Brent Plater (CA Bar No. 209555)
Wild Equity Institute
474 Valencia St., Suite 295
San Francisco, CA 94103
(415) 349-5787
bplater@wildequity.org

Matt Kenna (CO Bar No. 22159)
Public Interest Environmental Law
679 E. 2nd Ave, Suite 11B
Durango, CO 81301
(970) 385-6941
matt@kenna.net
*Pro Hac Vice*

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

| | |
|---|---|
| WILD EQUITY INSTITUTE, a non-profit corporation,<br><br>Plaintiff,<br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,<br><br>Defendant. | No. 4:15-cv-2461-PJH<br><br>**PLAINTIFF'S RESPONSE TO FEDERAL DEFENDANT'S MOTION TO DISMISS**<br><br>DATE: OCTOBER 14, 2015<br>TIME: 9:00 a.m.<br>Location: Oakland, Courtroom 3, 3rd Floor |

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**STATUTES**



**REGULATIONS**



**OTHER AUTHORITIES**

Wild Equity Institute now responds to the Federal Defendant's Motion to Dismiss. For the following reasons, the motion should be denied.

**INTRODUCTION**

"Each agency shall, in consultation with and with the assistance of the Secretary [of the Interior, and her delegate the U.S. Fish and Wildlife Service], insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species …." 16 U.S.C. § 1536(a)(2) (Section 7 of the Endangered Species act, or "ESA"). The Defendant United States Environment Protection Agency ("EPA") has authorized emissions from the Gateway Generating Station ("Gateway"), yet has never consulted with the U.S. Fish and Wildlife Service ("FWS") over the impacts of the emissions from the plant on three species potentially threatened with extinction by the power plant, despite the plea from FWS to do so. This failure violates the ESA, which contains "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation*." See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

EPA asserts that it can avoid this duty by permitting emissions through a consent decree, and in a 2010 suit resulting in that consent decree EPA argued that the issue of reinitiation of ESA consultation over those permitted emissions could be raised in a suit later in time from the suit in which the consent decree was entered. This Court agreed, and expressly stated that Wild Equity could bring this case as a stand-alone lawsuit. Yet now the EPA argues that such a suit cannot lie because Wild Equity's claims are supposedly barred by "*res judicata*" in the consent decree case brought by EPA against the power plant- the very same one in which it said Wild Equity's claim could be brought as a stand-alone suit.

EPA further argues that if Wild Equity's claim is construed as a challenge to issuance of a Prevention of Significant Deterioration ("PSD") action under the Clean Air Act ("CAA"), that such a claim must lie in the Court of Appeals. However, EPA does not seem to make this argument regarding the reinitiation of consultation claim brought by Wild Equity, and it clearly does not apply. In sum, EPA is playing a shell game seeking to avoid review of its failure to consult under the ESA, a tactic the Court should reject, and allow this suit to go forward.

Finally, although barely touched on by EPA, the agency does retain "sufficient discretionary authority and control" over the Gateway plant emissions to sustain Wild Equity's claim.

**FACTS**

In addition to the facts presented by EPA, an important fact in this case is that FWS- the agency entrusted by Congress to carry out implementation of the ESA- has requested that EPA consult with it over the effects of the gateway power plant's pollution. The FWS presented this request in a letter dated June 29, 2011, much of which bears excerpting here because it contains not only the request for consultation but also many background facts relevant to this dispute, which show the need for consultation in this case:

> 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.
>
> 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 (NOx), carbon monoxide (CO), sulfur dioxide (S02) 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 metal mark butterfly.

* * *

**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 reinitiate section 7 consultation with the Service for the GGS pursuant to 50 CFR § 402.14 of the Act.

Plater Decl. Exh. 1. FWS is authorized by regulation to request another federal agency to reinitiate consultation. 50 C.F.R. § 402.16.

**ARGUMENT**

While Wild Equity's complaint alleges that EPA failed to "initiate/reinitiate" consultation, it now clarifies that its claim is one for reinitiation of consultation. *See Thomas v. Mundell*, 572 F.3d 756, 760 (9th Cir.2009) (pleadings be construed broadly in favor of plaintiffs on motion to dismiss). With this clarification, it becomes clear that Wild Equity's claim for reinitiation of consultation should not be dismissed.[1]

Under the ESA and its regulations, a federal agency must reinitiate consultation over actions it has authorized and where "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(b). Wild Equity's complaint alleges facts that this is this case (*see* complaint and Pl. Exh. 1 excerpted above), and its suit should not otherwise be dismissed.

