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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILD EQUITY INSTITUTE,
Plaintiff,
v.
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Defendant.

Case No. 15-cv-2461-PJH

**ORDER GRANTING MOTION TO
DISMISS**

Defendant’s motion for an order dismissing the complaint for lack of subject matter jurisdiction and failure to state a claim came on for hearing before this court on October 21, 2015. Plaintiff appeared by its counsel Brent Plater, and defendant appeared by its counsel Bridget McNeil and Julie Walters. Having read the parties’ papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motion.

INTRODUCTION

Plaintiff Wild Equity Institute (“Wild Equity”), a non-profit environmental group, brought this action against the United States Environmental Protection Agency (“EPA”), asserting a claim under § 7 of the Endangered Species Act, 16 U.S.C. § 1536. Wild Equity alleges that emissions from a power plant in Contra Costa County endanger the continued existence of the Lange's metalmark butterfly, the Antioch Dunes evening primrose, and the Contra Costa wallflower (“the Listed Species”), each of which is endemic to the Antioch Dunes National Wildlife Refuge (“Antioch Dunes NWR”).

STATUTORY BACKGROUND

A. The Endangered Species Act

The Endangered Species Act ("ESA") provides for the listing of species as threatened or endangered. 16 U.S.C. § 1533. Section 7(a)(2) of the ESA requires federal agencies such as the EPA to

insure that any action authorized, funded, or carried out by such agency (hereinafter . . . referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.

16 U.S.C. § 1536(a)(2). An agency is required to consult with either the United States Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service (collectively, "the Services") whenever the agency takes action that "may affect" listed species or their habitats. 16 U.S.C. § 1536(a)(2); see also 50 C.F.R. § 402.14(a). Section 7 applies only to actions over which there is discretionary Federal involvement or control. 50 C.F.R. § 402.03.

The regulations promulgated under the ESA define "agency action" as follows:

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02.

In considering whether there has been an "agency action," courts in the Ninth Circuit employ a two-part test: "First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species." Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1021 (9th Cir. 2012) (en banc).

If the agency determines that its action "may affect" endangered or threatened species or critical habitat, it must pursue either informal or formal consultation with one of

1 the Services. See 50 C.F.R. §§ 402.13-402.14. Formal consultation is required unless
2 the agency determines, as a result of informal consultation with the Service, “that the
3 proposed action is not likely to adversely affect any listed species or critical habitat.” Id.
4 § 402.13(a). If formal consultation is required, the Service prepares a Biological Opinion
5 stating whether the proposed action is likely to “jeopardize the continued existence of
6 listed species or result in the destruction or adverse modification of critical habitat.” Id.
7 § 402.14(g). Thereafter, the agency must determine how to proceed with its action in
8 light of the Service’s Biological Opinion. Id. § 402.15.

9 The ESA's citizen suit provision authorizes any person to “commence a civil suit
10 on his own behalf . . . to enjoin any person, including the United States and any other
11 governmental instrumentality or agency . . . who is alleged to be in violation of any
12 provision of this chapter or regulation issued under the authority thereof.” 16 U.S.C.
13 § 1540(g)(1)(A). The citizen suit provision also provides that “district courts shall have
14 jurisdiction . . . to enforce any such provision or regulation.” Id. § 1540(g).

15 B. The Clean Air Act¹

16 Title I of the Clean Air Act is designed to ensure that air quality in the United
17 States attains and maintains National Ambient National Ambient Air Quality Standards
18 (“NAAQS”), which are health-based standards for the amount of air pollutant in the
19 ambient air. 42 U.S.C. § 7409. The New Source Review (“NSR”) program of the Clean
20 Air Act divides the nation into “attainment” areas, which have attained NAAQS, and “non-
21 attainment” areas, which have not attained the standards. 42 U.S.C. §§ 7470-7515. The
22 Act requires that all new major stationary sources obtain a preconstruction permit that
23 complies with the Act’s NSR requirements. 42 U.S.C. §§ 7470, 7475(a).

24 Areas designated as either “non-attainment” or “unclassifiable” are subject to
25 requirements to bring them into attainment, including the non-attainment NSR permitting
26

27 _____
28 ¹ The complaint alleges a single cause of action under the ESA. The court includes this
discussion of the Clean Air Act to make the discussion of the factual and procedural
background more comprehensible.

1 provisions. Id. §§ 7501-7515. Attainment areas, by contrast, are subject to the
2 Prevention of Significant Deterioration (“PSD”) permitting provisions. See Alaska Dep’t of
3 Envtl. Conservation v. Env’tl. Prot. Agency, 540 U.S. 461, 469-75 (2004).

4 States are encouraged to develop their own regulatory approaches for
5 implementing the NSR and PSD programs. See United States v. Pac. Gas & Elec., 776
6 F.Supp. 2d 1007, 1012 (N.D. Cal. 2011) (“PG&E”). Regulatory programs developed by
7 the states, and known as “State Implementation Plans” (“SIPs”), are intended to satisfy
8 the minimum requirements of the Clean Air Act. See generally 42 U.S.C. § 7410(a). A
9 state's SIP “may not adopt or enforce any emission standard or limitation which is less
10 stringent” than the Act's requirements. 42 U.S.C. § 7416. Each SIP is required to
11 contain preconstruction permitting requirements for major stationary sources, including
12 the PSD permitting requirements that apply in attainment and non-attainment areas. See
13 42 U.S.C. §§ 7410(a)(2)(C), 7470-7515. PSD permits issued by states under approved
14 SIPs are actions under state law. In re Milford Power Plant, 8 E.A.D. 670, 673, 1999 WL
15 1120154 at *3-4 (EAB Oct. 18, 1999).

