BAY AREA
AIR QUALITY
MANAGEMENT
DISTRICT

November 7, 2013

Brent Plater
Executive Director
Wild Equity Institute
474 Valencia Street, Suite 295
San Francisco, CA 94103

Dear Mr. Plater:

The Bay Area Air Quality Management District (District) has received your comments regarding the District's draft Title V permit for the Gateway Generating Station.

The District has considered your comments, along with other comments that were submitted, and has made a determination that the Title V permit meets the requirements of the District's Regulation 2 Rule 6. The District is therefore issuing the Title V permit to the Gateway Generating Station. The comments that you submitted regarding the draft Title V permit are addressed below. The District appreciates your interest and values your input into this permitting process.

Comment 1: Incidental Take Authorization

Your letter states that the District may not issue the Title V permit until "incidental take authorization" is obtained and incorporated into the Title V permit. The letter states that EPA has failed to obtain such incidental take authorization for listed species affected by Gateway, either through an incidental take statement and biological opinion issued through consultation with the U.S. Fish and Wildlife Service, or through an Endangered Species Act (ESA) Section 10 Incidental Take Permit. The letter states that such incidental take authorization is an "applicable requirement" that must be included in the Title V permit.

Response to Comment 1

The District disagrees that that there are any Title V "applicable requirements" related to any necessary incidental take authorization for listed species that need to be incorporated into the Title V permit. The District's Title V regulations define "applicable requirements" as "[a]ir quality requirements with which a facility must comply pursuant to the District's regulations, codes of California statutory law, and the federal Clean Air Act, including all applicable requirements as defined in 40 CFR 70.2." (See District Regulation 2-6-202.) There are no requirements related to incidental take authorization under the Endangered Species Act that fall within this definition. Specifically, neither of the two ESA requirements referred to in the comment, the Section 7 consultation requirement and the Section 10 incidental take permit requirement, give rise to any such Title V applicable requirements for this facility.

ESA Section 7 Consultation Requirements:

With respect to requirements that EPA consult with the U.S. Fish and Wildlife Service under ESA Section 7 in connection with issuing Prevention of Significant Deterioration (PSD) permits under 40 CFR Section 52.21, there are no Title V applicable requirements related to these consultation duties that need to be included the Title V permit for the Gateway facility. There are at least three reasons why this is the case.

First, the Section 7 consultation requirement is a requirement that applies to federal agencies, as you note in your letter. It is not a requirement "with which the facility must comply" that falls within the definition of "applicable requirement" in District Regulation 2-6-202. Thus even if Section 7 required *EPA* to do something at this point (which is not at all clear), it would not be a requirement with which *the facility* must comply that has to be included in the facility's Title V operating permit.

Second, ESA Section 7 consultation is a procedural requirement that governs how the permitting process must be conducted. It is not, in and of itself, an operational requirement that governs how a permitted project must be built or operated.[1] Thus even if the Section 7 consultation process did impose requirements on the facility itself (as opposed to EPA) for how the permitting process must be conducted, they would not constitute "applicable requirements" specifying how the facility must be operated that need to be included in the Title V permit.

Third, there is no indication that there are any applicable ESA consultation requirements that have not been fully satisfied for the PSD permitting of the Gateway Generating Station. During the original permit proceeding in 2001 EPA consulted with the U.S. Fish and Wildlife Service as required by the PSD permit program. Subsequently, the federal District Court expressly rejected a claim that EPA was required to reinitiate consultation during the enforcement proceedings over the subsequent PSD non-compliance issues related to the facility. (See *US v. PG&E*, Civil Action No. 09-4503 SI, Order Denying Wild Equity Institute's Motion to Intervene and Granting Plaintiff's Motion to Enter the Proposed Second Amended Consent Decree (Mar. 3, 2011), pp. 17-18 (rejecting claim that a consent decree is "agency action" triggering consultation requirements).) Given this history, it does not appear that there are any further requirements of any kind at this stage under ESA Section 7 with which anyone needs to comply.

ESA Section 10 Incidental Take Permit Requirements:

With respect to requirements that facility owner/operators themselves obtain incidental take permits under Section 10 of the Endangered Species Act, the District is not aware of any information that such a permit is or ever has been required for the Gateway Generating Station. Moreover, even if such a permit were required for this facility under the

[1] ESA consultation can of course lead to substantive requirements being imposed on the facility through the PSD permit when it is issued in order to protect listed species. But no such requirements were imposed for the Gateway facility, and all of the substantive PSD requirements that were imposed in the PSD permit are included in the Title V permit as noted below. The important point for purposes of this discussion is that the consultation process is a *pre-construction* requirement applicable to the permitting process, not an *operational* requirement that the facility must comply with at this point that needs to be included in the Title V operating permit.

