BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF GATEWAY GENERATING STATION ANTIOCH, CALIFORNIA MAJOR FACILITY REVIEW PERMIT FACILITY NO. B8143 ISSUED BY THE BAY AREA AIR QUALITY MANAGEMENT DISTRICT	PETITION NO. IX-2013-1 ORDER RESPONDING TO THE PETITIONER'S SEPTEMBER 3, 2013 REQUEST FOR OBJECTION TO THE ISSUANCE OF A TITLE V OPERATING PERMIT

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

This Order responds to issues raised in a petition to the U.S. Environmental Protection Agency by the Wild Equity Institute (Petitioner), dated September 3, 2013, pursuant to Section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2) (Petition).

The Petition relates to the proposed operating permit issued by the Bay Area Air Quality Management District (BAAQMD or District) to Pacific Gas & Electric (PG&E) for the Gateway Generating Station, LLC (Gateway), identified as Major Facility Review Permit, Gateway Generating Station, LLC, Facility #B8143. Gateway is a natural gas-fired electricity generating facility located in Contra Costa County, California.

The Petition requests that the EPA object to the proposed operating permit for the reasons outlined below. The proposed operating permit was issued pursuant to Title V of the CAA, CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f, and BAAQMD Regulation 2, Rule 6. *See also* the EPA's implementing regulations at 40 C.F.R. Part 70. These CAA operating permits are also referred to as title V permits or part 70 permits.

I. INTRODUCTION

The Petition requests that the EPA object to the title V operating permit proposed by the BAAQMD for the Gateway facility in Antioch, California (Proposed Permit), which was issued in May 2013.[1] This May 2013 Proposed Permit was the first proposed title V permit for this facility.

[1] In its Petition, the Petitioner references the "Title V Permit" or "Permit" for Gateway. *See, e.g.*, Petition at 1, 3, 4, 7. The EPA's understanding is that the Petition's claims generally reference the proposed permit for which public notice was given in May 2013, Major Facility Review Permit, Gateway Generating Station, LLC, Facility #B8143, (Proposed Permit) because the final title V permit for this facility was issued after the Petitioner submitted the Petition to the EPA in September 2013 (Final Permit). In this Order, when discussing the title V permit at issue and the substance of the Petitioner's claim, we will generally refer to the "Gateway Title V Permit," but may refer to the

The Petitioner requests that the EPA object to the Proposed Permit on the general basis that the permit "fails to ensure that Gateway satisfies all applicable pollution control requirements." Petition at 1. More specifically, the Petition contends that the EPA failed to obtain incidental take authorization under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, for listed species[2] that the Petitioner contends are affected by Gateway's Proposed Permit.

This Order contains the EPA's response to the Petition. Based on a review of the Petition, other relevant materials, including the Final Permit and permit record, and relevant statutory and regulatory authorities, and as explained below, I deny the Petition requesting that the EPA object to the Gateway Title V Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable state implementation plan (SIP). CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, as discussed further below, but does require that permits contain monitoring, recordkeeping, reporting and other requirements to assure sources' compliance. 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the title V program is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

Section 502(d)(l) of the CAA, 42 U.S.C. § 766la(d)(l), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA. In 1995, the EPA granted interim approval of the title V operating permit program submitted by BAAQMD. 60 *Fed. Reg.* 32606 (June 23, 1995); 40 C.F.R. Part 70, Appendix A. Effective November 30, 2001, the EPA granted full approval of BAAQMD's title V operating permit program. 66 *Fed. Reg.* 63503 (December 7, 2001).[3] The program is now codified in BAAQMD

Proposed Permit when discussing the Petitioner's request that the EPA object to Gateway's title V permit, or refer to the Final Permit as appropriate.

[2] A *listed species* is "any species of fish, wildlife, or plant [that] has been determined to be endangered or threatened under Section 4 of the Endangered Species Act." 50 C.F.R. § 402.02. As discussed in more detail in Section II.D. of this order, Section 9 of the ESA prohibits the unauthorized take of any listed species of endangered fish or wildlife. *See* ESA § 9(a), 16 U.S.C. § 1538(a). The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct. *See* ESA § 3, 16 U.S.C. § 1532. Section 10 of the ESA establishes a procedure under which a person can obtain a permit from the Fish and Wildlife Service (FWS) that authorizes take of a listed species, if such take is incidental to an otherwise lawful activity. *See* ESA § 10, 16 U.S.C. § 1539.

[3] Although not relevant to this Petition, the EPA also approved a revision submitted on November 7, 2003 for major stationary agricultural sources, effective on January 1, 2004. *See* 40 C.F.R. Part 70, Appendix A.

Regulation 2, Rule 6. BAAQMD thus issues title V operating permits pursuant to its EPA-approved title V operating permit program.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements or the requirements of the Act. CAA §§ 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c) (providing that the EPA will object if the EPA determines that a proposed permit is not in compliance with applicable requirements or requirements under 40 C.F.R. Part 70).

If the EPA does not object to a permit on its own initiative, CAA § 505(b)(2) of the Act and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit. The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

Section 505(b)(2) indicates that the Administrator "shall grant or deny such petition within 60 days after the petition is filed." This provision does not direct how the Administrator must address the individual issues in each petition, thus providing the EPA with discretion in determining the best approach for addressing such issues. The EPA may consider the complexity of the issues, the inter-relatedness of the issues, agency resources, public participation opportunities, source-specific considerations, and other relevant factors in deciding the most appropriate approach for addressing the issues in each petition. *See In the Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Petition Nos. VI-2010-02 and VI-2011-03 at 11 (March 23, 2012) ("Section 505(b)(2) does not specify whether the EPA must respond initially to all of the issues raised in a petition....the Act does not explicitly require that, nor does it foreclose the EPA from granting a petition based on one or more threshold issues where those issues potentially affect the analysis or disposition of other issues in the petition.").