16 California has adopted the SIP approach in the San Francisco Bay Area with
17 respect to the non-attainment NSR program of the Clean Air Act, but not with respect to
18 the attainment area PSD program. See PG&E, 776 F.Supp. 2d at 1021. For non-
19 attainment NSR, the Bay Area Air Quality Management District (“BAAQMD”), an agency
20 with jurisdiction in the nine Bay Area counties, see Cal. Health & Saf. Code §§ 40200-
21 40276, has adopted regulations and has had those regulations approved by the EPA.
22 See 64 Fed. Reg. 3850 (Jan. 26, 1999), 40 C.F.R. §§ 52.21, 52.22(c)(199)(i)(A)(8)).
23 These “SIP-approved” non-attainment NSR regulations are set forth in BAAQMD
24 Regulation 2, Rule 2.

25 As California has not adopted its own regulatory system to implement the Clean
26 Air Act's PSD requirements in the Bay Area, PSD permitting is governed by federal
27 regulations which are codified at 40 C.F.R. § 52.21, and which incorporate the procedural
28 regulations at 40 C.F.R. Part 124. These regulations provide for the EPA to delegate its

1 authority to conduct PSD source review and issue PSD permits. See 40 C.F.R. 52.21(u).
2 Where such a delegation occurs, the PSD permits issued by the delegate agency remain
3 federal and, as described below, are subject to EPA’s regulations governing
4 administrative appeals and exhaustion of administrative remedies. The delegate agency
5 is simply authorized to issue the permits under federal law on EPA’s behalf, rather than
6 issuing PSD permits under state law as in a state with an approved PSD program in its
7 SIP. Milford Power, 8 E.A.D. at 673-74.

8 On April 23, 1986, the EPA delegated to BAAQMD the “authority of the
9 administrative and enforcement elements” of the federal PSD program’s implementing
10 regulations, subject to the terms, conditions and reservations of authority set forth in that
11 agreement. PG&E, 776 F.Supp. 2d at 1012. BAAQMD also implements a separate SIP-
12 approved Clean Air Act program under state and local law, pursuant to which it issues
13 preconstruction or “Authority to Construct” (“ATC”) permits, to implement the Clean Air
14 Act non-attainment NSR program. Id. Although BAAQMD implements these programs in
15 parallel, the PSD and ATC requirements are distinct, with the latter being implemented
16 under state and local law and the former under federal law.

17 Under the PSD permitting program, new proposed major sources of pollution must
18 obtain a permit before construction. See 42 U.S.C. §§ 7470–7492. A PSD permit must
19 be supported by an air quality impact analysis that shows that the increased emissions
20 will not cause or contribute to an exceedance of the NAAQS or air quality increments in
21 the area. See 42 U.S.C. § 7475(a)(3). In addition, PSD applicants must show they will
22 apply the Best Available Control Technology (“BACT”) to minimize pollution. See 42
23 U.S.C. §§ 7475(a)(4), 7479(3).

24 Under federal regulations, PSD permits expire when 18 months elapse from the
25 time of issuance without construction. 40 C.F.R. § 52.21(r)(2). Expiration ensures that
26 major polluting sources use the most up-to-date pollution control technology. See Sierra
27 Club v. Franklin Cty. Power of Illinois, 546 F.3d 918, 934 (7th Cir. 2008). The 18-month
28 period specified in section 52.21(r)(2) may be extended “upon a satisfactory showing that

1 an extension is justified.” 40 C.F.R. § 52.21(r)(2). By contrast, BAAQMD’s state-law
2 construction permit regulations allow for a longer period before expiration of an ATC.
3 PG&E, 776 F.Supp. 2d at 1013; see BAAQMD Reg. 2-1-407 (ATC permit “that has not
4 expired after two years, due to substantial use or renewal, shall expire after four years,”
5 referred to as “the Four-Year Rule”).

6 **FACTUAL AND PROCEDURAL BACKGROUND**

7 On July 24, 2001, pursuant to its delegation agreement with the EPA, BAAQMD
8 issued a PSD permit (“2001 PSD Permit”) combined with an ATC permit under state and
9 local law (“2001 ATC Permit”), authorizing Mirant to construct a natural gas-fired power
10 plant – the Contra Costa Power Plant Unit 8 – in Antioch, California. The location of the
11 proposed power plant was less than one mile from the Antioch Dunes NWR. See PG&E,
12 776 F.Supp. 2d at 1011-14.

13 Because the PSD permit was a federal permit issued by BAAQMD on the EPA's
14 behalf, the EPA first conducted and concluded an informal ESA § 7 consultation with
15 FWS. See id. at 1023 & n.7 (citing documents submitted by Wild Equity in PG&E case
16 showing that prior to issuance of PSD permit, the EPA consulted with FWS about various
17 listed species, including the three Listed Species, and whether any listed species were
18 likely to be adversely affected by the construction project).

19 In a June 29, 2001 letter, the FWS concurred with the EPA that the three Listed
20 Species in the Antioch Dunes NWR were not likely to be adversely affected by the
21 issuance of the PSD permit. Based on the ATC provisions in state and local law, the
22 permit document stated that it expired in two years "unless substantial use of authority
23 has begun." Id. at 1013. Mirant began construction in late 2001 but permanently ceased
24 construction in February 2002. Id.

