

# WILD Equity INSTITUTE

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

RECEIVED

2013 JUL 29 PM 2: 30

OFFICE OF THE  
EXECUTIVE SECRETARIAT  
July 24, 2013

Acting Administrator Bob Perciasepe  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave.  
N.W. Washington, DC 20460

Secretary of Interior Sally Jewell  
Department of the Interior  
1849 C Street  
N.W. Washington, DC 20240

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

**RE: 60-Day Notice of Intent to Sue for Violations of Sections 7(a)(2) and 7(d) of the  
Endangered Species Act—Unlawful Permitting and Operation of the Gateway  
Generating Station**

Dear Acting Administrator Bob Perciasepe:

I write to inform you that the Wild Equity Institute, Communities for Better Environment, and Center for Biological Diversity intend to commence an action against the Environmental Protection Agency ("EPA") under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, for illegally issuing federal Clean Air Act permits to the Gateway Generating Station ("Gateway") without consulting with the Fish and Wildlife Service ("Service") as required by ESA Section 7(a)(2). This letter is provided to you pursuant to the 60-day notice requirement of the ESA's citizen suit provision under 16 U.S.C. § 1540(g)(2).

Specifically, the EPA has failed to comply with mandatory provisions of the ESA regarding the impacts of Gateway's nitrogen emissions on three highly endangered species at the Antioch Dunes National Wildlife Refuge: the Lange's Metalmark Butterfly, the Contra Costa Wallflower, and the Antioch Dunes Evening Primrose. While the agency has previously conducted informal consultation in 2001 with the Service on some of the facility's impacts on those species, to date EPA has failed to consult with the Service about Gateway's nitrogen emissions. Nitrogen deposition from the Gateway facility, which pollutes the Antioch Dunes National Wildlife Refuge to such an extent that all three endangered species are jeopardized by Gateway's operations, was never considered during the EPA's consultation process with the Service and must be considered now.

As we have stated in previous notice letters, new scientific information has been produced since 2001 that demonstrates the significant impacts of nitrogen deposition on endangered species and their habitats. This information clearly shows that Gateway's operations may affect the Antioch

Dunes Evening Primrose, the Contra Costa Wallflower, the Lange's Metalmark Butterfly and their habitats in a manner or to an extent not previously considered. Indeed, the Service, in its most recent demand that the EPA initiate consultation over Gateway's operations has indicated that nitrogen deposition may cause these species to go extinct, see Attachment.

Moreover, the EPA has taken several recent actions to authorize Gateway to operate, each of which independently trigger the ESA's consultation procedures. For example, the EPA has modified its original Prevention of Significant Deterioration ("PSD") permit terms. The EPA also took action that triggered the ESA's consultation requirements when it approved a Consent Decree with PG&E over Gateway's operations.

And most recently, the EPA triggered consultation by issuing and/or reissuing a PSD permit through a 2011 Bay Area Air Quality Management District Permit to Operate, and by subsequently extending that PSD permit several times. With this notice, Wild Equity, Communities for a Better Environment, and Center for Biological Diversity supplement two previous notice letters, attached herein, and provide you with notice of new, additional actions that trigger the ESA's consultation procedures.

#### **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, and long-standing ties to the communities in Antioch and Pittsburg, California. Specifically, the Wild Equity Institute, its members, staff, and Board of Directors have interests in the Antioch Dunes National Wildlife Refuge and the species that depend on the refuge for survival, including the Lange's Metalmark Butterfly. Furthermore, Wild Equity Institute's members, staff, and Board of Directors live near Gateway and regularly recreate at the Antioch Dunes National Wildlife Refuge when it is opened for public use, participating in butterfly counts and restoration activities on the land. The interests of Wild Equity Institute's members, staff, and Board of Directors in observing, studying, and otherwise enjoying the Lange's Metalmark Butterfly have been, and continue to be, harmed by Defendant's refusal to consult with the Service over the impacts of Gateway's nitrogen emissions on the species, in violation of federal law.

#### **Communities for a Better Environment.**

Communities for a Better Environment is a California non-profit corporation with offices in Huntington Park, Wilmington and Oakland, California. CBE's mission is to build peoples' power in California's communities of color and low income communities to achieve environmental health and justice by preventing and reducing pollution and building green, healthy and sustainable communities and environments. CBE provides residents in blighted and heavily polluted urban communities in California with organizing skills, leadership training and legal, scientific and technical assistance, so that they can successfully confront threats to their health and well-being. CBE's members, staff, and Board of Directors live near Gateway and regularly recreate at the Antioch Dunes National Wildlife Refuge when it is open for public use and participate in butterfly

counts and restoration activities on the land. In addition, an inextricable link exists between the survival of the species at the Antioch Dunes National Wildlife Refuge and the health and well-being of Communities for a Better Environment's members who live in close proximity to the Dunes. These members already face a disproportionate level of pollution and consequently suffer increased rates of respiratory and other illnesses. Gateway's increased nitrogen emissions, also a known precursor to ozone, simply add to that burden. The interests of Communities for a Better Environment's members, staff, and Board of Directors in observing, studying, and otherwise enjoying the Lange's Metalmark Butterfly have been, and continue to be, harmed by Defendant's refusal to consult with the Service over the impacts of Gateway's nitrogen emissions on the species, in violation of federal law.

#### **The Center for Biological Diversity.**

The Center for Biological Diversity works through science, law and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center for Biological Diversity, 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, and long-standing ties to the communities in Antioch, Oakley, and Pittsburg, California. Specifically, the Center for Biological Diversity, its members, staff, and board of directors have interests in the Antioch Dunes National Wildlife Refuge and the species that depend on the refuge for survival. The Center for Biological Diversity's members, staff, and Board of Directors live near Gateway and regularly recreate at the Antioch Dunes National Wildlife Refuge when it is open for public use and participate in butterfly counts and restoration activities on the land. The interests of the Center for Biological Diversity's members, staff, and Board of Directors in observing, studying, and otherwise enjoying the Lange's Metalmark Butterfly have been, and continue to be, harmed by Defendant's refusal to consult with the Service over the impacts of Gateway's nitrogen emissions on the species, 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 dunes retreated, but left behind a stretch of desert-like habitat along the San Joaquin near Antioch.

The isolation of this area in Antioch allowed the species found there to evolve into unique life forms found nowhere else on Earth. Today the Antioch Dunes National Wildlife Refuge ("ADNWR") 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. It is the only national wildlife refuge in the country established solely to protect endangered plants and insects.

Prior to European settlement, the 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 ADNWR.

### **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 under the ESA since 1976. 41 Fed. Reg. 22,041 (June 1, 1976). The species is endemic to ADNWR, 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 ADNWR 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 ADNWR, 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 ADNWR, 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 ADNWR 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 deltoides ssp. Howellii*) is a beautiful perennial plant that blooms only for one night. It has white flower petals with long yellow stamens, and is host to a rare sweet 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 ESA 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 ADNWR. 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.