In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) *(NYPIRG)*. Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130-33 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-1267 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-78 (7th Cir. 2008); *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081-82 (10th Cir. 2013); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *see also NYPIRG,* 321 F.3d at 333 n.11. In evaluating a petitioner's

claims, the EPA considers, as appropriate, the adequacy of the permitting authority's rationale in the permitting record, including the response to comments (RTC). If, in responding to a petition, the EPA objects to a permit that has already been issued, the EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 C.F.R. §§ 70.7(g)(4) and (5)(i) - (ii), 40 C.F.R. § 70.8(d).

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *NYPIRG*, 321 F.3d at 333; *Sierra Club v. Johnson*, 541 F.3d at 1265-66 ("it is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements"). Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioners have demonstrated that the permit is not in compliance with requirements of the Act. *See, e.g., Citizens Against Ruining the Environment*, 535 F.3d at 667 (§ 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made") (emphasis added); *Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' … plainly mandates an objection *whenever* a petitioner demonstrates noncompliance") (emphasis added). When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., Sierra Club v. Johnson*, 541 F.3d at 1265-66; *Citizens Against Ruining the Environment*, 535 F.3d at 678; *MacClarence*, 596 F.3d at 1130-31. We discuss certain aspects of the petitioner's demonstration burden below; however, a fuller discussion can be found in *In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Order on Petition Numbers VI-2011-06 and VI- 2012-07 (June 19, 2013) (*Nucor II Order*) at 4-7.

The EPA has looked at a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the RTC), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132-33; *see also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 (December 14, 2012) at 20-21 (denying title V petition issue where petitioners did not respond to state's explanation in response to comments or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 (June 22, 2012) at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient). Another factor the EPA has examined is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for petitioner's objection, contrary to Congress' express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("the Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive"); *In the Matter of Murphy Oil*

USA, Inc., Order on Petition No. VI-2011-02 (Sept. 21, 2011) at 12 (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring). Relatedly, the EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co. – Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 (Jan. 15, 2013) at 9; *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 (Apr. 20, 2007) at 8; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 (Mar. 15, 2005) at 12, 24. Also, if a petitioner did not address a key element of a particular issue, the petition should be denied. *See, e.g., In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station,* Order on Petition Number: VIII-2010-XX (June 30, 2011) at 7–10; *See, e.g., In the Matter of Georgia Pacific Consumer Products LP Plant,* Order on Petition No. V-2011-1 (July 23, 2012) at 6-7, 10–11, 13–14.

C. CAA Preconstruction Permits

Applicable requirements for a new major stationary source or for a major modification to a major stationary source include the requirement to obtain a preconstruction permit that complies with applicable new source review (NSR) requirements. For major sources, the NSR program is comprised of two core types of preconstruction permit programs. Part C of Title I the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to areas of the country that are designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS). CAA §§ 160-169, 42 U.S.C. §§ 7470-7479. Part D of Title I of the Act establishes the nonattainment NSR program, which applies to areas that are designated as nonattainment with the NAAQS. The area in which the Gateway facility is located (Antioch, California) is designated as attainment or unclassifiable for nitrogen dioxide and all of the other NAAQS, except the 8-hour ozone and $PM_{2.5}$ NAAQS.[4] *See* 40 CFR 81.305.

The only set of CAA requirements that appears to be addressed in the Petition is the PSD part of the NSR program, which requires a major stationary source in an attainment or unclassifiable area to obtain a PSD permit before beginning construction of a new facility or undertaking certain modifications. CAA § 165(a)(1), 42 U.S.C. § 7475(a)(1). The analysis under the PSD program must address two primary elements (among other requirements) before the permitting authority may issue a PSD permit: (1) an evaluation of the impact of the proposed new or modified major stationary source on ambient air quality in the area, and (2) an analysis ensuring that the proposed facility is subject to Best Available Control Technology for each pollutant subject to regulation under the Act. CAA §§ 165(a)(3), (4), 42 U.S.C. §§ 7475(a)(3), (4); 40 C.F.R. § 52.21(j), (k).

The EPA has two largely identical sets of regulations implementing the PSD program: one set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be

[4] On January 9, 2013, the EPA made a determination that the area including Antioch, California has attained the 24-hour $PM_{2.5}$ NAAQS, and that determination suspended the requirements for certain submissions that would otherwise be required under the Act. However, that action does not constitute a redesignation of the San Francisco Bay Area $PM_{2.5}$ nonattainment area (which includes Antioch, California) to attainment. *See* 78 *Fed. Reg.* 1760 (January 9, 2013).

approved as part of a SIP. The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. In such areas, the EPA can delegate its authority to conduct PSD source review and issue PSD permits. *See* 40 C.F.R. § 52.21(u). On April 23, 1986, the EPA Region 9 delegated its authority to issue PSD permits to the BAAQMD, subject to the terms, conditions and reservations of authority set forth in the delegation agreement.[5] The applicable requirements governing the issuance of PSD permits in the BAAQMD are the federal PSD regulations at 40 C.F.R. § 52.21. Accordingly, the applicable requirements of the Act for new major sources or major modifications in the BAAQMD include the requirement to comply with the terms or conditions of PSD permits under 40 C.F.R. § 52.21, and (for a new major stationary source or for a major modification to a major stationary source) the requirement to obtain a preconstruction permit that complies with 40 C.F.R. § 52.21. *See* 40 C.F.R. §§ 70.1(b) and 70.2.[6] Although the EPA delegated administration of the PSD program to the BAAQMD, PSD permits issued by the BAAQMD are considered federal PSD permits and are issued pursuant to federal regulations.[7]

D. Endangered Species Act[8]

The ESA, codified at 16 U.S.C. §§ 1531-1544, is intended "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." ESA § 2(b), 16 U.S.C. § 1531(b). The ESA contains provisions for the listing of endangered or threatened species and the designation of critical habitat for those species by the Secretary of the Interior and the Secretary of Commerce. *See* ESA § 4, 16 U.S.C. § 1533.