25 In December 2002, the EPA promulgated regulations implementing fundamental
26 changes to the federal PSD program. Id. In response, BAAQMD informed the EPA that
27 it could not incorporate those changes into its own regulations. Id. In March 2003, the,
28 EPA revoked BAAQMD's previously delegated authority to implement the PSD program.

1 At that point, the EPA was the only entity with authority to issue or to administer PSD
2 permits. Id. at 1013-14.

3 In August 2003, the 2001 PSD Permit expired, some 18 months after construction
4 had ceased. Notwithstanding both the EPA's revocation of BAAQMD's delegated federal
5 authority and the expiration of the PSD permit under federal regulations, BAAQMD wrote
6 to Mirant in October 2003, reciting BAAQMD's Regulation 2-1-407 (the Four Year Rule)
7 and asking for documentation that Mirant had satisfied the criteria for "substantial use"
8 referenced in the original 2001 ATC Permit document. Id. at 1014. BAAQMD apparently
9 accepted Mirant's demonstration of "substantial use" so that, under state and local
10 regulations, the 2001 ATC Permit could remain effective until 2005. Id. The distinct
11 federal PSD permit expiration provision was not considered at that time.

12 On June 21, 2004, the EPA partially redelegated PSD authority to BAAQMD. The
13 redelegation agreement provided authority to issue new permits and to make
14 "administrative" or "minor" modifications to existing PSD permits specifically identified in
15 the redelegation agreement (which included Mirant's 2001 PSD permit). Id. In July 2005,
16 BAAQMD purported to extend the 2001 construction permit again, without distinguishing
17 between the PSD and the ATD components. Id.

18 In 2006, PG&E acquired the project from Mirant, and on January 18, 2007, the
19 California Energy Commission ("CEC") under its power plant siting authority, authorized
20 PG&E to restart construction of the newly renamed Gateway Generating Station
21 ("Gateway"). Id. In December 2007, PG&E notified BAAQMD that it required an
22 amended ATC permit because its construction plans had changed. Throughout this
23 period, PG&E continued constructing the Gateway power plant, finishing the project in
24 November 2008. Id. at 1014-15.

25 In 2009, the EPA and PG&E entered into negotiations regarding alleged violations
26 of the Clean Air Act's PSD requirements concerning the construction and operation of
27 Gateway without a valid PSD permit, as the EPA took the position that the federal 2001
28 PSD Permit had expired in 2003. Id. at 1011, 1014. The negotiations resulted in a

1 proposed consent decree, in which PG&E agreed to a reduction in emissions of two
2 pollutants emitted by the power plant – nitrogen oxide or NO_x, and carbon monoxide or
3 CO – to levels that represented emissions achieved through application of BACT. Id. at
4 1015.

5 On September 24, 2009, the EPA filed the complaint in the PG&E case, a civil
6 enforcement action pursuant to §§ 113(b)(2) and 167 of the Clean Air Act, alleging that
7 PG&E had violated the Clean Air Act because its PSD permit authorizing construction
8 had expired before PG&E completed construction and began operating the plant. See id.
9 at 1010. Also on September 24, 2009, the EPA lodged the proposed consent decree
10 with the court.

11 After filing the lawsuit, the EPA reviewed certain emissions data from Gateway to
12 address concerns expressed by Communities for a Better Environment ("CBE"), which
13 had intervened in the case in March 2010. Id. at 1015. Based on that review and with
14 the participation of CBE, the consent decree was renegotiated (though still opposed by
15 CBE). Id. at 1015-16. The second amended proposed consent decree imposed
16 emissions limitations and requirements more stringent than those required under the
17 2001 PSD Permit, but did not require that PG&E undergo a new PSD permitting process.
18 Id. at 1015-16, 1027.

19 In December 2010, some 15 months after public notice of the settlement, two
20 months after the parties had filed briefs in connection with the motion for entry of the
21 second amended proposed consent decree, and only three weeks before the hearing on
22 the motion, Wild Equity moved to intervene in the PG&E case. Id. at 1019. Wild Equity
23 sought to file a complaint alleging that the EPA's settlement and the proposed consent
24 decree constituted an "agency action" under the ESA, and that the EPA had violated ESA
25 § 7(a)(2) by failing to consult with the FWS before agreeing to the terms of the negotiated
26 settlement and consent decree. See id. at 1016.

27 The court denied the motion to intervene, holding that a citizen may intervene as
28 of right in a Clean Air Act enforcement action by the EPA only for purposes of enforcing

1 compliance with the Act, but that in the case before it, Wild Equity sought to intervene to
2 assert ESA claims against the EPA, and there was thus no statutory right to intervene
3 under the Clean Air Act. Id. at 1016-18. The court also found that Wild Equity’s motion
4 did not satisfy the requirements for intervention as of right under Federal Rule of Civil
5 Procedure 24(a) – in particular that Wild Equity lacked a significant protectable interest in
6 the asserted ESA § 7(a)(2) claim, as the proposed amended consent decree was not an
7 “agency action.” Id. at 1018-24.

8 After evaluating CBE’s objections to the proposed consent decree, the court
9 issued an order on March 3, 2011, denying Wild Equity’s motion to intervene and
10 entering the second amended consent decree (“Consent Decree”). Id. at 1029. The
11 court rejected CBE’s argument that the settlement was unfair because it did not require
12 that PG&E undergo a new PSD permitting process, noting that “there is nothing that
13 mandates such a process,” and “find[ing] the United States’ reasons for structuring the
14 settlement in this fashion to be reasonable.” See id. at 1026-30. CBE did not appeal the
15 order approving entry of the Consent Decree, and Wild Equity did not appeal the denial of
16 its motion for leave to intervene.