## I. Wild Equity's Claim is Not Barred by Action in *United States v. Pacific Gas & Electric*

Regarding Wild Equity's claim for reinitiation of consultation, the *U.S. v. PG&E* court (see EPA Brf. at 8-10) stated:

> The entry of the proposed consent decree will not impair WEI's ability to file a separate lawsuit to allege this claim and protect its interest. * * * [T]he United States [has] asserted that WEI could file a separate lawsuit alleging claims under the ESA, and stated that the United States retains the authority to seek to modify the consent decree after it is entered.

*United States v. Pacific Gas & Elec.,* 776 F. Supp. 2d 1007, 1024 n.9 and acc. text (N.D. Cal. 2011) (citation omitted) (order denying WEI intervention in suit resulting in consent decree).

[1] As explained by the FWS letter excerpted above, EPA did initially consult with FWS over the impact of the building the power plant itself, but that did not include a consultation over the impact of the emissions from the plant. *See also* Complaint ¶¶ 26-27; EPA Brf. at 24.

The Court in *US v. PG&E* clearly stated that nothing about its decision should bar the suit that Wild Equity now brings—in fact it states just the opposite- and in seeking to avoid Wild Equity's intervention in that suit, EPA itself conceded that it retains discretion to modify the consent decree as needed to accommodate any changes to operation of the power plant that would be mandated by a consultation with FWS. In its brief, in describing the *PG&E* court's dismissal of the reinitiation claim as a basis for Wild Equity's intervention in that suit, EPA utterly failed to even mention this language, which shows that it can provide no good reason it should be permitted to "walk back" its concession. *See* EPA Brf. at 9 lines 19-25; Brf. at 24-25; *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984) (EPA bound by collateral estoppel from taking conflicting positions in litigation with a mutuality of parties).[2]

**II. The "Actions" "Authorized" by EPA are Gateway Power Plants Emissions, Not Any Permit or Consent Decree Itself**

EPA argues that Wild Equity "cannot maintain a reinitiation claim here because the 2001 PSD permit is no longer in effect [so] there is nothing upon which to reinitiate." EPA Brf. at 24. However, that argument misses the point: the action here is not any permit "carried out" by EPA, but rather the Gateway power plant emissions "authorized" by EPA through its permitting activities as a whole. *See* Complaint § 60 ("EPA retains a non-delegated responsibility to initiate/reinitiate consultation under Section 7 of the ESA regarding the issuance of the original PSD permit to Gateway and on new PSD requirements incorporated into the 2011 Permit to Operate and extended through 2015.").[3]

"Actions" under the ESA are not only defined as including "the granting of … permits" but also "actions directly or indirectly causing modifications to the land, water or air." 50

[2] While the government is not bound by *nonmutual* collateral estoppel (*i.e.* with differing parties), *United States v. Mendoza*, 464 U.S. 154 (1984), the government itself claims privity of the parties here and so collateral estoppel applies here. *See* EPA Brf. at 15.

[3] Although Wild Equity believes that its Complaint adequately alleges the reinitiation claim it describes here, in an abundance of caution, to the extent the Complaint is not deemed sufficiently drafted to allege this claim, Wild Equity requests leave to amend it to conform with this response to EPA's motion to dismiss. *See United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981) (Because Rule 15(a) mandates that leave to amend should be freely given when justice so requires, the rule is to be interpreted with "extreme liberality.").

C.F.R. § 402.02(c),(d). And this makes sense given that an agency must consult over actions "authorized" by it and not merely "carried out" by it. 16 U.S.C. § 1536 (a)(2); *see also Karuk Tribe of Cal. v. U.S. Forest Service*, 681 F.3d 1006, 1020-21 (9th Cir. 2012) (in addition to direct federal activities, "private activities" are also "agency action" under the ESA requiring consultation by an agency when that agency authorized the private activities).[4]

In order for Wild Equity to bring this claim, EPA must still retain "discretionary involvement or control" over its permitting authority for the Gateway plant, since it must be able to take action to adjust emissions at the plant and/or impose mitigation if the consultation shows that changes must be made to protect the three species. *See id*. As will be shown below, EPA does retain such involvement or control. But EPA cannot avoid its duty simply by showing that there was some breach in the permitting timeline while the emissions have been ongoing and continuous. "The [EPA]'s position in this case would relegate the ESA—"the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," [*TVA v. Hill,* 437 U.S. at 180]—to a static law that evaluates and responds to the impact of an action before that action takes place, but does not provide for any further evaluation or response when new information emerges that is critical to the evaluation." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv*., 789 F.3d 1075, 1088-89 (9th Cir. 2015).