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[5] In 2003, the EPA revoked BAAQMD's previously delegated authority to implement the PSD program, but later took actions to redelegate that authority. *See* discussion in Section III.B, Facility History, below. *See* also *United States v. Pacific Gas & Elec.*, 776 F.Supp.2d 1007, 1011 (N.D. Cal. 2011).

[6] Under 40 C.F.R. § 70.1(b), "[a]ll sources subject to [the title V regulations] shall have a permit to operate that assures compliance by the source with all applicable requirements." "Applicable requirements" are defined in 40 C.F.R. § 70.2 to include, in relevant part, "(1) [a]ny standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the [Clean Air] Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in [40 C.F.R.] part 52; [and] (2) [a]ny term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act." In the BAAQMD, the requirements in the applicable implementation plan include the requirement to obtain a PSD permit under 40 C.F.R. § 52.21.The applicable implementation plan in the BAAQMD includes a Federal Implementation Plan that incorporates the federal PSD permitting requirements. 40 C.F.R § 52.270(a).

[7] Further, appeals of those permits are governed by 40 CFR § 124.19 and are heard exclusively by the EPA Environmental Appeals Board (Board). When a federal PSD permit is appealed to the Board, the permit is not effective and construction may not begin until the Board has resolved the appeal. 40 C.F.R. § 124.15.

[8] Under CAA § 505(b)(2), a petitioner must demonstrate that a title V permit is not in compliance with the requirements of the CAA before the EPA will object to the permit. As discussed in detail in the EPA's Response in Section IV of this Order, ESA requirements are not applicable requirements under 40 C.F.R. § 70.2 or BAAQMD Regulations 2-6-202. We include this Section on the ESA to provide background information relevant to the history of the Gateway facility and the EPA's response concerning the Petitioner's Additional Contention that the EPA Failed to Adequately Comply with the ESA in Relation to the Gateway PSD Permit.

Section 7 of the ESA sets forth requirements for consultation between federal agencies and the Service.[9] Section 7(a)(2) of the ESA contains important substantive and procedural requirements. *See Sierra Club. v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995). This Section requires that:

> Each Federal agency shall, in consultation with and with the assistance of the [FWS], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the [FWS]. . . to be critical, unless such agency has been granted an exemption for such action. . . .

ESA § 7(a)(2), 16 U.S.C. 1536(a)(2).[10] The regulations implementing the ESA, at 50 C.F.R. part 402, describe in more detail the requirements for the consultation process. Formal consultation is required if a federal agency determines that its action may affect listed species or critical habitat. 50 C.F.R. § 402.14. Informal consultation is an optional process designed to assist a federal agency in determining whether formal consultation or a conference is required. If it is determined by the federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated and no further action is necessary. 50 C.F.R. § 402.13(a).

An "action" for purposes of the ESA means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies, including the granting of licenses, contracts, leases, easements rights-of-way, permits or grants-in-aid. 50 C.F.R. § 402.02. The initial issuance of a federal PSD permit, including a delegated federal PSD permit, falls within the meaning of a federal "action" as that term is used in the ESA. *See In re: Indeck-Elwood, LLC*, 2006 EPA App. LEXIS 44, 13 E.A.D. 126. ESA Section 7 consultation requirements apply to all actions in which there is discretionary federal involvement or control where such action may affect a listed species or its designated critical habitat. 50 C.F.R. §§ 402.03, 402.13, 402.14.[11]

Section 9 of the ESA prohibits the unauthorized take of any listed species of endangered fish or wildlife. *See* ESA § 9(a), 16 U.S.C. § 1538(a). The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct. *See* ESA § 3, 16 U.S.C. § 1532. Section 10 of the ESA establishes a procedure under which a person can obtain a permit from FWS that authorizes take of a listed species, if such take is incidental to

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[9] The lead federal agencies for implementing the ESA are the FWS and the U.S. National Oceanic and Atmospheric Administration (NOAA) Fisheries Service. *See* 50 C.F.R. § 402.01(b). Under the joint implementing regulations found at 50 C.F.R. Part 402, the term "Service" can mean either FWS or NOAA Fisheries Service, as appropriate. 50 C.F.R. § 402.02. Because the listed species addressed in the Petition are all within the jurisdiction of the FWS, in this Order the term "Service" refers to the FWS.

[10] The term "jeopardize the continued existence" means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02.

[11] After the conclusion of an initial ESA Section 7 consultation, federal agencies are required to reinitiate ESA consultation where: 1) discretionary Federal involvement or control over the action has been retained or is authorized by law; and 2) one of four changed circumstances listed in 50 C.F.R. § 402.16 is triggered. One of these changed circumstances is when new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. *See* 50 C.F.R. § 402.16.

an otherwise lawful activity. *See* ESA § 10, 16 U.S.C. § 1539. Section 7 of the ESA also provides a mechanism for authorizing incidental take, where necessary, through the formal Section 7 consultation process by the inclusion of an incidental take statement (ITS) in a biological opinion. *See* ESA § 7(b)(4), (o)(2), 16 U.S.C. § 1536(b)(4), (o)(2).