### **Nitrogen Emissions May Affect the Lange's Metalmark Butterfly, the Antioch Dunes Evening Primrose and the Contra Costa Wallflower, and May Adversely Affect Critical Habitat.**

Gateway will have significant nitrogen emissions. The long term chronic adverse biological effects of nitrogen deposition on native ecosystems and associated animals have been described in a number of papers (Brooks 2003). Sand dunes like the Antioch Dunes are nitrogen deficient, and the changes in plant and microbial communities resulting from increased amounts of the airborne deposition of this chemical has been documented to cause cascading negative effects on ecosystem processes and the species that depend upon the native plant community. One of the primary adverse effects is the enhancement of environmental conditions for the invasion of non-native weeds, which outcompete native plants (Allen et al. 1998; Padgett et al. 1999).

Currently, ADNWR receives nitrogen deposition from the surrounding atmosphere at a rate of 6.51/kg/ha/year. (Tonnesen 2007). This is above the level at which nitrogen deposition effects must be assessed for impacts on species and ecological communities. (Weiss 2006). Gateway is roughly  $\frac{3}{4}$  of a mile from the Antioch Dunes, and will deposit nitrogen into ADNWR.

The Lange's Metalmark Butterfly, the Antioch Dunes Evening Primrose, and the Contra Costa Wildflower are all highly endangered, and even small changes in the plant distribution at the dunes could result in take of these species, adversely modify critical habitat, impede recovery, and even cause the species to go extinct. In particular, the Lange's Metalmark Butterfly is so critically endangered that a single failure in the productivity of the species host plant could lead to the permanent extinction of the species. As stated by the Service in its 2011 letter to EPA, "[t]he status of this species has declined dramatically in the last few years and because the ADNWR supports the only existing population of Lange's metalmark butterfly, any adverse effects to habitat at ADNWR may place the butterfly in danger of extinction in the foreseeable future."

### **Violations of Section 7 of the Endangered Species Act.**

Section 7(a)(2) of the ESA states:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], 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 [critical] habitat . . . .

16 U.S.C. § 1536(a)(2). "Its very words affirmatively command all federal agencies to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species." *TVA v. Hill*, 437 U.S. 153, 173 (1978). The EPA must review its actions through the consultation process at the earliest possible time to determine whether any action may affected listed species or critical habitat, 50 C.F.R. § 402.14(a), and it must avoid making any irreversible or irretrievable commitment of resources that might limit the effectiveness of the consultation process. 16 U.S.C. § 1536(d). Reinitiation of consultation is required and must be requested by EPA where discretionary federal involvement or control over the action has been retained or is authorized by law and new information reveals effects of the action that may affect listed species or critical habitat in a manner not previously considered during consultation. 50 C.F.R. § 402.16(b).

### **The EPA Must Consult on the Gateway Generation Station Permit.**

There are several intervening incidents that require the EPA to both initiate consultation and reinitiate consultation with the Services for the Gateway facility. The statutory Section 7 consultation provisions require action agencies like the EPA to consult with experts like the Fish and Wildlife Service under two separate regulations. First, action agencies must initiate consultation whenever a new federal action may affect listed species or adversely modify their critical habitats. 50 C.F.R. § 402.14. Second, action agencies must reinitiate consultation when its activities are modified in ways that were not assessed in the initial consultation, or when new information documents affects on listed species that were not previously considered through the

consultation process. 50 C.F.R. § 402.16. Both of these provisions apply to the EPA's actions involving Gateway.

First, the PSD permit process creates an independent basis for triggering the ESA's consultation requirement. The EPA continues to exercise its discretion and control over Gateway's PSD permits by issuing, modifying, reissuing, and extending the PSD permit. Recent Ninth Circuit precedent makes clear that the EPA's 2011 Gateway Consent Decree is a federal action that triggers the ESA's Section 7 Consultation process. In *Conservation Northwest v. Sherman*, the Ninth Circuit held that consent decrees trigger procedural requirements like Section 7 Consultation "where a consent decree does promulgate a new substantive rule, or where the changes wrought by the decree are permanent rather than temporary." 2013 WL 1760807, \*4 (9th Cir. 2013) (citing *Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 672 F.3d 1160, 1167 (9th Cir. 2012)). Where, as here, a consent decree substantially alters the status quo and the previous approval has not complied with requisite procedural requirements, then the consent decree cannot be construed as a judicial action, but a federal agency action that requires consultation. *Id.* Specifically, the Consent Decree between EPA and PG&E substantially changed Gateway's position by imposing new PSD requirements. The new PSD requirements imposed upon Gateway through the Consent Decree constitutes an agency action that triggers Section 7 consultation.

The Gateway Generating Station is required to have a PSD permit. 40 C.F.R. § 52.21(r). In the Bay Area, the EPA issues PSD permits through a delegation agreement with the Bay Area Air Quality Management District pursuant to title 40 section 52.21(u) of the Code of Federal Regulations. The delegation agreement expressly requires BAAQMD and the EPA to comply with the ESA's section 7 Consultation provisions.<sup>1</sup> A 2011 Permit to Operate, which has since been extended several times, was issued to Gateway by BAAQMD and incorporates new PSD permit terms. Under the terms of the PSD delegation agreement between EPA and BAAQMD, ESA consultation requirements are triggered. EPA has failed to comply with the ESA, its implementing regulations, and even the EPA's own delegation agreement, all of which require EPA to initiate consultation with the Service over all issued and extended PSD permits issued since 2011.

Second, an independent obligation for EPA to reinitiate consultation for the Gateway facility is triggered by the modified PSD permit terms as well as new information on nitrogen emissions. 50 C.F.R. § 402.16(b), (c). Over the past decade the scientific evidence documenting the adverse consequences of nitrogen deposition on endangered species and their habitats has become robust. The Service has stated on numerous occasions that this evidence requires the EPA to consult over its Gateway activities, because these activities are threatening the survival of the endangered species at the Dunes. The EPA has never considered this information through any consultation process, and therefore the EPA must consult pursuant to title 50 section 402.16 of the Code of Federal Regulations. Any initial consultation triggered must also address the new studies and information disclosing the significant effects of nitrogen deposition from Gateway on the ADNWR and the ESA listed species at that refuge.

---

<sup>1</sup> 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, Section VI (2)(b). See Attachment.

## **Conclusion.**

The EPA has failed to conduct ESA consultation on the impacts of the Gateway Generation Station on three endangered species that the Service claims are "virtually certain" to be taken through the emission of nitrogen near these species last remaining habitats. Under such circumstances, this is a clear violation of the ESA's provisions protecting these species, and the Wild Equity Institute, Communities for a Better Environment and Center for Biological Diversity intend to file suit to enforce these requirements of the ESA.

In light of this evidence, an appropriate response to this letter would be for EPA to initiate or reinstate consultation with Service, and prohibit nitrogen emissions from the Gateway Generating Station until the terms and conditions of that consultation are implemented.

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

Jan C. Knight, Acting Field Supervisor  
U.S Fish and Wildlife Service  
Sacramento Fish and Wildlife Office  
2800 Cottage Way, Room W-2605  
Sacramento, California 95825-1846

## **References.**

Brooks, M. L. 2003. Effects of increased soil nitrogen on the dominance of annual plants in the Mojave Desert. *Journal of Applied Ecology*, 40:344-353.