In any event, even if the old permit lapsed, the terms of the consent decree resurrected it, so that there now has been no lapse as a legal matter. Subsequent to the issuance of the consent decree both the EPA and its delegated agent in the Bay Area, the Bay Area Air Quality Management District ("BAAQMD"), have issued permits to Gateway that demonstrate that the facility's PSD permit is still in effect. For example, BAAQMD issues a permit to Gateway every year called the "Authority to Construct/Permit to Operate" ("ATC/PTO"). The most recent ATC/PTO for Gateway was issued on October 16, 2014, and permits Gateway to

[4] For this reason, to the extent EPA's argument applies to Wild Equity's reinitiation claim, it is irrelevant whether the consent decree is an "agency action." *See* EPA Brf. at 16-17. The action authorized by EPA are the emissions from the Gateway plant which the FWS have now found to present effects on species requiring consultation, not the execution of the consent decree. The *PG&E* court's statement based on EPA's concession in that case, that a stand-alone reinitiation suit could be brought, shows that EPA can only take this position as to one for initial initiation of consultation on the consent decree itself.

operate during 2015. Gateway's 2015 ATC/PTO expressly states that Permit Condition 18138 parts 14, 20, 22, and 24 are derived from EPA's PSD permit. *See* Plater Decl., Exh. 2 pp. 9-13. Each of these parts specifically authorizes nitrogen emissions, the very pollutant that FWS believes is adversely affecting the listed species at the Antioch Dunes National Wildlife Refuge. To clarify that these requirements emanate from Gateway's PSD permitting requirements rather than organically from the consent decree itself, the ATC/PTO contains a separate provision that specifically lists the decree-imposed pollution control provisions that apply to Gateway above and beyond what is permitted through the PSD permit. *Id*., p. 20-21 ("Additional Conditions from Approved Federal Consent Decree"). If PSD permitting requirements either (a) no longer exist, or (b) were supplanted by the organic requirements of the Consent Decree, the ATC/PTO would not contain this express distinction.

Similarly, Gateway's Title V permit—which the EPA reviewed through a formal administrative process and found no reason to object to the issuance of the Title V permit, 79 Fed. Reg. 69,469 (Nov. 21, 2014) —also expressly references the PSD permit as it catalogues the "applicable requirements" that govern Gateway's pollution emissions. For example, in Table IV-A, which lists the "Source-specific Applicable Requirements," the Title V permit references the ATC/PTO provisions described above that limit nitrogen pollution, notes that the requirements' source is the PSD program, and further notes that each of these PSD provisions is "federally enforceable." Plater Decl., Exh. 3 p. 24. This table also lists the consent decree provisions governing pollution emissions as distinct "applicable requirements." *Id.* at 25-26.

To ensure that there is no ambiguity about the ongoing applicability of a federal PSD permit to Gateway, the glossary of the Title V permit notes that the acronym PSD refers to: "Prevention of Significant Deterioration. A *federal program* for permitting new and modified sources of those air pollutants for which the District is classified 'attainment' of the National Air Ambient Quality Standards. Mandated by Title I of the Act and *implemented by both 40 CFR Part 52* and District Regulation 2, Rule 2." *Id.* p. 81 (emphases added). The Title V

permit also explains that the PSD program limitations are "limitations and conditions which are enforceable by the Administrator of the EPA." *Id.* p. 80.

The EPA cannot have it both ways: they cannot consistently reference the applicability of the federal PSD program and permit, and also claim that the PSD program and permit no longer exists in relation to Gateway. There is no question that emissions limitations imposed on the Gateway plants are actions authorized by EPA.

**III. EPA Retains Discretionary Involvement or Control over its Permitting Authority for the Gateway Power Plant**

In a footnote, EPA states that while whether it retains "discretionary involvement or control" over Gateway's emissions is a "determinative question" here, it merely states that "EPA does not concede that it retains discretion to later modify federal PSD permits for the benefit of listed species." EPA Brf. at 24 n.10, citing 50 C.F.R. § 402.16 and *Cottonwood,* 789 F.3d at 1086. Even putting aside that raising an issue in a footnote does not sufficiently raise it- *see Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n. 4 (9th Cir.1996), while EPA does not concede this point here, it has already conceded it in the *PG&E* litigation and the law shows that EPA does indeed have the authority to amend its PSD authorization for the Gateway power plant.

First, just as with Wild Equity's ability to file this suit after the PG&E consent decree was entered, EPA conceded in that litigation that it "retains the authority to seek to modify the consent decree after it [was] entered." *US v. PG&E*, 776 at 1024 n.9. So to the extent the consent decree would need to be amended to account for any emissions changes, EPA has conceded it has that ability. Moreover, there would appear to be no bar to imposing new emissions restrictions or requiring mitigation through the PSD program or other federal actions: the consent decree does not prohibit the EPA from wielding its powers to constrain emissions by Gateway that would violate the ESA.