III. BACKGROUND

A. Facility

Gateway is a natural gas-fired power plant located in Antioch, California. The facility is located about a mile from the Antioch Dunes National Wildlife Refuge (ADNWR), a habitat for three species that are protected under the ESA. Gateway "is a combined-cycle cogeneration facility capable of producing a nominal electrical output of 530 MW" and "generates electricity using a 'combined cycle' system comprising two combustion turbine generators (CTGs) that work in concert with two heat recovery steam generators (HRSGs) and a steam turbine generator (STG)." BAAQMD's May 2013 Proposed Permit Evaluation and Statement of Basis for Initial Major Facility Review Permit for Gateway Generating Station, LLC Facility #B8143 (Statement of Basis) at 3.[12] The CTGs generate electricity by burning natural gas, which drives combustion turbine compressors and electric generators. Instead of being vented, the exhaust heat from the CTGs is routed to the HRSGs to produce steam to power the STG to generate additional electricity. *Id.*

The CTGs are identified in Gateway's title V permit as sources S-41 and S-43, each a 175 MW GE gas turbine. The HRSGs are sources S-42 and S-44, each a 90 MW heat recovery steam generator, Coen Model # 40D-13762-1-000. Gateway's permitted sources also include S-47, a diesel fire pump engine. For more details, see Table II A in the Final Permit.

B. Facility History

On July 24, 2001, BAAQMD issued a PSD permit authorizing the construction of the Gateway facility (PSD Permit).[13] The PSD Permit authorized emissions of NOx at a rate of 2.5 parts per million on a dry basis. At that time, the EPA had delegated to the BAAQMD the authority to conduct PSD review and issue federal PSD permits on the EPA's behalf. As a result, issuance of the PSD Permit by the BAAQMD pursuant to delegated authority to implement the federal PSD program was a federal agency action for purposes of ESA Section 7(a)(2). Consistent with the requirements of the ESA, on May 30, 2001, the EPA requested informal consultation with the FWS on the federal agency action of issuing the PSD Permit for Gateway. In a letter dated June 29, 2001, the FWS concurred with the EPA that the three species in the nearby ADNWR – the Lange's metalmark butterfly, Contra Costa wallflower and Antioch Dunes evening primrose – were not likely to be adversely affected by the issuance of the PSD Permit. Consistent with the ESA procedures, that letter concluded the informal ESA consultation process and no further ESA-related actions were required in connection with the PSD Permit.

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[12] A more detailed description of Gateway is included in the Statement of Basis.

[13] The PSD Permit was originally issued to Mirant Delta, LLC to construct the Contra Costa Power Plant Unit 8, later known as Delta Unit 8. After PG&E acquired the facility, it was renamed the Gateway Generating Station.

Construction of the Gateway facility began in late 2001, but ceased in February 2002. In 2003, the EPA revoked the BAAQMD's previously delegated authority to implement the PSD program, but later took actions to redelegate that authority. During this period, the BAAQMD took actions to extend the 2001 PSD permit. In February 2007, construction of the facility resumed, and in November 2008, construction was completed and the gas turbines were first fired. See Statement of Basis at 2-3, and *United States v. Pacific Gas & Elec.*, 776 F.Supp.2d 1007, 1013-14 (N.D. Cal 2011) (*Order Denying Wild Equity Institute's Motion to Intervene and Granting Plaintiff's Motion to Enter the Proposed Second Amended Consent Decree*), discussed further below.

In September 2009, the EPA filed a complaint against PG&E, alleging that PG&E constructed and operated Gateway in violation of NSR requirements because the 2001 PSD Permit expired before PG&E constructed and began operating Gateway. *See United States v. Pacific Gas & Elec.*, 776 F.Supp.2d at 1011. The EPA and PG&E negotiated a settlement, and requested that the Court approve and enter a proposed second amended consent decree (Consent Decree). In an order denying Petitioner's motion to intervene and granting the United States' motion to enter the Consent Decree, the Court noted that the claims in that case arose "out of the interplay between the federal and Air District regulations regarding expiration of PSD permits, and how this conflicting regulatory scheme was applied to PG&E and its predecessor, Mirant." *Id.* at 1013. The Consent Decree was entered following a public notice process, consistent with the CAA.

The Consent Decree imposed new emission limitations and requirements, which were more stringent than the terms and conditions included in the previously issued PSD Permit. Among other requirements, the Consent Decree required PG&E to reduce its emissions of NOx from 2.5 to 2.0 parts per million and reduced the annual tonnage cap on NOx emissions from 174.3 tons per year to 139.2 tons per year. *United States v. Pacific Gas & Elec.*, 776 F.Supp.2d at 1015. The Consent Decree also required lower limits for other pollutants (carbon monoxide, sulfur dioxide, and particulate emissions). *Id.* at 1015-16.

The emission limitations and related requirements of the Consent Decree were not imposed through the issuance of a new (or revised) PSD permit for Gateway. Instead, consistent with numerous other Consent Decrees entered across the United States, the Gateway Consent Decree included specific requirements for permanently incorporating the new terms and conditions into appropriate state and local permits, including, ultimately, Gateway's title V permit. Specifically, Paragraph 6 of the Consent Decree required PG&E to submit to the State of California Energy Commission (CEC) a Petition to Amend Conditions of Certification for Gateway, incorporating new emission limitations and requirements imposed by the Consent Decree into the state CEC authorization process. Paragraph 7 of the Consent Decree required PG&E to submit an application to the BAAQMD to amend the BAAQMD's permit to operate,[14] issued under state and local law, to include new emission limitations and requirements imposed by the Consent Decree. Paragraph 7 of the Consent Decree also required PG&E to submit an application requesting inclusion in the Gateway Title V Permit of new emissions limitations and requirements imposed by the Consent Decree.

[14] A BAAQMD "permit to operate" is a permit issued by the BAAQMD under state and local law, and is separate and distinct from a title V permit.