Allen E.B., Padgett, P.E., Bytnerowicz, A., Minnich, R. 1998. Nitrogen deposition effects on coastal sage vegetation of southern California. Pages 131-139 in Bytnerowicz, A., Arbaugh, M.J., Schilling, S.L., eds. *Proceedings of the International Symposium on Air Pollution and Climate Change Effects on Forest Ecosystems*, February 5-9, 1996, Riverside, California. Albany (CA): Pacific Southwest Research Station, USDA Forest Service. General Technical Report PSW---GTR---166.

**Padgett, P.E. and Allen, E.B. 1999. Differential Responses to Nitrogen Fertilization in Native Shrubs and Exotic Annuals Common to Mediterranean Coastal Sage Scrub of California Plant Ecology 144: 93---101.**

**Tonnesen, G., Z. Wang, M. Omary, and C. J. Chien. 2007. Assessment of nitrogen deposition: modeling and habitat assessment. California Energy Commission, PIER Energy-Related Environmental Research. CEC-500-2005-032.**

**Weiss, S.B. 2006. Impacts of nitrogen deposition on California ecosystems and biodiversity. California Energy Commission, PIER Energy-Related Environmental Research. CEC-500-2005-165.**

# ATTACHMENT A



## United States Department of the Interior



### FISH AND WILDLIFE SERVICE

Sacramento Fish and Wildlife Office  
2800 Cottage Way, Room W-2605  
Sacramento, California 95825-1846

In Reply Refer To:  
81420-2011-TA-0173

JUN 29 2011

Mr. Jared Blumenfeld  
Regional Administrator, Region 9  
U. S. Environmental Protection Agency  
75 Hawthorne Street  
San Francisco, California 94105-3901

Subject: Effects of Nitrogen Deposition at Antioch Dunes National Wildlife Refuge  
Resulting from Existing and Proposed Power Generating Stations in Contra Costa  
County, California

Dear Mr. Blumenfeld:

This letter conveys the U.S. Fish and Wildlife Service's (Service) concerns regarding the effects of nitrogen deposition from existing and proposed power generating stations located in Contra Costa County, California, on federally listed species at the Antioch Dunes National Wildlife Refuge (ADNWR). At issue are the potential adverse effects of the operational Gateway Generating Station (GGS), the proposed Marsh Landing Generating Station (MLGS), and the proposed Oakley Generating Station (OGS) on the endangered Lange's metalmark butterfly (*Apodemia mormo langei*), endangered Contra Costa wallflower (*Erysimum capitatum* var. *angustatum*), endangered Antioch Dunes evening primrose (*Oenothera deltoides* ssp. *howellii*), and designated critical habitat for these two listed plants. This letter is issued under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. § 1531 *et seq.*)(Act).

The Lange's metalmark butterfly, the Contra Costa wallflower, and the Antioch Dunes evening primrose occur almost exclusively on the ADNWR. The primary threat to these species is the overgrowth of non-native plant species that displace the wallflower, primrose, and host plants and nectar sources for the Lange's metalmark butterfly. The GGS and the proposed MLGS and OGS are all located less than two miles from the ADNWR and operation of these power generating stations will result in the deposition of nitrogen at ADNWR. Nitrogen deposition is known to exacerbate the growth of non-native weeds; these effects are particularly problematic in nitrogen deficient habitats, such as the sand dunes at ADNWR, where changes in plant and microbial communities resulting from increased nitrogen deposition can result in cascading negative effects on the ecosystem processes and the species that depend upon the native plant community.

**TAKE PRIDE  
IN AMERICA** 

The Service is concerned that the indirect and cumulative effects of the deposition of additional nitrogen at ADNWR resulting from operation of these power generating stations will result in adverse effects to the Contra Costa wallflower and the Antioch Dunes evening primrose and their critical habitat and in take of the Lange's metalmark butterfly. Adverse effects to the Lange's metalmark butterfly are of particular concern. The status of this species has declined dramatically in the last few years and because the ADNWR supports the only existing population of Lange's metalmark butterfly, any adverse effects to habitat at ADNWR may place the butterfly in danger of extinction in the foreseeable future.

### Gateway Generating Station

On May 30, 2001, the U.S. Environmental Protection Agency (EPA) requested informal consultation with the Service on the addition of a 30 megawatt natural gas fired combination combustion turbine, that is now referred to as the GGS, to the existing Contra Costa Power Plant. On June 29, 2001, the Service concurred that aside from the potential adverse effects of the existing cooling water intake system on the threatened delta smelt (*Hypomesus transpacificus*) and the formerly threatened Sacramento splittail (*Pogonichthys macrolepidotus*), both of which were addressed in a section 7 consultation with the U.S. Army Corps of Engineers, the installation of the new turbine was not likely to adversely affect listed species.

However, although the consultation process for the GGS was concluded in 2001, this facility apparently did not become operational until 2009. It is our understanding that, because of the lapse in time between the EPA's issuance of a Prevention of Significant Deterioration permit to Pacific Gas and Electric (PG&E) for GGS and the construction and operation of the GGS facility, your agency and PG&E recently entered into a settlement agreement to impose emission limits on GGS consistent with current standards. Although this agreement will impose emission limits on nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), sulfur dioxide (SO<sub>2</sub>) and particulate matter that are thought to represent what the result of a new permitting process with the EPA would be, the Service was not consulted regarding the effects of these emissions on listed species.

New scientific information relating to the adverse effects of nitrogen deposition on listed species and natural ecosystems has become available since 2001 when the original permits were issued, and consultation with the Service was concluded. Based on current scientific literature, a baseline nitrogen deposition value of 5 kilograms per hectare (kg/ha/yr) recently has been recognized as the level above which effects of nitrogen deposition should be analyzed (Weiss 2006, California Energy Commission 2010). According to the best available estimates for the ADNWR area, that are based on 2002 data, the baseline nitrogen deposition is thought to be approximately 6.39 kg/ha/yr (Tonneson *et al.* 2007). This already exceeds the 5 kg/ha/yr threshold above which nitrogen deposition can result in adverse impacts to native plant communities. Although the amount of nitrogen deposition at ADNWR resulting from operation of GGS has not been modeled, it is reasonable to assume that based on the location, type of generating station, and amount of power to be generated by GGS, the amount of nitrogen deposition at ADNWR is similar to the amount estimated for MLGS and OGS and described below. Based on the current scientific literature available, it is the Service's opinion that the

deposition of this amount of nitrogen deposition at ADNWR is likely to result in adverse effects to the Contra Costa wallflower, the Antioch Dunes evening primrose, and in take of the Lange's metalmark butterfly.