Further, the *PG&E* Court's statement was made in the context of its discussion of Wild Equity's reinitiation of consultation claim, so it cannot be argued that EPA's concession somehow applies to consent decree modification outside the context of new limits that would

be imposed as a result of a new ESA consultation. Again, EPA is bound by the principles of mutual collateral estoppel from taking a contrary position, a particularly apt principle here because its prior position was a basis for the *PG&E* court's disallowance of Wild Equity from bring its re-initiation claim into that case, *before* the consent decree was entered. The EPA cannot take one position to get out of the claim there and then take another to prevent the claim from being brought here.

Further, the applicable law shows that EPA does retain such discretion. In *Turtle Island Restoration Network v. National Marine Fisheries Serv.*, 340 F.3d 969 (9th Cir. 2003) ("*Turtle Island I*"), the Court held that because the permitting activity there had "ongoing and lasting effect and constitute ongoing agency activity, which is likely to adversely affect listed species," the agency had sufficient discretion in controlling the activity to require consultation. *Id.* at 977, citing *Pacific Rivers Council v. Thomas,* 30 F.3d 1050, 1053 (9th Cir.1994), *NRDC v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 2006) and *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir.1995). The Court contrasted two cases where sufficient discretion did not remain since the agencies there either "could not influence construction of the roadway" approved by the agency in one case, or "did not 'retain discretionary control to make new requirements to protect species that subsequently might be listed as endangered or threatened'" in the other. *Id.* at 976-77, citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir.1995) and *Envt'l Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1081 (9th Cir.2001).

More recently, and perhaps most relevantly, in a unanimous *en banc* decision, the Ninth Circuit held that even though the government and parties had entered binding "Settlement Contracts" controlling the amount of water that the government must provide to the parties from a water diversion system, that the government retained at least "some discretion" to act to protect species as a result of an ESA consultation. *Natural Res. Def. Council v. Jewell*, 749 F.3d 776, 783-85 (9th Cir., *en banc*), *cert. denied sub nom*. *Glenn-Colusa Irrigation Dist. v. Natural Res. Def. Council*, 135 S. Ct. 676, 190 L. Ed. 2d 389 (2014). The Court held that while the Settlement Contracts guaranteed "'the quantities of water and the allocation thereof, [n]othing in the provision deprives the Bureau of discretion to renegotiate contractual terms

that do not directly concern water quantity and allocation. … [T]he Bureau could benefit the delta smelt by renegotiating the Settlement Contracts' terms with regard to, *inter alia*, their pricing scheme or the timing of water distribution." *Id.* at 785. The Court pointed out that the legal standard is not, as the district court had stated, whether the agency's discretion was "substantially constrained" in a manner that would *foreclose* consultation, but rather whether the agency retained at least "some discretion," which would *require* consultation. *Id.* at 784-785.

And most recently, the Ninth Circuit held that while "ongoing agency action" strongly indicates that a reinitiation claim can lie, "there is nothing in the ESA or its implementing regulations that *limits* reinitiation to situations where there is 'ongoing agency action.'" *Cottonwood*, 789 F.3d at 1086 (emphasis added). The Court further held that as long there is no "'nondiscretionary statutory mandate'" nor other "'legal obligation'" preventing the agency from taking corrective action to protect species as a result of the consultation, then the agency may retain sufficient discretion to require reinitiation of consultation. *Id.* at 1087, citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) and *NRDC v. Jewell*.

Here, not only has EPA said in *U.S. v. PG&E* that it retains discretion to modify the consent decree to accommodate changes required as a result of consultation, but so do applicable regulations state that EPA has discretion to amend PSD permitting as necessary. 40 CFR § 71.7(f)(1)(iv) (PSD permitting must be amended if EPA "determines that the permit must be revised or revoked to assure compliance with the applicable requirements"); "applicable requirements" include those of the Clean Air Act and "'any other federally-recognized requirements applicable to the source.'" *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1018 n.3 (D.C. Cir. 2000) (citation omitted). There is no dispute from EPA that the ESA applies the PSD permitting generally (as evidenced by its original consultation), and indeed it could not dispute it since, as discussed above, the ESA is a "comprehensive" act applicable to all actions authorized by an agency- so the ESA clearly contains federally-recognized

requirements applicable to the Gateway power plant.[5] And the consent decree, which now covers emissions authorized by EPA from the plant, itself states that it may be modified by "subsequent written agreement signed by the United States and PG&E … effective only upon approval by the Court.". Defendant's Exh. A at ¶¶ 6, 54.