The Court entering the Consent Decree specifically considered the fact that the Consent Decree's terms did not call for a PSD permitting process to resolve the alleged PSD violations. *United States v. Pacific Gas & Elec.*, 776 F.Supp.2d at 1027. In response to the arguments of an intervenor, Communities for a Better Environment, the Court held that the Consent Decree was substantively fair. *Id.* at 1026-30. In rejecting the intervenor's argument that the EPA should have required PG&E to go through a PSD permitting process to address the alleged PSD violations, the Court upheld the EPA's decision to structure the settlement in a manner that did not require a new PSD permitting process and found that this approach was reasonable. *Id.* at 1027.

When the EPA and PG&E requested that the Court approve and enter the Consent Decree, the Petitioner sought to intervene, asserting that the EPA's settlement of its enforcement action against PG&E constituted a federal "agency action" under the ESA, and that the EPA failed to engage in a Section 7 consultation under the ESA. *Id.* at 1016. The Court analyzed and rejected the Petitioner's argument that the Consent Decree was a federal agency action. *Id.* at 1020-23.[15] In addition, the Court rejected the Petitioner's argument that entry of the Consent Decree would require the EPA to reinitiate consultation because of new evidence about the effect of nitrogen emissions on the Lange Metalmark butterfly that was not considered at the time of the Section 7 consultation on the PSD Permit in 2001, finding that this issue was independent of the issues and claims in the case before it. *Id.* at 1023-24. The Court noted that entry of the Consent Decree would not impair the Petitioner's ability to file a separate lawsuit to allege this issue and protect its interest. *Id.* at 1024 and fn 9. The Consent Decree was entered in March 2011. *Id.*

In a letter to the EPA dated June 29, 2011, the FWS conveyed its concerns regarding the effects of nitrogen deposition from existing and proposed power generating stations, including Gateway, located in Contra Costa County, California on federally listed species at ADNWR. (FWS Letter). The Petitioner includes with its Petition a copy of this letter. For Gateway, the FWS recommended that "[b]ased on the availability of new scientific information that reveals adverse effects to listed species not previously considered and based on changes to the [Gateway] project resulting from entering into the recent settlement agreement with PG&E, the EPA should reinitiate Section 7 consultation with the Service [] . . . pursuant to 50 CFR § 402.14 of the Act." FWS Letter at 4. Notably, the FWS Letter did not acknowledge the fact that the Consent Decree effectuating the settlement and imposing new emission limits for Gateway was neither itself a federal action triggering any ESA obligations nor an action resulting in a new PSD permitting process for Gateway.

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[15] The Court also rejected Petitioner's argument that the EPA had violated Section 7(d) of the ESA by entering into the Consent Decree without initiating, reinitiating, or completing the consultation process with FWS to ensure that the EPA's action would not jeopardize the continued existence of the Lange's Metalmark Butterfly. *Id.* at 1023. Section 7(d) of the ESA provides: "After initiation of consultation required under [Section 7(a)], the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section 7(a)(2) of the ESA]." ESA § 7(d), 16 U.S.C. § 1537(d). The Court held that the restrictions of Section 7(d) apply only in the context of an agency action that is subject to ESA consultation, and because the Consent Decree was not such an action, Section 7(d) was inapplicable. 776 F.Supp.2d at 1023.

In accordance with the requirements of Paragraph 7 of the Consent Decree, PG&E submitted an application to the BAAQMD to amend its permit to operate to include the new emissions limitations and requirements as required by the Consent Decree. BAAQMD issued this permit to operate the CTGs, HRSGs, and fire pump diesel engine pursuant to its local operating permit program on September 13, 2011 (2011 Permit to Operate).[16] The BAAQMD acted pursuant to its own authority under state and local law in issuing the 2011 Permit to Operate and was not relying on delegated federal authority to apply 40 C.F.R. § 52.21.

C. Gateway Title V Permit History

On February 20, 2007, the initial title V permit application for Gateway was submitted to the BAAQMD. On May 22, 2013, the BAAQMD released the Proposed Permit for public comment. On May 22, 2013, the BAAQMD also submitted the Proposed Permit to the EPA. Petitioner submitted comments on the Proposed Permit to the BAAQMD in a letter dated June 30, 2013. Another set of comments was submitted to the BAAQMD on the Proposed Permit by Mr. Robert Sarvey and Mr. Rob Simpson. The EPA's 45-day review period on the Proposed Permit ended on July 11, 2013.[17] During its 45-day review period, the EPA did not object to the Proposed Permit. On October 30, 2013, the BAAQMD issued the Final Permit pursuant to its approved title V operating permit program. The BAAQMD also considered and issued responses to the two sets of comments it received on the Proposed Permit.[18] It is our understanding that on October 30, 2013, BAAQMD announced on its website that the Final Permit had been issued.

D. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to take such action. CAA § 505(b)(2); 42 U.S.C. § 766ld(b)(2). Any petition seeking the EPA's objection to the Proposed Permit was due on or before September 9, 2013. The Petition was received by the EPA on September 9, 2013. Thus, the EPA finds the Petitioner timely filed its Petition.

IV. EPA DETERMINATIONS ON CLAIM RAISED BY THE PETITIONER

The Petitioner's Claim. The Petitioner raises a number of issues all related to the claim that the Proposed Permit "fails to ensure that Gateway satisfies all applicable pollution control requirements." Petition at 1. Specifically, the Petitioner contends that the EPA failed to obtain

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[16] The Petition included as an attachment a September 13, 2011 letter from BAAQMD transmitting the 2001 Permit to Operate as well as the 2001 Permit to Operate. The 2011 Permit to Operate shows that the September 13, 2011 action revised that permit's conditions to be consistent with CEC license amendments in September 2011 and to incorporate additional conditions from the Consent Decree. *See* BAAQMD September 13, 2011 letter and 2011 Permit to Operate at Petition pages 8, 13 and 30. BAAQMD was using its regulatory authority under State and local law when it issued the 2011 Permit to Operate to ensure consistency with the CEC license amendments and to incorporate the approved Consent Decree requirements.

