Air Act conflicts with State or local law, or exceeds the

District's authority or resources to fully and satisfactorily carry out such responsibilities, the District after consultation with EPA may remand administration of such permits, or of Federal PSD delegation in its entirety, to EPA. Any such remand shall be effective as of the date specified in a Notice of Remand to EPA.

8. The permit appeal provisions of 40 C.F.R. Part 124, including subpart C thereof, pertaining to the Environmental Appeals Board (EAB), shall apply to all federal PSD permitting action appeals to the EAB for PSD permits issued by the District under this partial delegation agreement. For purposes of implementing the federal permit appeal provisions under this partial delegation, the District shall notify the applicant and each person who submitted written comments or requested notice of final permit decision of the final permit decision in accordance with 40 C.F.R. Section 124.15. The notice of final permit decision shall include (i) reference to the procedures for appealing the final permit decision under 40 C.F.R. Section 124.19; and (ii) a statement of the effective date of the final permit decision established pursuant to 40 C.F.R. Section 124.15(b) and that the effective date shall be suspended if the final permit decision is appealed pursuant to 40 C.F.R. Section 124.19 until such appeal is resolved by the EAB.

V. Communication Between EPA and the District

The District and EPA will use the following communication procedures:

1. The District will forward to EPA copies of (1) all draft PSD permits prepared by the District pursuant to 40 C.F.R. Section 124.6; (2) all "Statements of Basis" prepared by the District pursuant to 40 C.F.R. Section 124.7 and/or "Fact Sheets" prepared by the District pursuant to 40 C.F.R. Section 124.8; and (3) all public notices the District issues pursuant to the requirements of 40 C.F.R. Section 124.10. Such copies shall be provided to EPA at or prior to the beginning of the public comment period for each PSD preliminary determination.
2. Upon any final PSD permit issuance, the District will forward to EPA copies of the notice of final permit issuance required by 40 C.F.R. Section 124.15(a) and the responses to

public comments required by 124.17(a) (if any); and, if requested by EPA, copies of all substantive comments (if any).

3. The District shall forward to EPA copies of all PSD non-applicability determinations that utilize netting. All such determinations must be accompanied by a written justification.

VI. EPA Policies Applicable to PSD Review

1. All PSD BACT determinations are required to perform a “top-down” BACT analysis. EPA will consider as deficient any BACT determination that does not begin with the most stringent control options available for the source under review.
2. The District shall notify and/or consult with the appropriate Federal, State and local agencies as required by 40 C.F.R. Section 52.21 and 40 C.F.R. Part 124. The District shall (among other requirements as applicable):
 - a. Notify the appropriate Class I area Federal Land Manager(s) within 30 days of receipt of a PSD permit application and at least 60 days prior to any public hearing if the emissions from a proposed facility may affect any Class I area(s), as required by 40 C.F.R. Section 52.21(p);
 - b. Notify the Fish and Wildlife Service (FWS) and EPA when a submitted PSD permit application has been deemed complete, in order to assist EPA in carrying out its non-delegable responsibilities to consult with FWS under Section 7 of the Endangered Species Act;
 - c. Notify the applicant of the potential need for consultation between EPA and FWS if an endangered species may be affected by the project; and
 - d. Refrain from issuing a final PSD permit unless FWS has determined that the proposed project will not adversely affect any endangered species.

VII. Permits

1. The District shall follow EPA guidance on any matter involving the interpretation of sections 160-169 of the Clean Air Act or 40 C.F.R. Section 52.21 relating to applicability determinations, PSD permit issuance and enforcement. EPA shall provide guidance to

the District as appropriate in response to any request by the District for guidance on such federal PSD issues.

2. The District shall at no time grant any waiver of the PSD permit requirements.
3. Federal PSD permits issued by the District must include appropriate provisions to ensure permit enforceability. PSD permit conditions shall, at a minimum, contain reporting requirements on initiation of construction, initial commencement of operation, and source testing (where applicable).
4. When any conditions of a PSD permit are incorporated into a Title V permit, the District shall clearly identify PSD as the basis for those conditions.
5. The primary responsibility for the administration and enforcement of the following EPA-issued permits is delegated to the District:

<u>Facility</u>	<u>EPA File Number</u>	<u>Permit Issuance Date</u>
Calpine Gilroy Cogen	SFB 84-04	August 1, 1985
Cardinal Cogen	SFB 82-04	June 27, 1983
IBM Corporation	SFB 82-01	June 9, 1982
Martinez Cogen Limited Partnership	SFB 83-01	December 13, 1983
Tosco Corporation	SFB 78-07	December 18, 1978
Tosco SF Area Refinery at Rodeo	SFB 85-03	March 3, 1986

District-issued modifications to these permits which meet the requirements of 40 C.F.R. Section 52.21 will be considered valid by EPA. The District shall issue any permit modifications to the above listed facilities pursuant to this agreement.

VIII. Permit Enforcement

1. The primary responsibility for enforcement of the PSD regulations rests with the District. The District will enforce the provisions of the PSD program, consistent with the enforcement provisions of the Clean Air Act and Paragraph VIII.3. of this agreement, except in those cases where District rules, policies, or permit conditions are as stringent

or more stringent than the PSD requirements. In that case, the District may elect to enforce the as stringent or more stringent District requirements.


2. Nothing in this partial delegation agreement shall prohibit EPA from enforcing the PSD provisions of the Clean Air Act, 40 C.F.R. Section 52.21, or any PSD permit issued by the District pursuant to this agreement.
3. In the event that the District is unwilling or unable to enforce a provision of this partial delegation agreement with respect to a source subject to the PSD regulations, the District will immediately notify the Air Division Director. Failure to notify the Air Division Director does not preclude EPA from exercising its enforcement authority.

3-8-11
Date



Jack P. Broadbent
Executive Officer/APCO
Bay Area Air Quality Management District

2-7-2011
Date



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