The kinds of requirements EPA might impose to inure a benefit to the three listed species here could include operational changes or pollution control requirements that would reduce the amount of nitrogen deposited at the Antioch Dunes National Wildlife Refuge. For example, the EPA could change the startup/shutdown requirements for Gateway, which tend to be when pollution control devices are least effective, so that fewer startups/shutdowns are authorized in a particular year. *See, e.g.*, 40 C.F.R. § 52.21(a)(a)(7)(iv) (PSD regulations stating that a "requirement that emission calculations for compliance purposes must include emissions from startups, shutdowns, and malfunctions."). However, the EPA is not limited solely to actions that affect nitrogen emissions emitted from Gateway's smokestacks. EPA could also require offsets be purchased to reduce emissions, or order mitigation funding to ameliorate the impacts the facility imposes on the wildlife refuge and the endangered species found there. *See Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987) (mitigation imposed as a precondition of project). These potential remedial actions are at least as substantial as the ability to affect the "timing of water distribution" that provided "some discretion" in *NRDC v. Jewell*. *See* 749 F.3d at 785. Ultimately the initial decision about which and to what extent these options will be required will rest with the FWS and EPA. But unless consultation occurs, the FWS cannot initiate the process for evaluating the feasibility and effectiveness of any of these options: which is exactly why this Court must order the EPA to do as FWS asks and conduct a consultation process.

[5] Further, the "Consultation Handbook" of the FWS- the agency entrusted by Congress to administer the ESA- states that the ESA "requires action agencies to consult or confer with the Services when there is discretionary Federal involvement or control over the action, whether apparent (issuance of a new Federal permit), or less direct (State operation of a program that retains Federal oversight, such as the National Pollution Discharge Elimination System Program)." FWS Consultation Handbook p. 2-6, http://www.fws.gov/endangered/esa-library/index.html#consultations

**IV. Wild Equity's Claim does Not Lie in the Court of Appeals**

The EPA argues that Wild Equity's claim can be brought, if at all, only in the Court of Appeals. However, this argument, to the extent EPA even makes it as to Wild Equity's reinitiation claim, cannot be accepted.

While Wild Equity does not concede that a claim for initial initiation of consultation would need to be brought in the Court of Appeals, for the sake of argument even if it would, a reinitiation claim clearly does not. Because these claims by definition are brought later in time than initial permitting decisions, 1) there are no associated Clean Air Act challenges to combine them with in the Court of Appeals; and 2) the 60-day statute of limitations for the Clean Air Act's court of appeals venue provision would prevent reinitiation claims. Accordingly, such a claim lies in district court. *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937, 949 (9th Cir. 2006) (*Turtle Island II*) ("[T]he regulatory challenge limitation would not encompass claims that [an agency] failed to reinitiate consultation when … 'new information reveals effects of the action that may affect listed species … to an extent not previously considered ….'") (citing 50 C.F.R. § 402.16).

**V. Wild Equity Does Not Bring a Separate Section 7(d) Claim**

EPA argues that Wild Equity's Section 7(d) claim should be dismissed. EPA Brf. at 19-20. While it is not clear whether this argument (like other arguments presented prior to page 24 of its brief) was meant to apply to Wild Equity's reinitiation of consultation claim, regardless Wild Equity only brings one claim, that for initiation/reinitiation of consultation (now clarified by this Response to be a reinitiation claim). Complaint at 12. Section 7(d) prevents the irreversible or irretrievable commitments of resources *during* consultation, and so Wild Equity included it to show that if consultation is required under its claim, that EPA is necessarily in violation of section 7(d) for allowing *status quo* emissions to continue before consultation is completed, which could be relevant in fashioning a remedy here. *See* 16 U.S.C. § 1536(d); Complaint at 13.

//

//

**CONCLUSION**

For these reasons, EPA's motion to dismiss should be denied.

Respectfully submitted September 16, 2015,

/s/Brent Plater
Brent Plater (CA Bar No. 209555)
Wild Equity Institute
474 Valencia St., Suite 295
San Francisco, CA 94103
(415) 349-5787
bplater@wildequity.org

/s/Matt Kenna
Matt Kenna (CO Bar No. 22159)
Public Interest Environmental Law
679 E. 2nd Ave, Suite 11B
Durango, CO 81301
(970) 385-6941
matt@kenna.net
*Pro Hac Vice*

Attorneys for Plaintiff Wild Equity Institute