### **Marsh Landing Generating Station**

The California Energy Commission (CEC) is the primary state and local permitting authority for new power plants in California. Based on the CEC's final staff assessment for MLGS, the facility is predicted to result in an estimated 0.04 kg/ha/yr of additional nitrogen deposition to current baseline levels at ADNWR. On August 17, 2010, the Service submitted a letter to the CEC, conveying our concerns that the deposition of this amount of nitrogen at ADNWR would result in adverse effects to federally listed species and recommending that the applicant seek authorization for incidental take of the Lange's metalmark butterfly pursuant to either section 7 or 10(a) of the Act. We stated that should a Federal agency be involved with the permitting, funding, or carrying out of the project, that agency should initiate formal consultation with the Service pursuant to section 7 of the Act. If a Federal agency was not involved, we recommended an incidental take permit pursuant to section 10(a)(1)(B) of the Act be obtained. On August 25, 2010, the CEC issued Mirant Energy a Certificate to Construct and Operate the proposed MLGS. Although the CEC's conditions for certification for MLGS included a nominal annual payment to ADNWR for weed removal in order to mitigate for the effects of nitrogen deposition at ADNWR, the CEC did not recommend consultation with the Service and noted that section 7 of the Act would not apply because section 7 does not apply "to activities simply approved by state agencies, as we approve MLGS here". However, it is the Service's understanding that the EPA has delegated regional implementation of the Federal Clean Air Act to the Bay Area Air Quality Management District (BAAQMD) and that based on the CEC's environmental analysis, the BAAQMD issued an Authority to Construct permit for MLGS on August 31, 2010. Irrespective of the need for authorization of incidental take, we are concerned the payment of minimal funding will not, by itself, adequately compensate for the adverse effects of the project to listed species.

### **Oakley Generating Station**

Based on the CEC's final staff assessment for OGS, the facility is predicted to result in an estimated 0.083 kg/ha/yr of additional nitrogen deposition to current baseline levels at ADNWR. The Service submitted comment letters to the CEC on October 13, 2010, February 14, 2011, and April 28, 2011, conveying our concerns that the deposition of nitrogen at ADNWR would result in adverse effects to federally listed species, recommending the applicant assist with the captive propagation and release of Lange's metalmark butterfly, and recommending the applicant seek authorization for incidental take pursuant to either section 7 or 10(a) of the Act. Again the CEC required the annual payment of nominal fees to ADNWR for weed eradication but did not recommend consultation with the Service.

### **Recommendations**

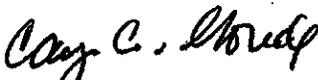
The Service is concerned that the current operation of GGS, and the proposed operation of MLGS and OGS, will not be in compliance with the Endangered Species Act of 1973, as

amended, because take of the Lange's metalmark butterfly, and adverse effects to the Antioch Dunes evening primrose, the Contra Costa wallflower, and critical habitat for these two plants are likely to occur as result of these projects. Therefore, we recommend that:

1. Based on the availability of new scientific information that reveals adverse effects to listed species not previously considered and based on changes to the GGS project resulting from entering into the recent settlement agreement with PG&E, the EPA should reinstate section 7 consultation with the Service for the GGS pursuant to 50 CFR § 402.14 of the Act.
2. The EPA should contact the Service in order to clarify their role in the permitting and review of OGS and MLGS. If the EPA's permitting authority has been delegated to a state or local agency, the EPA should either retain their permitting authority over these projects and initiate section 7 consultation with the Service or delegate their authority for consultation with the Service to the responsible State or local permitting agency.

We are interested in assisting the EPA in determining how to proceed with the consultation process for these power generating stations. Please contact Stephanie Jentsch, Ryan Olah, or Chris Nagano at the letterhead address, electronic mail ([Stephanie\\_Jentsch@fws.gov](mailto:Stephanie_Jentsch@fws.gov)); [Ryan\\_Olah@fws.gov](mailto:Ryan_Olah@fws.gov); [Chris\\_Nagano@fws.gov](mailto:Chris_Nagano@fws.gov)), or at telephone (916) 414-6600 if you have any questions regarding this letter.

Sincerely,

  
Cay E. Goude  
Assistant Field Supervisor

cc:

Gerardo Rios, U.S. Environmental Protection Agency, San Francisco, California  
Jack Broadbent, Brian Lusher, and Kathleen Truesdell, Bay Area Air Quality Management  
District, San Francisco, California  
Randi Adair, California Department of Fish and Game, Yountville, California  
Rick York, California Energy Commission, Sacramento, California  
Louie Terrazas, Mendel Stewart, Don Brubaker, San Francisco Bay National Wildlife Refuge,  
Newark, California

**Literature Cited**

California Energy Commission. 2010. Revised staff assessment of the Marsh Landing Generating Station (08-AFC-03). Sacramento, California.

Tonnesan, G., Z. Wang, M. Ormary, and C. J. Chien. 2007. Assessment of nitrogen deposition: modeling and habitat assessment. California Energy Commission, PIER Energy-Related Environmental Research. CEC-500-2005-032.

Weiss, S.B. 2006. Impacts of nitrogen deposition on California ecosystems and biodiversity. California Energy Commission, PIER Energy-Related Environmental Research. CEC-500-2005-165.

# ATTACHMENT B

# **WILD** Equity INSTITUTE

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

December 28, 2010

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

Peter A. Darbee  
President  
Pacific Gas and Electric Company  
77 Beale Street, 32<sup>nd</sup> Floor  
San Francisco, CA 94105

Administrator Lisa Jackson  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460  
FAX: (202) 501-1450

Jared Blumenfeld  
Regional Administrator  
Office of Regional Administrator  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
Mail Code: ORA-I  
San Francisco, CA, 94105

Secretary of Interior Ken Salazar  
Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

Regional Director Robyn Thorson  
U.S. Fish & Wildlife Service  
Pacific Region  
911 NE 11<sup>th</sup> Ave.  
Portland, OR 97232

**RE: 60-Day Notice of Intent to Sue for Violations of Sections 7(a)(1), 7(a)(2), 7(d), and Section 9 of the Endangered Species Act—Unlawful Permitting of the Gateway Generating Station and Unlawful Entry of the Proposed Consent Decree in United States v. Pacific Gas & Electric Company, Civil Action No. 09-4503 (N.D. Cal.); D.J. Ref. No. 90-5-2-1-09753**

Dear Administrator Jackson:

I write to inform you that the Wild Equity Institute objects to the proposed settlement and consent decree in the above referenced matter, and intends to commence an action against the Environmental Protection Agency ("EPA") under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, for illegally issuing federal Clean Air Act permits to the Gateway Generating Station, and for illegally entering a proposed consent decree regarding the Gateway Generating Station permits. This letter is provided to you pursuant to the 60-day notice requirement of the ESA's citizen suit provision, to the extent a court deems such notice necessary. 16 U.S.C. § 1540(g)(2).

The Environmental Protection Agency has failed to comply with mandatory provisions of the Endangered Species Act regarding the Gateway Generating Station. While the agency has previously consulted with the National Marine Fisheries Service over the impacts of the project on marine species, the Environmental Protection Agency has failed to consult with the United States

*Brent Plater, Executive Director* ✉ P.O. Box 191695 ✉ San Francisco, CA ✉ 94119  
O: 415-349-5787 ✉ C: 415-572-6989 ✉ [bplater@wildequity.org](mailto:bplater@wildequity.org) ✉ <http://wildequity.org>

Fish and Wildlife Service on the settlement's impacts on the Lange's Metalmark Butterfly, *Apodemia mormo langei*, the Contra Costa Wallflower, *Erysimum capitatum* var. *angustatum*, and the Antioch Dunes Evening Primrose, *Oenothera deltoides* ssp. *howellii*, in violation of the ESA.