17 While the Consent Decree did not require a new or revised PSD permit for
18 Gateway, it did include specific requirements for permanently incorporating the Consent
19 Decree’s new emission limitations and related requirements into appropriate state and
20 local permits. Those emission limitations and requirements were more stringent than the
21 terms and conditions imposed in the previously issued PSD permit.

22 Specifically, ¶ 6 of the Consent Decree required PG&E to petition the CEC to
23 amend the Conditions of Certification for the Gateway facility to incorporate the new
24 emission limitations and requirements imposed by the Consent Decree into the state
25 CEC authorization process. Separately, ¶ 7 of the Consent Decree required PG&E to
26 apply to BAAQMD to amend its Permit to Operate, issued under state and local law, to
27 include the new emission limitations and requirements.

28 PG&E subsequently submitted an application to BAAQMD, to amend the PTO to

1 include the new emissions limitations and requirements as provided in the Consent
2 Decree. On September 13, 2011, BAAQMD issued Gateway a PTO, including the new
3 terms (“2011 Permit”). See Cplt ¶ 39. In so doing, BAAQMD acted pursuant to its own
4 authority under state and local law and was not relying on delegated federal authority to
5 apply 40 C.F.R. § 52.21.

6 On June 3, 2015, more than four years after the court denied Wild Equity's motion
7 for leave to intervene in the PG&E case, and approved entry of the Consent Decree, Wild
8 Equity filed the complaint in the present action, asserting violations of the ESA. Wild
9 Equity alleges that the deposition of nitrogen pollution (NOx) into the Antioch Dunes
10 NWR, caused by fossil fuel combustion in the Gateway power plant, is adversely
11 impacting the Listed Species. Cplt ¶¶ 48-54.

12 Wild Equity contends that the FWS recognizes the dangerous risk that nitrogen
13 deposition can have on endangered species habitat, and that in a letter dated June 29,
14 2011, the FWS conveyed concerns to BAAQMD regarding adverse effects on the three
15 Listed Species caused by nitrogen deposition from the continued operation of Gateway,
16 “based on changes to the [Gateway] project resulting from entering into the recent
17 settlement agreement with PG&E.” FWS recommended that the EPA reinstate ESA § 7
18 consultation. Cplt ¶¶ 55-56. However, Wild Equity asserts, the EPA has not responded
19 to this letter. Cplt ¶ 57.

20 The complaint alleges a single cause of action against the EPA, under ESA
21 § 7(a)(2), 16 U.S.C. § 1536(a)(2), for “failure to . . . reinstate consultation on the operation
22 of the Gateway Generating Station.” See Cplt ¶¶ 58-63.² Wild Equity asserts that the
23 EPA retains a non-delegated responsibility to reinstate consultation under § 7(a)(2), with
24 regard to the issuance of “the original PSD permit to Gateway” – i.e., the 2001 PSD
25 Permit – and with regard to new PSD requirements incorporated into the 2011 Permit to
26

27 _____
28 ² The complaint also asserts “failure to consult,” but Wild Equity has clarified that it is not
pursuing that claim, nor any claim under § 7 that the EPA had a responsibility to “initiate
consultation” with regard to the Consent Decree.

1 Operate and extended through 2015. Cplt ¶¶ 60-61.

2 Wild Equity alleges that the EPA is violating ESA § 7(a)(2) by failing to consult with
3 the FWS and by failing to ensure through consultation that its actions regarding the
4 Gateway facility do not jeopardize the continued existence of endangered and threatened
5 species or destroy or adversely modify designated critical habitat. Cplt ¶ 62.³ Wild
6 Equity seeks declaratory and injunctive relief, an order setting aside the EPA's operating
7 permit in order to halt harmful emissions of nitrogen from Gateway.

8 **DISCUSSION**

9 A. Legal Standards

10 1. Dismissal for lack of subject matter jurisdiction

11 Federal courts are courts of limited jurisdiction. Unlike state courts, they have no
12 “inherent” or “general” subject matter jurisdiction. They can adjudicate only those cases
13 which the Constitution and Congress authorize them to adjudicate – those involving
14 diversity of citizenship or a federal question, or those to which the United States is a
15 party. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 380-81 (1994). The
16 burden of establishing jurisdiction rests on the party asserting jurisdiction. Id. at 377.
17 Lack of subject matter jurisdiction is never waived, and may be raised by either party or
18 the court at any time. Attorneys Tr. v. Videotape Computer Prods., Inc., 93 F.3d 593,
19 594-95 (9th Cir. 1996).

20 On a Rule 12(b)(1) motion to dismiss, the applicable standard turns on the nature
21 of the jurisdictional challenge. A defendant may either challenge jurisdiction on the face
22 of the complaint or provide extrinsic evidence demonstrating lack of jurisdiction on the
23 facts of the case. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). In evaluating a
24 facial attack on jurisdiction, the court must accept the factual allegations in plaintiff's
25 complaint as true. See Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001).

26

27

28 ³ The complaint appears to allege a violation of ESA § 7(d), but Wild Equity has disavowed any such claim.

1 2. Dismissal for failure to state a claim

2 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the
3 legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d
4 1191, 1199-1200 (9th Cir. 2003). While review is generally limited to the contents of the
5 complaint, the court can also consider a document on which the complaint relies if the
6 document is central to the claims asserted in the complaint, and no party questions the
7 authenticity of the document. See Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007).

