

**BEFORE THE ENVIRONMENTAL APPEALS BOARD**  
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**WASHINGTON, D.C.**

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ENVIR. APPEALS BOARD

IN THE MATTER OF: )  
 )  
INDECK-ELWOOD, LLC ) PSD APPEAL NO. 03-04  
PERMIT NUMBER 197035AAJ )

**MOTION FOR VOLUNTARY  
PARTIAL REMAND**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by and through its attorneys, and moves the ENVIRONMENTAL APPEALS BOARD (“EAB”) grant a voluntary partial remand in this matter. Specifically, the Illinois EPA seeks a voluntary remand of a particular issue relating to the federal Endangered Species Act (“ESA”), 16 U.S.C. §§1531-1544, as it pertains to the Construction Permit/Prevention of Significant Deterioration (“PSD”) Approval previously issued to Indeck-Elwood, LLC, (“Indeck”) on October 10, 2003.

1. One of the issues presented by Petitioners in this appeal is that the United States Environmental Protection Agency’s (“USEPA”) Region 5 failed to undertake consultation with the Fish and Wildlife Service (“FWS”) in accordance with Section 7 of the ESA, 16 U.S.C. § 1536.

2. On February 3, 2003, the EAB requested that the Office of General Counsel (“OGC”) and/or Region 5 address certain matters relating to the merits of the ESA consultation issue raised by Petitioners, SIERRA CLUB et al., in their Amended

Petition for Appeal. The EAB also instructed the Illinois EPA that the issue should be addressed in its formal response. *See*, February 3, 2003 Order of the EAB.<sup>1</sup>

3. In its Response to the Amended Petition filed with the EAB on March 30, 2004, the Illinois EPA respectfully deferred to its federal counterparts at OGC and/or Region 5 for any interpretation of applicable law regarding federal agency obligations under the ESA.

4. Since the date of the Illinois EPA's filing of the Response to the Amended Petition, the Illinois EPA has requested that Region 5 voluntarily recommence the consultation process under the ESA as soon as practicable. The Illinois EPA has subsequently received agreement from Region 5 in this regard.

5. A voluntary remand of the consultation issue is arguably necessary to facilitate the recommencement of consultation by Region 5 authorities. The Part 124 regulations appear to provide a relevant source of authority in this context.

6. Section 124.19(d) of Title 40 of the Code of Federal Regulations provides that a Regional Administrator, any time prior to the EAB's rendering of a decision to review or deny review of a permit decision, may withdraw the permit and prepare a new draft permit "addressing the portions so withdrawn." 40 C.F.R. §124.19(d). The plain language of the Part 124 provision clearly recognizes that an issue or particular component of an appeal may be withdrawn and thus separated from the rest of the appeal, thereby resulting in the relevant issue being returned to the permitting authority for

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<sup>1</sup> The filing deadlines for both USEPA and the Illinois EPA relative to the ESA consultation issue were subsequently extended to May 6, 2004. *See*, March 19, 2004 Order of the EAB.

further review.<sup>2</sup> *Cf., In re: Washington Aqueduct Water Treatment Plant*, NPDES Appeal No. 03-07 (EAB, December 15, 2003)(USEPA regional offices may withdraw a permit in part or in its entirety).

7. The ESA consultation issue is wholly distinct and separate from the other issues raised by Petitioners in this appeal.<sup>3</sup> Although certain components of the permit may or may not change as a result of the recommenced consultation process, such circumstances should not affect the EAB's review of Petitioners' other issues and, in fact, are plainly contemplated by Section 124.19(d). For this reason, the Illinois EPA only seeks a voluntary partial remand relative to the ESA consultation issue.

8. In the interests of economy, the Illinois EPA also believes that the EAB's review of the remaining issues raised by Petitioners should proceed without delay. In the absence of certainty about the time required for consultation, a stay of those issues could further prolong resolution of the appeal. *Cf., In re: Phelps Dodge Corporation, Verde Valley Ranch Development*, NPDES Appeal No. 01-07, slip op. at pages 86-90)(EAB

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<sup>2</sup> Few EAB rulings appear to address the scope of the aforementioned provision and it is somewhat unclear whether the Illinois EPA and/or USEPA regional authorities are obliged to seek a voluntary remand of the relevant issue or, alternatively, merely file a notice of withdrawal of the same. *See, In re: Washington Aqueduct Water Treatment Plant*, NPDES Appeal No. 03-07 (EAB, December 15, 2003)(EAB observed that a joint motion for remand was unnecessary and that EPA regional offices possess an absolute right to withdraw the permit prior to the EAB's adjudication); *In re: BHP Copper, Inc., Pinto Valley Operations*, NPDES Appeal No. 02-05 (EAB, August 21, 2002); *cf., NE Hub Partners, L.P.*, U.I.C. Appeal Nos. 97-1 & 97-2, (EAB, May 30 1, 1998)(EAB granted joint motion for remand for issues raised on appeal).

<sup>3</sup> Petitioners may attempt to argue that some of their issues, including the validity of the soils and vegetation analysis, are so intertwined with the ESA consultation issue as to make it impracticable for the EAB to rule on them prior to the completion of consultation. Nothing in the Petitioners' Amended Petition for Review or other pleadings support such an argument. Judged either by the manner in which those issues were raised in the Amended Petition or by their own merits, the arguments are all mutually exclusive and are not dependent upon one another for their explanation or for the analytical framework needed to address them. As to the soils and vegetation analysis, the issue is governed solely by the PSD program's requirements of Section 52.21(o).

refused Region IX's request to delay decision on merits of other issues raised on appeal in order to facilitate completion of ESA consultation process; EAB ultimately denied review on all grounds raised in the petition but remanded permit for further proceedings under ESA).

WHEREFORE, the Illinois EPA respectfully requests that the Board grant this Motion for Voluntary Partial Remand to allow for the recommencement of consultation by Region 5 or, alternatively, order such relief as may be deemed just and appropriate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,



Robb H. Layman  
Assistant Counsel  
Division of Legal Counsel

Dated: May 6, 2004  
Illinois Environmental Protection Agency  
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Springfield, Illinois 62794-9276  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 6<sup>th</sup> day of May 2004, I did send a facsimile copy, as well as one (1) original and five (5) copies by express mail for next-day delivery, of the following instrument entitled **MOTION FOR LEAVE TO FILE MOTION FOR VOLUNTARY PARTIAL REMAND AND MOTION FOR VOLUNTARY PARTIAL REMAND** to:

Eurika Durr,  
Environmental Appeals Board  
U.S. Environmental Protection Agency  
1341 G Street N.W. Suite 600  
Washington, D.C. 20005

and a true and correct copy of the same foregoing instrument, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

Bertram C. Frey,  
Acting Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency,  
Region 5  
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Ann Brewster Weeks  
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U.S. Environmental Appeals Board  
Ariel Rios Building, 2344A  
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**CERTIFICATE OF SERVICE (continued)**

A copy of the instrument was also faxed to the Mr. Bruce Nilles on this same date.

By: Robb H. Layman  
Robb H. Layman  
Assistant Counsel  
Division of Legal Counsel