Because federal agencies are required to review their actions and enter consultation with the Fish and Wildlife Service "at the earliest possible time," 40 C.F.R. § 402.14(a), and because the Endangered Species Act expressly commands action agencies to conduct consultation before an "irreversible and irretrievable commitment of resources" forecloses the possibility of implementing alternatives to the action that are less harmful to endangered species, 7 U.S.C. § 1536(d); 50 C.F.R. § 402.09, the Environmental Protection Agency must conduct this consultation before entering binding agreements such as this.

A more full explanation of this requirement, and the Wild Equity Institute's objection to this settlement agreement, is set out below.

### **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, and long-standing ties to the communities in Antioch and Pittsburg, California. Specifically, the Wild Equity Institute, its members, staff, and Board of Directors have specific interests in the Antioch Dunes National Wildlife Refuge and the species that depend on the refuge for survival. The Wild Equity Institute's members, staff, and Board of Directors regularly recreate at the Antioch Dunes National Wildlife Refuge when it is opened for public use and participates in butterfly counts and restoration activities on the land. The Wild Equity Institute's members, staff, and Board of Directors also recreate, commute, and live in or near the Gateway Generation Station.

### **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 dunes retreated, but left behind a stretch of desert-like habitat along the San Joaquin near Antioch.

The isolation of this area in Antioch allowed the species found there to evolve into unique life forms found nowhere else on Earth. Today the Antioch Dunes National Wildlife Refuge 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 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 in Contra Costa County, and the only known extant population today is found at the Antioch Dunes.

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 four 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. The health of this species is therefore entirely dependant on the population of naked-stemmed buckwheat, 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 Area, 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 is a beautiful perennial plant that blooms only for one night. It has white flower petals with long yellow stamens, and is host to a rare sweet bee species. The Contra Costa Wallflower 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.

### **Nitrogen Emissions May Affect the Lange's Metalmark Butterfly, the Antioch Dunes Evening Primrose and the Contra Costa Wallflower, and May Adversely Affect Critical Habitat.**

The Gateway Generation Station will have significant nitrogen emissions. The long term chronic adverse biological effects of nitrogen deposition on native ecosystems and associated animals have been described in a number of papers (Brooks 2003). Sand dunes like the Antioch Dunes are nitrogen deficient, and the changes in plant and microbial communities resulting from increased

amounts of the airborne deposition of this chemical has been documented to cause cascading negative effects on ecosystem processes and the species that depend upon the native plant community. One of the primary adverse effects is the enhancement of environmental conditions for the invasion of non-native weeds, which outcompete native plants (Allen et al. 1998; Padgett et al. 1999).

Currently, the Antioch Dunes National Wildlife Refuge receives nitrogen deposition from the surrounding atmosphere at a rate of 6.51/kg/ha/year. (Tonnesen 2007). This is above the level at which nitrogen deposition effects must be assessed for impacts on species and ecological communities. (Weiss 2006; CEC 2007). The Gateway Generation Station is roughly  $\frac{3}{4}$  of a mile from the Antioch Dunes, and will deposit nitrogen into the Wildlife refuge.

The Lange's Metalmark Butterfly, the Antioch Dunes Evening Primrose, and the Contra Costa Wildflower are all highly endangered, and even small changes in the plant distribution at the dunes could take these species, adversely modify critical habitat, impede recovery, and even cause the species to go extinct. In particular, the Lange's Metalmark Butterfly is so critically endangered that a single failure in the productivity of the species host plant could lead to the permanent extinction of the species.

### **Previous Consultation Efforts.**

The EPA has previously conducted Endangered Species Act consultation on this project. However, it has never conducted formal or informal consultation with the United States Fish and Wildlife Service over the impacts of nitrogen deposition on the endangered species found at the Antioch Dunes. The EPA is required to consult over these impacts before irreversible commitments like binding settlement agreements are agreed to. However, the previous consultation effort may provide the EPA with an additional way to come into compliance with the Endangered Species Act, as explained below.

### **Violations of Section 7 of the Endangered Species Act.**

Section 7(a)(2) of the ESA states:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], 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 [critical] habitat . . . .

16 U.S.C. § 1536(a)(2). "Its very words affirmatively command all federal agencies to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species." *TVA v. Hill*, 437 U.S. 153, 173 (1978). The EPA must review its actions through the consultation process at the earliest possible time to determine whether any action may affected listed species or critical habitat, 50 C.F.R. § 402.14(a), and it must avoid making any irreversible or irretrievable commitment of resources that might limit the effectiveness of the consultation process. 16 U.S.C. § 1536(d). Reinitiation of consultation is required and must be requested by EPA where discretionary federal involvement or control over the action has been retained or is authorized by law and new information reveals effects of the action that may affect

listed species or critical habitat in a manner not previously considered during consultation. 50 C.F.R. § 402.16(b).

### **The EPA Must Reinitiate Consultation on the Gateway Generation Station Permit.**

The EPA's permitting of the Gateway Generation Station constitutes federal agency action: the Prevention of Significant Deterioration permit is a federal action over which the EPA retains discretionary control. The EPA has acknowledged this in the record of this proceeding, and on this basis sought to conduct Endangered Species Act consultation in 2001. At that time, the EPA conducted consultation with the National Marine Fisheries Service over the impacts of the Gateway Generation Station on marine species, but it has never conducted any consultation with the United States Fish and Wildlife Service to determine the effects of nitrogen deposition on the endangered species at the Antioch Dunes National Wildlife Refuge.

Although the EPA may not have had the requisite information to conduct consultation at the time this permit was issued, it has this information now: the record shows that this information has been developed in the scientific literature and has been presented to the EPA by the Fish and Wildlife Service and other sources since the Gateway Generation Station was initially permitted.

Furthermore, the EPA retains the requisite discretion and control to change the permit conditions, or conditions of a settlement agreement, to address those impacts: at least until the settlement agreement is entered. All parties agree that the existing permit expired, giving the EPA a new opportunity to implement new terms and conditions on the Gateway Generation Station: or to not permit the station at all. Moreover, the EPA's decision to enter into this settlement agreement, with a new set of terms and conditions placed on the Gateway Generation Station, is further evidence that the EPA retains the requisite discretionary control over the project such that consultation is required.

Yet to date, the EPA has failed to consult with the Fish and Wildlife Service over the impacts of nitrogen deposition on the endangered species endemic to the Antioch Dunes National Wildlife Refuge, nor has it considered the cumulative impacts of nitrogen deposition for projects the EPA is proposing and/or has already approved in the vicinity of the Antioch Dunes National Wildlife Refuge.

This is a clear violation of the regulations implementing the ESA, 50 C.F.R. § 402.16(b), and the ESA itself, 16 U.S.C. § 1536. When faced with new information describing impacts to listed species not previously considered during the consultation process, action agencies like the EPA are required to reinitiate consultation with the expert agency, in this case, the Fish and Wildlife Service. The consultation process may result in new or different restrictions on the project that will ensure that these species will not be harmed. But these conditions can only be implemented if the consultation process is completed.