8 To survive a motion to dismiss for failure to state a claim, a complaint generally
9 must satisfy only the minimal notice pleading requirements of Federal Rule of Civil
10 Procedure 8(a)(2). A complaint may be dismissed for failure to state a claim if the plaintiff
11 fails to state a cognizable legal theory, or has not alleged sufficient facts to support a
12 cognizable legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013). While
13 the court is to accept as true all the factual allegations in the complaint, legally conclusory
14 statements, not supported by actual factual allegations, need not be accepted. Ashcroft
15 v. Iqbal, 556 U.S. 662, 678-79 (2009).

16 A motion to dismiss should be granted if the complaint does not proffer enough
17 facts to state a claim for relief that is plausible on its face. See Bell Atl. Corp. v.
18 Twombly, 550 U.S. 544, 555, 558-59 (2007). A claim has facial plausibility when the
19 plaintiff pleads factual content that allows the court to draw the reasonable inference that
20 the defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678. Where
21 dismissal is warranted, it is generally without prejudice, unless it is clear the complaint
22 cannot be saved by any amendment. Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir.
23 2005).

24 B. Defendant's Motion

25 The EPA seeks an order dismissing the complaint for lack of subject matter
26 jurisdiction and failure to state a claim. As Wild Equity has clarified that there is no viable
27 claim for “failure to consult” or “failure to initiate consultation” (with regard to the 2011
28 Consent Decree, or otherwise), and no viable claim for violation of § 7(d), what remains

1 are two claims under § 7(a)(2) – that the EPA failed to reinitiate consultation regarding
2 the issuance of the original 2001 PSD Permit to Gateway, and that the EPA failed to
3 reinitiate consultation on the new PSD requirements incorporated into the 2011 Permit to
4 Operate extended through 2015.

5 An agency is required to reinitiate consultation on a proposed action “where
6 discretionary Federal involvement or control over the action has been retained or is
7 authorized by law,” and

8 (a) . . . the amount or extent of taking specified in the incidental take
9 statement is exceeded;

10 (b) . . . new information reveals effects of the action that may affect listed
11 species or critical habitat in a manner or to an extent not previously
12 considered;

13 (c) . . . the identified action is subsequently modified in a manner that causes
14 an effect to the listed species or critical habitat that was not considered in the
15 biological opinion; or

16 (d) . . . a new species is listed or critical habitat designated that may be
17 affected by the identified action.

18 50 C.F.R. § 402.16.⁴

19 Here, Wild Equity’s basis for seeking reinitiation of consultation is that “new
20 information reveals effects of the action that may affect listed species or critical habitat in
21 a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(b). This “new
22 information” is a reference to the June 29, 2011 letter from FWS to the EPA. See Cplt
23 ¶¶ 55-57; see also Doc. 27, Plaintiff’s Response to Motion to Dismiss (“Pltf’s Opp.”) at 2-4
24 (citing statement in FWS letter that “[n]ew scientific information relating to the adverse
25 effects of nitrogen deposition on listed species and natural ecosystems has become

26 ⁴ Although § 402.16 is entitled “Reinitiation of Formal Consultation,” the reinitiation
27 requirement applies to both formal and informal consultation. Conservation Cong. v.
28 Finley, 774 F.3d 611, 618 (9th Cir. 2014) (citing Forest Guardians v. Johanns, 450 F.3d
455, 458 (9th Cir. 2006)). However, even assuming the other provisions are met, 50
C.F.R. § 402.16 does not require agencies to stop and reinitiate consultation for “every
modification of or uncertainty in a complex and lengthy project.” Id. (citing Sierra Club v.
Marsh, 816 F.2d 1376, 1388 (9th Cir. 1987)).

1 available since 2001 when the original permits were issued and consultation with the
2 Service was concluded”).

3 The EPA argues that both parts of Wild Equity’s reinitiation claim must be
4 dismissed. First, the EPA argues that Wild Equity cannot maintain a claim that the EPA
5 failed to reinitiate consultation regarding the issuance of the original 2001 PSD Permit to
6 Gateway, because the 2001 Permit expired in August 2003 and cannot be the “agency
7 action” over which the EPA retains discretionary involvement or control or upon which
8 any reinitiation duty can be derived, and Wild Equity has identified no other “agency
9 action” that could provide a basis for the claim.

10 The EPA contends that the purpose of reinitiation of consultation is to ensure that
11 the underlying agency action addressed in the initial consultation remains compliant with
12 ESA Section 7, notwithstanding new information or changed circumstances such as a
13 new species listing or critical habitat designation. See 50 C.F.R. § 402.16. The EPA
14 asserts that it makes no sense to require a consultation by the EPA with the Service on
15 the question of whether old actions, which no longer govern anything, have any effect on
16 endangered species or their habitat. The EPA also contends that any claim of failure-to-
17 initiate is time-barred, under the applicable statute of limitations, 28 U.S.C. § 2401(a),
18 and that it thus does not retain discretion to modify expired federal PSD permits for the
19 benefit of listed species.

20 Second, the EPA similarly asserts that Wild Equity cannot maintain a claim that
21 the EPA failed to reinitiate consultation on the new PSD requirements incorporated into
22 the 2011 Permit to Operate, because Wild Equity has failed to identify an “agency action”
23 over which there is discretionary Federal involvement or control. In particular, the EPA
24 argues, because the 2011 PTO was issued by BAAQMD, not by the EPA, there is no
25 federal action upon which Wild Equity can seek reinitiation of consultation. The EPA also
26 contends that because the incorporation of emission limitations and requirements was a
27 direct result of the implementation of the Consent Decree, this part of the claim amounts
28 to an attempt to evade the res judicata effect of the ruling in the PG&E decision that

1 consultation was not required on the Consent Decree.