Endangered Species Act, such ESA permits are not "applicable requirements" under Title V. To the extent that any Endangered Species Act permitting requirements are in fact applicable to this facility, they are endangered species requirements, not air quality requirements; and they arise under the Endangered Species Act, not under District regulations, California statutes, or the federal Clean Air Act. (See District Regulation 2-6-202.)

For all of these reasons, there are no legal requirements arising under Section 7 or Section 10 of the Endangered Species Act that constitute "applicable requirements" to be included in the Title V permit.

Comment 2: PSD Permit Requirements as Title V "Applicable Requirements"

Your letter states that the PSD program is an "applicable requirement" under the Title V permit program. It further states that since PSD is a Title V applicable requirement, the incidental take statement contained in a biological opinion issued by the U.S. Fish and Wildlife Service during consultation on a PSD permit is also an applicable requirement.

Response to Comment 2

The comment is correct that where a facility is subject to the PSD program and obtains a PSD permit, the permit conditions contained in that PSD permit are Title V "applicable requirements". (See 40 CFR Section 70.2 Applicable Requirement Definition (2) Preconstruction Permit Programs.) That is the case here. The federal PSD permitting requirements of Clean Air Act Section 165 applied to this project, and the project obtained a PSD permit prior to construction.[2] The PSD permit conditions applicable to the project—both from the initial PSD permit and from the subsequent consent decree—are all included as "applicable requirements" in the Title V permit. The inclusion of all such PSD conditions satisfies the Title V permitting regulations with respect to these conditions.

With respect to EPA's consultation obligations under ESA Section 7 in connection with issuance of the PSD permit, EPA satisfied those requirements through an informal consultation process. Through this process, EPA made a finding of "No Likely Adverse Effect" (without recommending or proposing any permit conditions related to endangered species impacts), and the Fish & Wildlife Service concurred (excluding potential adverse effects from a cooling water intake system which were being addressed through a separate Section 7 consultation involving the Army Corps of Engineers). As a result, the Fish & Wildlife Service did not issue an incidental take statement or biological opinion for the project through the ESA consultation process, and there were no conditions of approval imposed through the PSD permit process with respect to endangered species. Accordingly, there are no such conditions that need to be included in the Title V permit as "applicable requirements".

[2] As you are aware, the facility's PSD permit expired and EPA took enforcement action in federal District Court over PG&E's continued construction without a PSD valid permit as noted in the response to the previous comment. That enforcement action resulted in a consent decree that imposed additional conditions on the facility to ensure compliance with federal PSD requirements. These additional conditions are included as applicable requirements in the Title V permit.

As for the consultation process itself, that process is a requirement that EPA is subject to as part of its permitting activities. It is not an "applicable requirement" that this facility is subject to as a condition of operation as explained in response to the previous comment. The consultation process can lead to endangered-species-related conditions being imposed through a PSD permit, which would be "applicable requirements" to be included in the Title V permit, but there were no such conditions imposed for this facility.

Comment 3: Request for Consultation from U.S. Fish and Wildlife Service.

The comment letter states that the U.S. Fish and Wildlife Service has requested that EPA re-initiate consultation over the Antioch Dunes endangered species. It also states that even without this request, EPA would still be required to conduct further consultation because of its consent decree, because new information has become available, and/or because its action in approving the PSD permit has been modified. The letter states that the District should not issue the Title V permit until EPA has consulted with the Fish and Wildlife Service and any findings made as a result of such consultation are included in the Title V permit.

Response to Comment 3

The District disagrees that it would be appropriate to refrain from issuing the Title V permit to wait for potential re-initiation of consultation between EPA and the Fish and Wildlife Service. It is not clear that further consultation is required or will take place, given the fact that the PSD permitting process for the Gateway facility has been completed and the fact that the federal District Court determined when it entered the consent decree that no further consultation was required at that stage. Moreover, even if EPA and the Fish and Wildlife Service do undertake further consultation, any endangered-species-related operating requirements imposed on the facility as a result of that consultation can be incorporated into the Title V permit if and when they are imposed. The Title V process is designed to be flexible to accommodate such new applicable requirements as they are imposed over the life of the permit, and it is preferable to get the permit issued now and use that process to incorporate any new requirements that become applicable in the future, rather than to wait and see whether further consultation will take place and whether it will result in any such requirements.

Moreover, there is nothing in the legal requirements for Title V issuance that would prevent the District from issuing the permit at this time. Regardless of any potential for further species-related applicable requirements to be imposed in the future as a result of additional consultation, all current applicable requirements are included in the permit as required under District Regulation 2, Rule 6. The District is therefore going ahead with issuance of the Title V permit at this time. The District will continue to monitor the situation, and will incorporate any new additional requirements that may result from further consultation as appropriate in the future.

If you have any further questions regarding the Gateway Generating Station, please call me at **(415) 749-4623, (fax 415-749-5030).**

Sincerely,

Signed by Brian K. Lusher
Brian K Lusher
Senior Air Quality Engineer