

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

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

NOTICE

To:

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Environmental Appeals Board
U.S. Environmental Protection Agency
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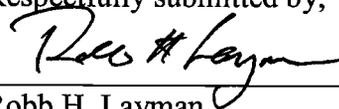
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PLEASE TAKE NOTICE that I have today filed with the Clerk of the Environmental Appeals Board an original (1) and five (5) copies of a **SUPPLEMENTAL BRIEF** of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, a copy of which is herewith served upon you.

Respectfully submitted by,



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Dated: October 19, 2005
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SUPPLEMENTAL BRIEF

NOW COMES the Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), and files its Supplemental Brief pursuant to an order issued by the ENVIRONMENTAL APPEALS BOARD (hereinafter “Board”) on July 21, 2005, in the above-referenced cause.

I.

INTRODUCTION

On July 21, 2005, the Board formally lifted a stay of the proceedings with respect to the pending Prevention of Significant Deterioration (“PSD”) permit appeal previously issued by the Illinois EPA to INDECK-ELWOOD, LLC’s (“Indeck”). The Illinois EPA received a copy of the order on July 26, 2005.

In the same order, the Board also requested the Illinois EPA and the Petitioners, SIERRA CLUB *et. al*, (“Sierra Club”), to file briefs regarding certain issues relating to the United States Environmental Protection Agency (“USEPA”)/Region V’s completion of consultation under Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. §1536. The Board’s order specifically asked the Illinois EPA to provide a response regarding any further action that will be taken with respect to the subject PSD permit as a result of the ESA consultation process that was voluntarily undertaken by Region V.

Notably, various informational materials came into existence as a result of the consultation process directed by Region V, including technical reports generated by Indeck's consultants. In light of this new information, the Board's order asked whether the Illinois EPA will be incorporating those materials into the record of the PSD permit for the purpose of addressing the ESA issue raised by Petitioners in the Amended Petition. The Board advised that if the Illinois EPA intends no further action, then the Illinois EPA should explain the legal basis supporting its decision. The Board also asked for the Illinois EPA's views as to whether the Petitioners should be allowed to amend their Petition to address any issues related to the ESA consultation process.

At the outset, the Illinois EPA wishes to express its appreciation to the Board for seeking the input of the delegated State permit authority in this matter. The Illinois EPA recognizes that the ESA-related issues framed by the Board's order are a matter of first impression, the resolution of which will likely establish an important, national precedent in future PSD permit proceedings. In this regard, the Illinois EPA is grateful for the opportunity to share its views, or perhaps more aptly, its grave misgivings, about the potential outcome of the Board's deliberations in this matter.

The Illinois EPA also appreciates the deferential manner in which the Board requested that these issues be addressed at this stage in the proceedings. By seeking an explanation of the Illinois EPA's intentions with respect to the ESA consultation's impact upon the PSD permit, the Board intimates that the delegated permit authority retains a manifest discretion over the PSD permitting decision throughout the ESA consultation process. However, as explained below, the Illinois EPA is dubious as to whether the existence of such discretion is consistent with the current legal framework of the PSD

program. Moreover, the Illinois EPA is not convinced that further action on the PSD permit is appropriate in the absence of more direct and forthcoming action by USEPA, especially in terms of the needed implementation of a formal rulemaking and/or policy guidance.

II.

PROCEDURAL POSTURE AND SUPPORTING ARGUMENTS CONCERNING ISSUES DIRECTED TO THE ILLINOIS EPA

The Illinois EPA construes the Board's July 21, 2005, order as seeking, in essence, the procedural posture and supporting arguments of both parties relative to the impact of Region V's completion of Section 7 consultation on the subject PSD permit. To this end, the Illinois EPA will articulate its positions and supporting arguments for each of the two fundamental issues raised by the Board's order.

A. Whether the Illinois EPA will undertake any further PSD permitting action as a result of the completion of the ESA consultation.

After much deliberation, the Illinois EPA is not inclined to undertake any additional action with respect to the PSD permit at this time. Although serious consideration was given to reopening the PSD permit to allow for public comment on the ESA-related materials assembled during consultation, the Illinois EPA maintains grave reservations about such an approach. Given the lack of relevant standards for addressing ESA-related matters within the PSD program, the Illinois EPA is reluctant to blaze a trail outside of the established contours of the regulations and an existing delegation agreement simply to avert a potential ruling on the ESA's applicability to the PSD program. By the same token, the Illinois EPA does not relish the thought of a case-by-case approach in addressing this unsettled area of the law. Such an approach would

likely prove unwieldy, if not unworkable, given the current framework of the PSD program. Perhaps more than anything else, the Illinois EPA would favor having the current shroud of uncertainty surrounding this issue lifted altogether, ideally by a formal USEPA rulemaking and/or guidance policy.

i. Governing law and regulations

As a preliminary matter, it should be observed that the Board's request for this additional briefing does not call into question the legal applicability of the Section 7 consultation process under the ESA to Indeck's proposed project. As in earlier pleadings, the Illinois EPA expresses no opinion regarding whether the ESA's requirement of federal agency consultation was initially triggered by Indeck's project. The Illinois EPA's interpretation of applicable PSD requirements as they may relate to ESA-related issues is also not indicative of a desire to diminish the importance of the ESA or its underlying goals.

Instead, the issue brought to the forefront of the analysis is whether the Illinois EPA is obliged to address ESA-related concerns (i.e., the absence of certain documents in the PSD permit record that were generated during the consultation process) as part of its delegated responsibilities in issuing a PSD permit approval to Indeck. While it is true that the Board's order only inquired into the Illinois EPA's intentions to "incorporate the ESA consultation materials into the [permit] record," the threshold issue is unavoidable. By asking for a "legal basis" for any decision for which "no such action is required," the Board effectively left the Illinois EPA with little choice but to evaluate its decision in accordance with the applicable standards governing PSD permitting. Indeed, against

what else could the Illinois EPA's obligation to undertake any further action for the Indeck permit be measured?