2 In opposition, Wild Equity argues that the relevant “agency action” here is not the
3 issuance of a particular permit, but rather the emissions of the Gateway power plant,
4 which Wild Equity claims are “authorized” by the EPA through the EPA’s “permitting
5 activities as a whole.” Wild Equity cites the examples in the definition of "action" in 50
6 C.F.R. § 402.02(c)-(d), which include "the granting of . . . permits" and "actions directly or
7 indirectly causing modifications to the land, water or air."

8 In addition, Wild Equity asserts that even if the 2001 Permit has lapsed, the terms
9 of the Consent Decree “resurrected” it. Wild Equity contends that since the entry of the
10 Consent Decree, both the EPA and its delegated agent in the Bay Area, BAAQMD, have
11 issued permits to Gateway that demonstrate that the facility’s PSD permit is still in effect.

12 Wild Equity claims that BAAQMD issues a permit to Gateway every year called the
13 “Authority to Construct/Permit to Operate” (“ATC/PTO”), with the most recent such permit
14 (issued on October 16, 2014) allowing Gateway to operate during 2015. Wild Equity
15 asserts that the 2015 ATC/PTO states that portions of the permit are derived from the
16 EPA’s PSD permit, and contends that those portions specifically authorize nitrogen
17 emissions, and that the ATC/PTO contains a separate provision that specifically limits the
18 decree-imposed pollution control provisions that apply to Gateway beyond what is
19 permitted through the PSD permit. Wild Equity argues that these requirements emanate
20 from Gateway’s PSD permitting requirements rather than organically from the Consent
21 Decree itself. Wild Equity claims that if PSD permitting requirements either no longer
22 exist, or were supplanted by the organic requirements of the Consent Decree, the
23 ATC/PTO would not include this express distinction.

24 Wild Equity also contends that the EPA retains “discretionary involvement or
25 control" over its permitting authority for the Gateway plant, so that it can act to adjust
26 emissions at the plant or impose mitigation if the consultation shows that changes must
27 be made to protect the three Listed Species. Wild Equity cites the PG&E decision, where
28 the court noted that the EPA indicated at the hearing on Wild Equity’s motion to intervene

1 that it "retains the authority to seek to modify the [c]onsent [d]ecree after it [was] issued."
2 See PG&E, 776 F.Supp. 2d at 1024 n.9. Thus, Wild Equity argues, to the extent the
3 Consent Decree would need to be amended to account for any emissions changes, the
4 EPA has "conceded" it has that ability.

5 Wild Equity argues that the applicable law shows that the EPA does retain such
6 discretion. In support, Wild Equity cites Turtle Is. Restoration Network v. Nat'l Marine
7 Fisheries Serv., 340 F.3d 969, 977 (9th Cir. 2003); Natural Res. Def. Council v. Jewell,
8 749 F.3d 776, 783-85 (9th Cir. en banc), cert den. sub nom Glenn-Colusa Irrigation Dist.
9 v. Natural Res. Def. Council, 135 S.Ct. 676 (2014); Cottonwood Env'tl. Law Ctr. v. U.S.
10 Forest Serv., 789 F.3d 1075, 1086 (9th Cir. 2015).

11 The court finds that the motion must be GRANTED as to both parts of Wild
12 Equity's § 7(a)(2) claim. The claim that the EPA failed to reinitiate consultation regarding
13 the issuance of the original PSD permit to Gateway must be dismissed, because there is
14 no authorized agency action upon which the EPA could reinitiate consultation.

15 A claim that an agency has violated § 7(a)(2) necessarily entails an allegation that
16 the agency undertook an "agency action," and that such action was improper because it
17 was taken without the agency's having first engaged in consultation. See Ctr. for
18 Biological Diversity v. Chertoff, 2009 WL 839042 at *5 n.2 (N.D. Cal., Mar. 30, 2009).

19 While the term "action" in 50 C.F.R. Part 402 is broadly defined to include "all activities or
20 programs of any kind authorized, funded, or carried out, in whole or in part, by Federal
21 agencies" 50 C.F.R. § 402.02, nothing in the ESA or the regulations suggests that
22 power plant emissions can be considered "activities or programs . . . authorized or carried
23 out" by the EPA or any other federal agency. The subsequent effect of a prior agency
24 action is not itself an "agency action" that triggers ESA § 7 consultation. See Karuk
25 Tribe, 681 F.3d at 1021; Cal. Sportfishing Prot. Alliance v. FERC, 472 F.3d 593, 597-98
26 (9th Cir. 2006).

27 Although Wild Equity insists that the agency "action" as to which it seeks
28 reinitiation of consultation is not a "permit," the court finds that the only possible activity or

1 program that could be considered an “action” of the EPA is the issuance of the 2001
2 Permit. However, because the 2001 Permit expired in 2003, no “discretionary Federal
3 involvement or control over the action has been retained or is authorized by law” as
4 required under 50 C.F.R. § 402.16.⁵ The fact that the EPA stated at a hearing in the
5 PG&E case that it “retains the authority to seek to modify the [C]onsent [D]ecree after it is
6 entered” is irrelevant to the question whether it retains discretionary involvement or
7 control over an “action” as to which Wild Equity can legitimately seek reinitiation of
8 consultation, not least because the Consent Decree is not an “agency action” under the
9 ESA. PG&E, 776 F.Supp. 2d at 1023.

