

# WILD Equity INSTITUTE

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

December 17, 2013

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

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

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

Dear Secretary McCarthy and Administrator Blumenfeld:

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

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

**The Wild Equity Institute.**

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

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

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

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

### **The Antioch Dunes National Wildlife Refuge.**

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

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

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

### **The Lange's Metalmark Butterfly.**

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

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

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



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

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

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

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

### **Title V.**

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

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

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



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

### **Gateway Generating Station.**

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

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

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

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

### **Conclusion.**

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

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

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

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

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

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

Very truly yours,



Laura Horton

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