[17] Information in the EPA Region 9 Electronic Permit Submittal System states that the 45-day review period ended on July 11, 2013.

[18] *See* Letter dated November 7, 2013, from B. Lusher, BAAQMD to B. Plater, Wild Equity Institute; Letter dated November 7, 2013, from B. Lusher, BAAQMD to R. Sarvey and R. Simpson.

incidental take authorization under the ESA for "listed species affected by" the facility. *Id.* Thus, the EPA must object to the permit until the incidental take authorization is obtained and incorporated into the title V permit. *Id.* To support its contention, the Petitioner explains its reasoning as follows. First, the Petitioner explains its view that the PSD program is one of the applicable requirements of the Title V program. Petition at 4. Second, the Petitioner explains that PSD applies to Gateway. *Id.* Third, the Petitioner explains that, because of the delegation agreement between the EPA and BAAQMD, the EPA must consult with the FWS over potential effects to endangered species during the PSD application process. *Id.* The Petitioner further explains that if during that consultation, the agencies find that the action will likely adversely affect an endangered species, the FWS "may issue" an ITS. *Id.* On these bases, the Petitioner concludes that the "ITS is a key part of the PSD program and a possible component of the EPA's non-delegable duties under the ESA that must be performed before a Federal agency … may issue a PSD permit." *Id.* The Petitioner then reasons that, because PSD is an applicable requirement of the title V permit, the requirement under the ESA to obtain an ITS is an applicable requirement under the CAA as well. *Id.*

In addition to this analysis concerning whether Gateway's title V permit contains all applicable requirements, the Petitioner raises a number of other factual and legal arguments to further support its contention that the EPA's failure to adequately comply with the ESA in relation to the underlying PSD permit results in the EPA's obligation to object to the Proposed Permit. More specifically, the Petitioner claims that the Consent Decree is a new federal action that triggered ESA obligations. Petition at 6, fn 1. In addition, the Petitioner argues that reinitiation of the ESA consultation is required due to new scientific information being available or because a federal "action [was] modified . . . by the terms of the new PSD permit included in the BAAQMD 2011 Permit to Operate." Petition at 3, 5, 7 and fn 1.

The EPA's Response. For the reasons provided below, the EPA denies the Petitioner's claim.

The EPA Response on Whether the Gateway's Proposed Permit Contains All Applicable CAA Requirements

Pursuant to Section 505(b)(2) of the CAA, "[t]he Administrator shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan." 42 U.S.C. § 7661d(b)(2). In the context of that sentence, the word "chapter" refers to Chapter 85 of the United States Code – "Air Pollution Prevention and Control" – otherwise known as the CAA. "Applicable requirement" of the CAA for title V purposes is defined in 40 C.F.R. § 70.2. Relevant to the Petition, the term "applicable requirement" means, among other specifically identified CAA requirements, any "standard or other requirement provided for in the applicable implementation plan approved or promulgated by the EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter [referring to 40 C.F.R. Part 52]" and any "term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act." *See also* BAAQMD

Regulation 2-6-202.[19] None of the applicable requirements listed under 40 C.F.R. § 70.2 refer to any other environmental statutes, including the ESA.

The Petitioner's claim is based on the primary contention that requirements of the ESA are applicable requirements for purposes of the CAA title V program. However, ESA-related provisions are not requirements of the CAA, but rather under the ESA, a separate federal statute that is administered by the FWS and NOAA Fisheries Service.[20] While the EPA may have specific obligations under the ESA in certain circumstances, the ESA itself is not a part of the CAA, not a part of a SIP or federal implementation plan that implements the CAA, and not otherwise an applicable requirement as that term is defined in 40 C.F.R. § 70.2 or BAAQMD Regulation 2-6-202. The ESA is an independent federal statutory requirement that includes its own independent implementation and enforcement mechanisms. Since the ESA is not an applicable requirement of the CAA, it is not possible for the Petitioner to demonstrate that the permit is not in compliance with the CAA on the basis of a claim alleging noncompliance with the ESA.

By its own terms, Section 505(b)(2) applies only to requirements of the CAA – thus explicitly excluding obligations that may stem from the ESA since it is not a part of the CAA. As a result, the Petitioner did not demonstrate, under CAA Section 505(b)(2), that ESA requirements are applicable requirements under 40 C.F.R. § 70.2 or BAAQMD Regulation 2-6-202 that must be included in the Gateway Title V Permit.

As a direct result of the ESA not being a part of the CAA, the claim raised by Petitioners that the EPA had an obligation to initiate or reinitiate consultation under the ESA is not properly raised under Section 505(b)(2). Under Section 505(b)(2), a petitioner must demonstrate that "the *permit* is not in compliance with the requirements" of the CAA before the EPA will object to the permit. *See* 42 U.S.C. § 7661d(b)(2) (emphasis added). Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence*, 596 F.3d at 1130-33; *Sierra Club v. Johnson*, 541 F.3d at 1266-1267; *Citizens Against Ruining the Environment*, 535 F.3d at 677-78; *Sierra Club v. EPA*, 557 F.3d at 406; *Whitman*, 321 F.3d at 333 n.11. Here, the Petitioner's claim is based on an alleged failure of the EPA to comply with the ESA (not a deficiency in the permit issued by the BAAQMD), which then allegedly resulted in the omission of a term or condition in the permit that would be required under the ESA, not the CAA. Thus, the Petitioner's claim is not based on a flaw with the Proposed Permit, or a procedural flaw with how the permitting authority processed the permit, as required by CAA § 505(b)(2). *See also* 40 C.F.R. § 70.8(c) and (d). Consequently, the Petitioner did not demonstrate that the permit was not in compliance with the CAA because the Petitioner's claim is based on the EPA's alleged failure to meet its obligations under a separate statute, the ESA.