### **The EPA Must Initiate Consultation on this Settlement Agreement.**

Alternatively, the EPA and/or the Department of Justice must initiate consultation on this settlement agreement, rather than reinitiating consultation on the permit itself. The ESA requires "any action" undertaken by a federal agency that may affect listed species to undergo the consultation process. 16 U.S.C. § 1536(a)(2). Courts have long held that contracts are "agency

action" subject to the Section 7 consultation provisions of the ESA. *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1082 (9<sup>th</sup> Cir. 2001) ("Negotiating and executing contracts constituted 'agency action.')" Furthermore, the Ninth Circuit has held that settlement agreements are final agency actions under the Administrative Procedure Act. *United States of America v. Carpenter*, 526 F.3d 11237 (9<sup>th</sup> Cir. 2008) ("Final actions of the Attorney General fall within the definition of agency action").

Although settlement agreements and other contracts are agency actions, and this particular settlement agreement will permit the emission of nitrogen emissions that may affect listed species, neither the EPA or the Department of Justice has initiated the mandatory Section 7 consultation process. This is a clear violation of the ESA.

#### **Entry of this Settlement Agreement Before Consultation Occurs Would Violate Section 7(d).**

Section 7(d) of the ESA mandates that no "irreversible and irretrievable commitment of resources" that would foreclose the agency's ability to implement reasonable and prudent alternatives. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. The purpose of this section is to insure that the existing environmental status quo is maintained during the consultation process so as not to foreclose consideration and adoption of alternatives to the proposed federal agency action. *Connor v. Burford*, 848 F.2d 1441, 1445 n. 34 (9<sup>th</sup> Cir. 1988). This prohibition on irreversible and irretrievable commitment of resources applies throughout consultation and continues until the requirements of Section 7 are completed. Because entry of a contract constitutes "agency action" triggering the consultation process, entering this settlement agreement would constitute an irreversible and irretrievable commitments of resources without the benefit of the consultation process, in clear violation of the Endangered Species Act.

#### **Violation of Section 7(a)(1) of the Endangered Species Act.**

Section 7(a)(1) of the ESA states:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

16 U.S.C. § 1536(a)(2). The ESA defines "conserve" as meaning "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

The EPA has violated and is continuing to violate its duty under this section to utilize its authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of the Lange's Metalmark Butterfly, the Contra Costa Wallflower, and the Antioch Dunes Evening Primrose in consultation with the Secretary of the Interior.

## **Violation of Section 9 of the Endangered Species Act.**

Section 9 of the ESA prohibits the take of any species listed under the ESA. 16 U.S.C. § 1538. The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

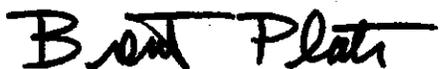
The Fish and Wildlife Service has provided testimony before the California Energy Commission that continued nitrogen deposition is virtually certain to not only take individual Lange's Metalmark Butterfly, but also jeopardize the continued existence of the entire species. By permitting nitrogen deposition in the vicinity of this species, the EPA is violating Section 9 of the ESA.

### **Conclusion.**

The Environmental Protection Agency has failed to conduct ESA consultation on the impacts of the Gateway Generation Station on three endangered species that the Fish and Wildlife Service claims are "virtually certain" to be taken through the emission of nitrogen near these species last remaining habitats. Under such circumstances, this is a clear violation of the Endangered Species Act's provisions protecting these species, and the Wild Equity Institute intends to file suit to enforce these requirements of the ESA.

In light of this evidence, an appropriate response to this letter would be for the EPA to withdraw the proposed consent decree, initiate consultation with the Fish and Wildlife Service, and prohibit nitrogen emissions from the Gateway Generating Station until the terms and conditions of that consultation are implemented. Furthermore, the Wild Equity Institute requests that the Court reject this settlement offer and order the EPA to consult with the United States Fish and Wildlife Service over the impacts this project has on endangered species.

Very truly yours,



Brent Plater

cc: Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 7611 Ben Franklin Station  
Washington, DC 20044-7611  
[Pubcomment-ees.enrd@usdoj.gov](mailto:Pubcomment-ees.enrd@usdoj.gov)

Judge Susan Illston  
Chambers Copy  
Courtroom 10, 19<sup>th</sup> Floor  
450 Golden Gate Ave.  
San Francisco, CA 94102

# ATTACHMENT C

# WILD Equity

## INSTITUTE

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

December 19, 2011

Administrator Lisa Jackson  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

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

Secretary of Interior Ken Salazar  
Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

Contra Costa Generating Station, LLC  
145 Town and Country Drive  
Danville, CA 94526

GenOn Energy Inc.  
1000 Main St.  
Houston, Texas 77002

Radback Energy, Inc.  
CEO and Registered Agent for Service of Process  
Bryan Bartacchi  
145 Town & Country Dr., Suite 107  
Danville, CA 94526

**RE: 60-Day Notice of Intent to Sue for Violations of Sections 7(a)(1), 7(a)(2), 7(d), and Section 9 of the Endangered Species Act—Unlawful Permitting and Operation of the Gateway Generating Station; Unlawful Operation of the Contra Costa Power Plant; Unlawful Permitting and Proposed Operation of the Oakley Generating Station; Unlawful Permitting and Proposed Operation of the Marsh Landing Generating Station**

To Whom it May Concern:

We write to inform you that the Wild Equity Institute, Communities for a Better Environment, and the Center for Biological Diversity intend to commence an action under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, against the Environmental Protection Agency ("EPA") for illegally issuing federal Clean Air Act permits to the Gateway Generating Station; against Pacific Gas & Electric Company ("PG&E") for illegally operating the Gateway Generating Station and for illegally operating or proposing to operate the Oakley Generating Station; against Radback Energy, Inc. for illegally operating or proposing to operate the Oakley Generating Station; against Contra Costa Generating Station, LLC for illegally operating or proposing to operate the Oakley Generating Station; against GenOn Energy, Inc. for illegally operating or proposing to operate the

*Brent Plater, Executive Director • P.O. Box 191695 • San Francisco, CA • 94119  
O: 415-349-5787 • C: 415-572-6989 • [bplater@wildequity.org](mailto:bplater@wildequity.org) • <http://wildequity.org>*

Marsh Landing Generating Station and the Contra Costa County Power Plant; and the California Energy Commission for illegally permitting the construction and operation of Gateway Generating Station, Contra Costa County Power Plant, Marsh Landing Generating Station, and the Oakley Generating Station (hereinafter "the Power Plants") in a manner that will cause take of species protected by the federal Endangered Species Act. This letter is provided to you pursuant to the 60-day notice requirement of the ESA's citizen suit provision, to the extent a court deems such notice necessary. 16 U.S.C. § 1540(g)(2).

### **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, and long-standing ties to the communities in Antioch, Oakley, and Pittsburg, California. Specifically, the Wild Equity Institute, its members, staff, and board of directors have interests in the Antioch Dunes National Wildlife Refuge and the species that depend on the refuge for survival. The Wild Equity Institute's members, staff, and Board of Directors regularly recreate at the Antioch Dunes National Wildlife Refuge when it is open for public use and participate in butterfly counts and restoration activities on the land. The Wild Equity Institute's members, staff, and board of directors also recreate, commute, and live at or near the Power Plants.

### **Communities for a Better Environment.**

CBE is an environmental health and justice organization primarily concerned with protecting and enhancing the environment and public health by reducing air and water pollution and toxics, and equipping residents of California's urban areas, particularly low income communities and communities of color, with the tools to monitor and transform their immediate environment.