10 Further, the question of appropriate additional emission limits, and the mechanism
11 for imposing such limits, was addressed and resolved through the entry of the Consent
12 Decree, which in turn resolved the Clean Air Act enforcement action filed by the EPA.
13 Thus, any attempt to compel the EPA to consult on the NOx emission rates that were set
14 in the Consent Decree can be viewed only as an attempt to relitigate an issue that was
15 resolved by the PG&E court, which found the Consent Decree and its limits on emissions
16 to be fair, adequate, and reasonable, and further found nothing that mandated a new
17 permitting process. See PG&E, 776 F.Supp. 2d at 1024-27.

18 Neither the entry of the Consent Decree nor the denial of Wild Equity’s motion to
19 intervene was ever challenged on appeal. Wild Equity has stated no basis for vacating or
20 amending the Consent Decree to impose more stringent restrictions on the allowed
21 emissions, and no basis for a new action case that in essence seeks to attack the
22

23 ⁵ In addition, even assuming Wild Equity could identify a federal PSD action that
24 might be subject to review, any assertion that the EPA violated the ESA in conjunction
25 with the issuance of a federal PSD permit would necessarily challenge an alleged EPA
26 final action taken pursuant to the Clean Air Act. Such actions are subject to judicial
27 review only in the applicable court of appeals, not the district court. See Harrison, 446
28 U.S. at 586; Sierra Pac. Power Co. v. EPA, 647 F.2d 60, 62 n.2 (9th Cir. 1981)
(recognizing that Clean Air Act § 307(b)(1) encompasses “any final EPA action”). Thus,
the court would lack jurisdiction to adjudicate any such claim. See City of Tacoma v.
Taxpayers of Tacoma, 357 U.S. 320, 336 (1958); Carpenter v. Dep’t of Transp., 13 F.3d
313, 316 (9th Cir. 1994).

1 provisions of the Consent Decree in the guise of demanding that the EPA "reinitiate"
2 consultation as to the very same pollutants that were at issue in the prior case.

3 The incorporation of PSD permit conditions into state and local agency permits
4 does not mean that the expired 2001 PSD permit is still in effect. To the extent that Wild
5 Equity is now arguing that certain elements of BAAQMD's PTO are not, in fact, "new PSD
6 requirements," but rather are the same requirements from the 2001 permit – that the
7 admittedly expired PSD permit somehow retains sufficient vitality upon which to premise
8 an ESA reinitiation claim – a later permitting action taken by a separate local authority
9 under state and local law cannot legally "resurrect" an expired federal PSD permit.

10 The 2014 PTO, the most recent PTO issued by BAAQMD, may (as Wild Equity
11 claims) cite certain limits that were first established in the 2001 combined ATC/PSD
12 permit. However, this does not mean that the 2001 expired permit still governs
13 Gateway's operations or that the EPA has discretion to reopen the expired PSD permit to
14 modify it for the benefit of the species. The requirements of BAAQMD's 2014 PTO are
15 factually and procedurally distinct from those of the expired 2001 permit. More
16 importantly, for purposes of ESA § 7, the key question is whether there is a federal
17 agency "action," not whether a later non-federal permit incorporates substantially the
18 same requirements included in a prior federal action.

19 With the expiration of the 2001 PSD permit, the combined ATC/PSD permit for
20 Gateway no longer served as a PSD permit. That is, the PSD element of the prior
21 combined permit expired; and, as the EPA argues, following the entry of the Consent
22 Decree, the PSD permit for Gateway has not been renewed, reissued, or otherwise
23 revived. Even though the PSD portion of the prior permit expired, the state-law ATC
24 component of the combined permit remained in effect, and its provisions were later
25 carried over in the BAAQMD's PTOs for Gateway. The BAAQMD's actions in continuing
26 to implement the state-law ATC and the subsequent issuance of the PTOs for Gateway
27 under state and local law do not serve as PSD permitting actions. Therefore, the
28 BAAQMD's 2014 PTO does not show a continuing effect of, or EPA's discretionary

1 control over, the expired 2001 PSD permit.

2 Nor is “discretion” itself an "action" that can resurrect the 2001 permit. Wild Equity
3 several times suggests in its opposition that the mere existence of the EPA’s “permitting
4 authority,” “permitting activities as a whole,” or the “PSD program” generally constitutes
5 the “action” that gives rise to an EPA obligation to reinstate consultation, and also
6 suggests that the existence of "discretion" to reopen or modify a PSD permit, generally,
7 shows that EPA retains discretionary control over the 2001 PSD permit here.

8 The duty to engage in ESA consultation is triggered only by an affirmative agency
9 act or authorization; the mere existence of unexercised authority to take additional action
10 is insufficient. See Cal. Sportfishing, 472 F.3d at 599; Karuk Tribe, 681 F.3d at 1021).
11 “[E]ven where an agency has discretion to change the terms of an existing license, the
12 agency has no duty to consult in light of such retention of discretion, when it has not
13 exercised such discretion.” Ellis v. Bradbury, 2014 WL 1569271, at *12 (N.D. Cal. Apr.
14 18, 2014) (citing Cal. Sportfishing, 472 F.3d at 594-95). Put another way, the
15 consultation duty is triggered only when the agency affirmatively exercises that discretion
16 to act. See Ctr. for Biological Diversity v. Env’tl. Prot. Agency, 65 F. Supp. 3d 742, 758
17 (N.D. Cal. 1014).

18 The cases cited by Wild Equity are inapposite. In Turtle Is., 340 F.3d at 977, the
19 court held that discretion remains where permitting activity has an "ongoing and lasting
20 effect." However, the agency action was the “continued issuance of fishing permits,” and
21 there was no question that the permits at issue were currently governing the fishing
22 vessels’ activities and that the agency was continuing to issue permits.