The Petitioner also claims that the ESA is a requirement of the PSD program, and, thus, an applicable requirement for title V purposes. This too is a legally flawed rationale because compliance with the ESA is not required under the PSD provisions in the CAA or the EPA's

[19] The BAAQMD's rules define "applicable requirements" as "[a]ir quality requirements with which a facility must comply pursuant to the District's regulations, codes of California statutory law, and the federal Clean Air Act, including all applicable requirements as defined in 40 CFR 70.2."
[20] *See* footnote 9 above.

implementing regulations. As explained in Section II.C of this Order, PSD permits issued by the BAAQMD are considered federal PSD permits and are issued pursuant to the federal PSD regulations in 40 C.F.R. § 52.21. Compliance with the ESA is not a requirement of the federal PSD regulations in 40 C.F.R. § 52.21. The federal PSD regulations in 40 C.F.R. § 52.21 do not require permitting authorities to meet ESA requirements when issuing PSD permits. While Section 7 of the ESA may apply to certain federal actions taken under the PSD program, this does not convert compliance with the ESA into a requirement of the PSD program. The ESA remains an independent federal statutory provision. As a result, the Petitioners did not, and could not, demonstrate a deficiency with the title V permit on this basis under Section 505(b)(2) of the CAA.

The EPA observes that these same general points were underscored by the BAAMQD in its response to the Petitioner's comments on the Gateway Title V Permit. In its response to the Petitioner's comments regarding the relationship between the ESA and PSD and title V applicable requirements, the BAAQMD stated its disagreement with the Petitioner's contentions that ESA-related requirements associated with PSD permitting for Gateway were "applicable requirements" that must be included in the Gateway Title V Permit, describing in detail the reasoning supporting its conclusion. *See* Letter dated November 7, 2013 from B. Lusher, BAAQMD to B. Plater, Wild Equity Institute. (BAAQMD RTC). In summary, the BAAQMD disagreed that there are any title V "applicable requirements" related to any incidental take authorization for listed species that need to be incorporated into the Title V permit, under the BAAQMD's definition of "applicable requirements" in District Regulation 2-6-202 or the definition of "applicable requirements" in 40 C.F.R. § 70.2. *Id.* The BAAQMD stated that "neither of the two ESA requirements referred to in the comment, the Section 7 consultation requirement and the Section 10 incidental take permit requirement, give rise to any such Title V applicable requirements for this facility," and explained its reasoning for this conclusion. *Id.* at 1-3.[21] The BAAQMD also noted that the conditions from the initial PSD permit and the conditions from the subsequent Consent Decree are all included as "applicable requirements" in the Gateway Title V Permit, and that the inclusion of such conditions satisfies the title V permitting regulations. *Id.* at 3.

In sum, the Petitioner has failed to demonstrate that any ESA-related requirements are applicable requirements under the definition of "applicable requirements" in 40 C.F.R. § 70.2 or the BAAQMD's definition of "applicable requirements" in District Regulation 2-6-202 that should have been included in the Gateway Title V Permit. The Petitioner also has not demonstrated that compliance with the ESA is a requirement of the federal PSD regulations in 40 C.F.R. § 52.21.

The EPA Response Concerning the Petitioner's Additional Contention that the EPA Failed to Adequately Comply with the ESA in Relation to the Gateway PSD Permit.

[21] In its response to Petitioner's comments on the Proposed Permit, the BAAQMD noted that "the Fish & Wildlife Service did not issue an incidental take statement or biological opinion for the project through the ESA consultation process, and there were no conditions of approval imposed through the PSD permit process with respect to endangered species. Accordingly, there are no such conditions that need to be included in the Title V permit as 'applicable requirements.'" BAAQMD RTC *at* 3.

As explained above, the Petitioner did not demonstrate that the EPA failed to adequately comply with the ESA in relation to the underlying PSD permit.[22] Additional discussion is provided below.

The Petitioner's claims concerning the EPA's obligation to initiate or reinitiate Section 7 consultation under the ESA in association with Gateway's PSD Permit, the Consent Decree, new scientific information, alleged permit modification, and any other actions related to Gateway are without merit, for the reasons discussed below. These reasons provide an additional basis on which the EPA denies the Petitioner's request for an objection to the Proposed Permit based on this claim.

In responding to the Petitioner's arguments about ESA Section 7, the BAAQMD also "disagree[d] that it would be appropriate to refrain from issuing the Title V permit to wait for potential re-initiation of consultation between the EPA and the Fish and Wildlife Service," noting that "it is not clear that further consultation is required or will take place, given the fact that the PSD permitting process for the Gateway facility has been completed and the fact that the federal District Court determined when it entered the consent decree that no further consultation was required at that stage. Moreover, even if the EPA and the Fish and Wildlife Service do undertake further consultation, any endangered-species-related operating requirements imposed on the facility as a result of that consultation can be incorporated into the Title V permit if and when they are imposed . . ." BAAQMD RTC at 4.