Communities for a Better Environment's members, its staff, and its board of directors have long-standing interests in improving the environment in the communities in Antioch, Oakley, and Pittsburg, California. Specifically, Communities for a Better Environment, its members, staff, and Board of Directors have interests in the Antioch Dunes National Wildlife Refuge and the species that depend on the refuge for survival, including the Lange's Metalmark Butterfly, the Contra Costa Wallflower, and the Antioch Dunes Evening Primrose. Communities for a Better Environment's members, staff, and board of directors recreate at the Antioch Dunes National Wildlife Refuge when it is open for public use. Communities for a Better Environment's members, staff, and board of directors also recreate, commute, work, go to school, and live at or near the Power Plants.

### **Center for Biological Diversity.**

The Center for Biological Diversity works through science, law and creative media to secure a future for all species, great or small, hovering on the brink of extinction.

The Center for Biological Diversity, 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, and long-standing ties to the communities in Antioch, Oakley, and Pittsburg, California. Specifically, the Center for Biological Diversity, its members, staff, and board of directors have interests in the Antioch Dunes National Wildlife Refuge and the species that depend on the refuge for survival. The Center for Biological Diversity's members, staff, and Board of Directors regularly recreate at the Antioch Dunes National Wildlife Refuge when it is open for public use and participate in butterfly counts and restoration activities on the land. The Center for Biological Diversity's members, staff, and board of directors also recreate, commute, and live in or near the Power Plants.

### **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 California's climate changed the dunes retreated, but a stretch of desert-like habitat was left behind along the San Joaquin near Antioch, California.

The isolation of this area in Antioch allowed the species found there to evolve into unique life forms found nowhere else on Earth. Today the Antioch Dunes National Wildlife Refuge 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 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 in Contra Costa County, and the only known extant population today is found at the Antioch Dunes.

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 five years, the number of adults observed in the wild has continued to remain at critically low levels. Surveys from 2009 to 2011 revealed an average population for the species of 35 individuals in the wild.

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. The health of this species is entirely dependent on the population of naked-stemmed buckwheat, 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 this essential host plant at the Antioch Dunes National Wildlife Refuge will surely lead to the extinction of the Lange's Metalmark Butterfly because of the butterfly's limited range.

### **The Antioch Dunes Evening Primrose and the Contra Costa Wallflower.**

The Antioch Dunes Evening Primrose is a beautiful perennial plant. It has white flower petals with long yellow stamens, and is host to a rare sweat bee species, *Sphecodogastra antiochensis*. The Contra Costa Wallflower 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 of these plants fluctuates 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.

### **Nitrogen Emissions Jeopardize the Lange's Metalmark Butterfly, the Antioch Dunes Evening Primrose and the Contra Costa Wallflower, and Adversely Affects Their Critical Habitats.**

The Power Plants have and will have significant nitrogen emissions. The long term chronic adverse biological effects of nitrogen deposition on native ecosystems and associated animals have been described in a number of papers (Huenneke et al. 1990; Inouye and Tilman 1995; Brooks 2003). Sand dunes like the Antioch Dunes are nitrogen deficient, and the changes in plant and microbial communities resulting from increased amounts of the airborne deposition of this chemical has been documented to cause cascading negative effects on ecosystem processes and the species that depend upon the structure of the existing native plant community. One of the primary adverse effects is the enhancement of environmental conditions for the invasion of non-native weeds, which outcompete native plants (Allen et al. 1998; Padgett & Allen 1999).

Currently, the Antioch Dunes National Wildlife Refuge receives nitrogen deposition from the surrounding atmosphere at a rate of 6.51 kg-N/ha/year (Tonnesen 2007). This is above the level at which nitrogen deposition effects must be assessed for impacts on species and ecological communities (Weiss 2006; CEC 2007). In nutrient-poor soils and deserts like those found at the Antioch Dunes this level is around 4-6 kg-N/ha/year (Fenn 2010); *see also* Exhibit A. The Power Plants are roughly within one mile of the Antioch Dunes, and will deposit nitrogen into the Wildlife Refuge.

The Lange's Metalmark Butterfly, the Antioch Dunes Evening Primrose, and the Contra Costa Wildflower are all highly endangered, and even small changes in the plant distribution at the dunes could take these species, adversely modify critical habitat, impede recovery, and even cause the species to go extinct. In particular, the Lange's Metalmark Butterfly is so critically endangered that a single failure in the productivity of the species host plant could lead to the permanent extinction of the species.

## **Violations of Section 7 Consultation Provisions of the Endangered Species Act.**

Section 7(a)(2) of the ESA states:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], 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 [critical] habitat . . . .

16 U.S.C. § 1536(a)(2). "Its very words affirmatively command all federal agencies to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species." *TVA v. Hill*, 437 U.S. 153, 173 (1978). The EPA must review its actions through the consultation process at the earliest possible time to determine whether any action may affected listed species or critical habitat, 50 C.F.R. § 402.14(a), and it must avoid making any irreversible or irretrievable commitment of resources that might limit the effectiveness of the consultation process. 16 U.S.C. § 1536(d). Reinitiation of consultation is required and must be requested by EPA where discretionary federal involvement or control over the action has been retained or is authorized by law and new information reveals effects of the action that may affect listed species or critical habitat in a manner not previously considered during consultation. 50 C.F.R. § 402.16(b).

### **The EPA Must Reinitiate Consultation on the Gateway Generation Station Permit.**

The EPA has issued a Prevention of Significant Deterioration permit under the Clean Air Act for Gateway Generating Station, and recently modified the terms of this permit through a settlement agreement with PG&E. The EPA's Prevention of Significant Deterioration permit and agreements with PG&E are federal actions over which the EPA retains discretionary control. In 2001, the EPA initiated consultation with the National Marine Fisheries Service and the Fish and Wildlife Service regarding impacts from the *construction* of the Gateway Generating Station, but it has never conducted any consultation with the United States Fish and Wildlife Service to determine the *effects of nitrogen deposition* from the Gateway Generating Station on the endangered species at the Antioch Dunes National Wildlife Refuge.

Although the EPA may not have had the requisite information to conduct consultation at the time this permit was originally issued, it has this information now and had this information before it entered into a settlement agreement with PG&E: this information has been developed in the scientific literature and has been presented to the EPA by the Fish and Wildlife Service and other sources since the Gateway Generating Station was initially permitted. Yet to date, the EPA has failed to reinitiate consultation with the Fish and Wildlife Service over the impacts of nitrogen deposition on the endangered species endemic to the Antioch Dunes National Wildlife Refuge, nor has it considered the cumulative impacts of nitrogen deposition for projects the EPA is proposing and/or has already approved in the vicinity of the Antioch Dunes National Wildlife Refuge.

This is a clear violation of the regulations implementing the ESA, 50 C.F.R. § 402.16(b), and the ESA itself, 16 U.S.C. § 1536. When faced with new information describing impacts to listed species not previously considered during the consultation process, action agencies like the EPA are

required to reinitiate consultation with the expert agency: in this case, the Fish and Wildlife Service. The consultation process may result in new or different restrictions on the project that will ensure that these species will not be harmed. But these conditions can only be implemented if the consultation process is completed. Because the EPA has not reinitiated consultation, it is in violation of Section 7 of the Endangered Species Act.