23 In Jewell, 749 F.3d at 783-85, the court held that even though the government
24 and the parties had entered binding settlements controlling the amount of water
25 government must provide to the parties, government retained at least "some discretion"
26 to act to protect species as result of ESA consultation. However, the relevant action was
27 the Bureau of Reclamation’s renewal of long-term water delivery contracts, and there was
28 no question that the contracts were in effect at the time of the challenge and were

1 governing water delivery operations.

2 In Cottonwood, 789 F.3d at 1086, the court observed that nothing in the ESA or its
3 implementing regulations limits reinitiation to situations where there is "ongoing agency
4 action." However, the agency action was the amendment of current forest plans to
5 incorporate management standards for Canada lynx which continue to be applied at the
6 site-specific project level. The question, as in Turtle Is. and Jewell, was whether the
7 agency retained sufficient discretionary involvement or control over existing agency
8 action. None of these cases involved a situation (as here) where the only relevant
9 agency action targeted by the plaintiff previously expired and the agency took no further
10 affirmative action.

11 The claim that the EPA failed to reinitiate consultation regarding the issuance of
12 the 2011 Permit to Operate also fails, because the 2011 PTO was issued by BAAQMD,
13 not EPA, see Cplt ¶ 39, and it was issued under state and local law. The § 7(a)(2)
14 consultation requirement applies only to actions authorized, funded, or carried out by
15 federal agencies. See 16 U.S.C. § 1536(a)(2); see also Nat'l Ass'n of Home Builders v.
16 Defenders of Wildlife, 551 U.S. 644, 653 (2007) (the ESA's § 7(a)(2) consultation
17 requirement "does not apply to permitting decisions by state authorities").

18 Wild Equity appears to be attempting to argue around this barrier by claiming that
19 BAAQMD incorporated "certain PSD requirements" into the 2011 Permit to Operate.
20 However, BAAQMD's PTO – which is based solely on state and local law – is not imbued
21 with the character of a federal CAA PSD permit by virtue of its inclusion of requirements
22 that might otherwise have been imposed through a PSD permitting process. As
23 explained above, while PSD permitting is governed by the federal regulatory program in
24 the Bay Area, the BAAQMD implements a separate state implementation plan-approved
25 Clean Air Act program under which it issues ATC permits.

26 That is, the PSD and ATC programs are distinct, with the latter being implemented
27 under state and local law, and the former being implemented under federal law. The
28 ESA § 7 consultation requirement "does not apply to permitting decisions by state

1 authorities.” Home Builders, 551 U.S. at 653. While the BAAQMD may have a practice
2 of issuing combined permits, that cannot federalize the state and local components of the
3 permit for purposes of ESA § 7's focus on federal agency actions.

4 The Consent Decree imposed new emission limitations and requirements for
5 certain pollutants, which were more stringent than the terms and conditions included in
6 the previously issued 2001 PSD/ATC permit. See PG&E, 776 F. Supp. 2d at 1015-16.
7 However, it is equally clear that the Consent Decree did not require or otherwise result in
8 issuance of a new or revised federal PSD permit for the Gateway facility. See id. at
9 1027. Instead, PG&E was required to seek amendment of its applicable state and local
10 permits, as well as to include the new emission limitations and requirements as part of its
11 future permit application to BAAQMD. The Consent Decree did not require any additional
12 federal permitting action, under PSD or otherwise, and no such action has occurred, and
13 Wild Equity cannot manufacture a federal action for purposes of an ESA § 7 claim where
14 no such action exists.

15 To the extent that Wild Equity is arguing that the EPA was required to revise the
16 PSD components of the 2001 PSD/ATC permit or issue a new PSD permit instead of
17 imposing new emission limitations and requirements through the Consent Decree, the
18 PG&E court already considered and rejected such an argument from CBE. See PG&E,
19 776 F. Supp. 2d at 1027. Thus, despite Wild Equity's attempt to characterize the
20 emission limitations and requirements resulting from the Consent Decree as “PSD
21 requirements,” it is clear from the PG&E decision and the Consent Decree that no new
22 PSD permitting process occurred and there is no federal agency action related to the
23 2011 Permit to Operate that could trigger ESA § 7(a)(2) consultation.

24 Finally, Wild Equity asserts, the applicable regulations also state that the EPA has
25 discretion to amend PSD permitting as necessary. In support, Wild Equity cites 40
26 C.F.R. § 71.7(f)(1)(iv). This provision does not help Wild Equity's position, as it relates to
27 reopening and revising of permits prior to their expiration.

28 Wild Equity has not identified a final "agency action" that can be challenged, but

1 even if it had, a claim challenging a final EPA action can only be pursued in the form of a
2 petition in the court of appeals. See Cal. Dump Truck Owners Ass'n, 784 F.3d 500, 506-
3 07 & n.8 (9th Cir. 2015) (citing 42 U.S.C. § 7607(b)(1)). That would include any
4 challenge to issuance of a PSD permit.

5 **CONCLUSION**

6 In accordance with the foregoing, the EPA's motion is GRANTED. Wild Equity
7 requests leave to amend the complaint "to conform it with [the] response to EPA's motion
8 to dismiss." Wild Equity's Opp. at 5 n.3. However, Wild Equity offers no new proposed
9 facts, and the court finds that amendment would be futile. Accordingly, the dismissal is
10 WITH PREJUDICE.

11

12 **IT IS SO ORDERED.**

13 Dated: November 20, 2015



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15 PHYLLIS J. HAMILTON
16 United States District Judge
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