With respect to the Petitioner's contention that that the EPA has not fulfilled an obligation to consult under ESA Section 7 with the FWS concerning the Gateway PSD Permit, the Consent Decree resulting from the Gateway enforcement action, and the Court's order entering the Consent Decree, are particularly instructive. Specifically, the Court's order entering the Consent Decree made clear that the terms imposed by the Consent Decree were not going to be established through the federal PSD permitting process. *United States v. Pacific Gas & Elec.*, 776 F.Supp.2d at 1027. In rejecting Communities for a Better Environment's argument that the EPA should have required PG&E to go through a PSD permitting process to address the alleged PSD violations, the Court found the EPA's reasons for structuring the settlement without such a process to be reasonable. *Id.* Thus, the premise upon which the Petitioner relies in speculating that a new federal PSD permitting action took place, or was necessarily required, is incorrect. Instead, in accordance with the terms of the Consent Decree, specific terms and conditions from

[22] We note that the Petitioner appears to assert at the conclusion of the Petition that the EPA should initiate ESA consultation with the FWS over the Gateway Title V Permit itself. Petition at 7. This issue was not raised in comments on the Proposed Permit. A title V petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). Because this issue was not raised during the public comment period on the Proposed Permit, and the Petitioner has not demonstrated in the Petition that it was impracticable to raise this issue during the public comment period or that the grounds for this assertion arose after such period, this issue cannot be raised in the Petition. Even if this were not the case, this assertion about the EPA's responsibilities under ESA Section 7 is not a proper claim to raise in a petition submitted under CAA § 505(b)(2), for the reasons discussed in this Order. Accordingly, to the extent this assertion is a basis for the Petitioner's claim, we find it to be without merit.

the Consent Decree were to be incorporated by the BAAQMD into a permit issued under state and local law and into CEC licensing documentation, and those terms were then to be incorporated as applicable requirements into the Gateway Title V Permit. This process did not result in a federal action that would trigger consultation under the ESA.

Accordingly, the BAAQMD 2011 Permit to Operate, which BAAQMD issued pursuant to state and local law, incorporated the more stringent emission limitations and requirements from the Consent Decree in accordance with the Consent Decree's terms, and did not constitute a revision of the 2001 PSD Permit, a new PSD permit, or otherwise constitute a federal PSD permitting action that could have triggered any obligation by the EPA to consult under the ESA.[23] Thus, there is no new or revised PSD permit for Gateway that could have triggered any ESA consultation or other ESA obligation, including incidental take authorization requirements, contrary to the Petitioner's allegations.[24]

The Petitioner, citing ESA regulations, further suggests that the EPA is required to "reinitiate" ESA consultation concerning Gateway because new scientific information became available concerning nitrogen deposition. The Petitioner contends that the EPA was required to consult with the FWS under the ESA on the Consent Decree, stating that a letter from the FWS dated June 29, 2011, requested that the EPA consult with the FWS regarding endangered species in the ADNWR based on the "settlement agreement and consent decree between EPA and PG&E". Petition at 6. The Petitioner states that "[e]ven without this letter, EPA would still be required to consult with the Service because the consent decree is a new federal action." Petition at 6, fn. 1. The Court addressed this point expressly and stated:

> The Court is persuaded that a proposed consent decree is not an 'agency action' under the ESA. There is nothing in the ESA or the regulations suggesting that a consent decree is an 'agency action.' The Court finds it significant that WEI [Petitioner] has not been able to locate any authority interpreting a consent decree as an 'agency action' under the ESA, and that the only case squarely addressing the issue has held that it is not.

776 F.Supp.2d at 1023. Contrary to the Petitioner's assertions, the Consent Decree is not a federal "agency action" triggering ESA Section 7 obligations. Accordingly, the Petitioner did not

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[23] Similarly, the CEC's modification of its licensing documents for Gateway to incorporate emission limitations and requirements from the Consent Decree did not constitute a revision of the 2001 PSD Permit, a new PSD permit, or otherwise constitute a federal PSD permitting action that could have triggered any obligation by the EPA to consult under the ESA.

[24] To the extent that the Petitioner is separately alleging that Gateway's operations violate the "take" prohibitions in Section 9 of the ESA, the Petitioner has not explained how any requirements associated with such alleged "take" that may apply to the facility independently under the ESA are "applicable requirements" of the CAA or otherwise resulted in error with the BAAQMD's issuance of the Gateway Title V Permit. The EPA finds that the Petitioner did not demonstrate that such ESA requirements are applicable requirements for purposes of 40 C.F.R. § 70.2 or BAAQMD Regulation 2-6-202 or otherwise demonstrate error in the issuance of the Gateway Title V Permit associated with these requirements.

demonstrate that the June 29, 2011, letter from FWS discussing new information concerning nitrogen deposition and listed species requires the EPA to consult on the Consent Decree.[25]

In sum, the Petitioner's claims concerning the EPA's failure to comply with the ESA with respect to the Gateway PSD Permit and any other actions related to Gateway are without merit, for the reasons discussed above. These reasons provide an additional basis on which I deny the Petitioner's request for an objection to the Proposed Permit based on this claim.

For the foregoing reasons, the EPA denies the Petition as to this claim.

V. CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby deny the Petition requesting that the EPA object to the Gateway Title V Permit.

Date: 10/15/14

Gina McCarthy,
Administrator.

[25] New information, by itself, does not trigger the obligation to reinitiate consultation under the ESA. The Petitioner cites to 50 C.F.R. § 401.16 (b) and (c) but Section 401.16 concerns records and reporting. The Petitioner presumably meant to cite to 50 C.F.R. § 402.16 (b) and (c) concerning new information and modification of an identified action. As discussed above, there was no PSD permit modification that could have triggered an obligation to reinitiate ESA consultation. 50 C.F.R. § 402.16 also requires that discretionary federal involvement or control over the action has been retained or is authorized by law in order for any obligation to reinitiate consultation to be triggered. To the extent that the Petitioner is arguing that new scientific information triggers a duty for the EPA to reinitiate consultation concerning the PSD Permit for Gateway under 50 C.F.R. § 402.16, the EPA lacks the requisite continuing discretionary involvement or control over the PSD Permit to trigger that duty.