#### **Violation of Section 7(d) of the Endangered Species Act.**

Section 7(d) of the ESA mandates that no "irreversible and irretrievable commitment of resources" that would foreclose the agency's ability to implement reasonable and prudent alternatives. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. The purpose of this section is to insure that the existing environmental status quo is maintained during the consultation process so as not to foreclose consideration and adoption of alternatives to the proposed federal agency action. *Connor v. Burford*, 848 F.2d 1441, 1445 n. 34 (9<sup>th</sup> Cir. 1988). This prohibition on irreversible and irretrievable commitment of resources applies throughout consultation and continues until the requirements of Section 7 are completed. Because the ongoing emissions of nitrogen that impact listed species pursuant to an EPA permit constitutes "agency action" triggering the consultation process, by entering into settlement agreements and issuing permits the EPA is deploying irreversible and irretrievable commitments of resources without the benefit of the consultation process, in clear violation of the Endangered Species Act.

#### **Violation of Section 7(a)(1) of the Endangered Species Act.**

Section 7(a)(1) of the ESA states:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

16 U.S.C. § 1536(a)(2). The ESA defines "conserve" as "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

The EPA has violated and is continuing to violate its duty under this section to utilize its authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of the Lange's Metalmark Butterfly, the Contra Costa Wallflower, and the Antioch Dunes Evening Primrose in consultation with the Secretary of the Interior.

#### **Violation of Section 9 of the Endangered Species Act.**

Section 9 of the ESA prohibits the take of any species listed under the ESA. 16 U.S.C. § 1538. The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." By regulation, the Fish and Wildlife Service has further defined the term "harm" to include "significant habitat modification or degradation" that

“actually kills or injures wildlife by significantly impairing essential behavioral patterns.” 50 C.F.R. § 17.3.

Currently, the Antioch Dunes National Wildlife Refuge receives nitrogen deposition from the surrounding atmosphere at a rate of 6.51 kg-N/ha/year. This is above the critical load for deposition—which in nutrient-poor soils and deserts like those found at the Antioch Dunes is around 4-6 kg-N/ha/year, (Fenn 2010)—beyond which the impacts of additional nitrogen deposition must at least be assessed. The Power Plants are roughly one mile from the Antioch Dunes, and it is undisputed that the Power Plants do and will continue to deposit nitrogen into the Wildlife Refuge—even though critical loads of nitrogen have already been exceeded. The Fish and Wildlife Service has provided testimony before the California Energy Commission that continued nitrogen deposition is “virtually certain” to not only take individual Lange’s Metalmark Butterflies, but also jeopardize the continued existence of the entire species. See Exhibit B. This is a clear violation of Section 9 of the ESA.

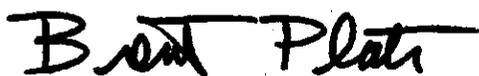
### **Conclusion.**

By permitting facilities that deposit nitrogen in the vicinity of the Antioch Dunes National Wildlife Refuge—which is the home of three endangered species and constitutes the species’ critical habitats—the EPA is violating Section 7 of the ESA in regards to Gateway Generating Station. By operating or proposing to operate facilities that deposit nitrogen in the vicinity of the Antioch Dunes National Wildlife Refuge, PG&E is violating Section 9 of the ESA in regards to its operation of Gateway Generating Station and its proposed operation of Oakley Generating Station; Radback Energy is violating Section 9 of the ESA in regards to its proposed operation of the Oakley Generating Station; Contra Costa Generating Station, LLC is violating Section 9 of the ESA in regards to its proposed operation of the Oakley Generating Station; GenOn is violating Section 9 of the ESA in regards to its proposed operation of the Marsh Landing Generating Station and the operation of the Contra Costa County Power Plant; and the California Energy Commission is violating Section 9 of the ESA in regards to all of these Power Plants.

An appropriate response to this letter would be (1) for the EPA to reinitiate consultation with the Fish and Wildlife Service on the Gateway Generating Station to address the affects caused by the deposition of nitrogen at the Antioch Dunes National Wildlife Refuge; (2) for the Power Plant owners, operators, and the CEC to obtain a Habitat Conservation Plan (“HCP”) that ensures listed species at the Antioch Dunes are not jeopardized; and (3) prohibit nitrogen emissions from the Power Plants until the terms and conditions of the consultation and HCP are implemented. These terms and conditions will likely reduce harmful pollution from the Power Plants.

If such a response is not provided, the Wild Equity Institute, Communities for a Better Environment, and the Center for Biological Diversity intend to file suit in the United States District Court in order to obtain the relief required by the Endangered Species Act.

Very truly yours,



Brent Plater

## References.

- Allen E.B., Padgett, P.E., Bytnerowicz, A., Minnich, R. 1998. Nitrogen deposition effects on coastal sage vegetation of southern California. Pages 131–139 in Bytnerowicz, A., Arbaugh, M.J., Schilling, S.L., eds. Proceedings of the International Symposium on Air Pollution and Climate Change Effects on Forest Ecosystems, February 5–9, 1996, Riverside, California. Albany (CA): Pacific Southwest Research Station, USDA Forest Service. General Technical Report PSW-GTR-166.
- Brooks, M. L. 2003. Effects of increased soil nitrogen on the dominance of alien annual plants in the Mojave Desert. *Journal of Applied Ecology*, 40: 344–353.
- California Energy Commission. 2010. Revised staff assessment of the Marsh Landing Generating Station (08-AFC-03). Sacramento, California.
- Fenn, M.E., Allen, E.B., Weiss, S.B., Jovan, S., Geiser, L.H., Tonnesen, G.S., Johnson, R.F., Rao, L.E., Gimeno, B.S., Yuan, F., Meixner, T., Bytnerowicz, A. 2010. Nitrogen critical loads and management alternatives for N-impacted ecosystems in California. *Journal of Environmental Management* 91:2402-2423.
- Huenneke, L.F., Hamburg, S.P., Koide, R., Mooney, H. A., and Vitousek, P. M. 1990. Effects of soil resources on plant invasion and community structure in Californian serpentine grassland. *Ecology* 71:478-491.
- Inouye, R.S., Tilman, D. 1995. Convergence and Divergence of Old-Field Vegetation After 11 yr of Nitrogen Addition. *Ecology* 76:1872–1887.
- Padgett, P.E. and Allen, E.B. 1999. Differential Responses to Nitrogen Fertilization in Native Shrubs and Exotic Annuals Common to Mediterranean Coastal Sage Scrub of California. *Plant Ecology* 144: 93-101.
- Tonnesen, G., Wang, Z., Omary, M., and Chien C. J. 2007. Assessment of nitrogen deposition: modeling and habitat assessment. California Energy Commission, PIER Energy-Related Environmental Research. CEC-500-2005-032.
- Weiss, S.B. 2006. Impacts of nitrogen deposition on California ecosystems and biodiversity. California Energy Commission, PIER Energy-Related Environmental Research. CEC-500-2005-165.

# ATTACHMENT D

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 (9<sup>th</sup> Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977), and *Brown v. EPA*, 566 F.2d 665 (9<sup>th</sup> 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

  
\_\_\_\_\_  
Deborah Jordan  
Director, Air Division  
U.S. EPA, Region IX