The existing PSD program currently lacks the basic framework for integrating the ESA's consultation process within PSD permitting. In an earlier Response to Petitioners' Motion for Leave to File an Amended Petition, the Illinois EPA observed that the ESA is not expressly mentioned or directly related to the statutory or regulatory components of the PSD program.¹ Those requirements, in fact, not only fail to show any demonstrated nexus with the ESA and its implementing regulations, but they do not appear to have even contemplated it. Neither the Clean Air Act nor the PSD regulations reveal the slightest hint of a linkage to, or relationship with, the ESA. Any notion that ESA-related issues could be tied to the PSD program's substantive BACT requirements is similarly unsubstantiated. While the definition of BACT may be broad and encompassing, it is not so elastic as to embrace every conceivable environmental or public health concern.

The Board's own procedural regulations, promulgated at 40 C.F.R. Part 124, are another source of authority dealing with PSD permitting. Given the procedural nature of these regulations, it is not surprising that no mention of the ESA's substantive requirements with respect to the PSD program can be found. Generally speaking, the various provisions of Part 124 can be read to relate only to the requirements found in a given permit, rather than a distinct body of law or regulations.

¹ The Illinois EPA also noted that the PSD program stood in contrast to other federal environmental programs that explicitly incorporated ESA-related provisions into their permitting procedures, citing *In re: Metcalf Energy Center*, PSD Appeal Nos. 01-07 and 01-08, *slip opinion* at page 42, footnote 20; *In re: Phelps Dodge Corporation Verde Valley Ranch Development*, NPDES Appeal No. 01-07, *slip opinion* (EAB, May 21, 2002)(EAB's consideration of ESA-related issues was authorized where specific provisions of the Clean Water Act's National Pollutant Discharge Elimination System permit program expressly required USEPA's compliance with the ESA in permitting storm water discharges).

Quite apart from the threshold applicability issue, the Board's regulations offer some relevant insight into the broader issue of the Petitioners' requested remand for public comment. In this regard, it is noteworthy that the Board's Part 124 regulations provide a clear mechanism for a reopening of the public comment period based on circumstances that are not present in this case. Specifically, Section 124.14(b) generally provides that a permitting authority may exercise discretion in reopening of the public comment period where information submitted during the public comment period "appear to raise substantial new questions concerning a permit." *See*, 40 C.F.R. §124.14(b). In this instance, the information subject to scrutiny involves the ESA-related materials generated long after the public comment period and as part of a distinctly separate regulatory obligation borne by USEPA.

The Board has also previously recognized the purpose of the public comment as being relevant "to determine whether the conditions of the permit should be changed." *See, In re: Columbia Gulf Transmission Company*, PSD Appeal No. 88-11, Order on Motion for Stay, note 3 (EAB, July 3, 1990), *citing* 40 C.F.R. §124.14. In ruling on a motion for stay involving an applicant's request to submit new information supporting the delegated State permit authority's original decision, the Board observed in a passing footnote that:

"[N]othing in the statute, e.g., Clean Air Act §165(a)(2), 42 U.S.C.A. §7465(a)(2), or the regulations, e.g., 40 CFR §52.21(q) can reasonably be read as mandating solicitation of public comment on information qua information. Therefore, if... the new information might not prompt any alteration of the permit conditions, no legitimate purpose would be served by soliciting public comment on the new information. The general public has already had an opportunity to comment on the permit's conditions. Further solicitation of public comment under these circumstances would be redundant."

Id.

In this situation, it cannot be argued that the ESA consultation process raised “substantial new questions” concerning Indeck’s permit where, given the consultation’s outcome that no species “are likely to be adversely affected” by the proposed project, no further changes to the permit can ostensibly be required owing to ESA-related concerns. Significantly, the public was afforded an opportunity to comment on Indeck’s draft permit, which included various monitoring and reporting requirements derived from applicable state consultation requirements under the Illinois Endangered Species Protection Act, 520 ILCS 10/1 *et seq.* The absence of any change to the permit as a result of federal ESA consultation should not constitute a valid basis to reopen the permit for public comment. To do so would serve no legitimate purpose other than to forestall the Board’s review of the remaining issues on appeal. For this reason, the Board can affirm the Illinois EPA’s decision declining to put the ESA-related materials through public comment on these procedural grounds alone.

ii. PSD delegation agreement

As with any delegated permit authority, the Illinois EPA relies upon a direct grant of authority from USEPA to administer the federal PSD program in Illinois EPA. This grant of authority has traditionally been memorialized in a formal delegation agreement. Aside from the applicable PSD regulations mentioned above, the Illinois EPA and other delegated permit authorities place considerable reliance on these instruments, as they frequently are the only channel thorough which the role and responsibilities of both the permitting agencies and USEPA are clearly set forth. The Illinois EPA administers the PSD program in Illinois pursuant to a delegation agreement entered into with Region V. *See*, 46 Fed. Reg. 9580 (January 29, 1981). As previously acknowledged in prior cases

before the Board, the Illinois EPA “stands in the shoes” of the Administrator of the USEPA in implementing the federal PSD program in Illinois. *See*, 46 Fed. Reg. 9580 (January 29, 1981); *In re Zion Energy, LLC*, PSD Appeal No. 01-01, slip op. at page 2, note 1 (EAB, March 27, 2001).

By the express terms of the delegation agreement, the Illinois EPA has assumed the responsibility for reviewing all applications for proposed PSD sources in Illinois and is vested with the sole responsibility to take final action on a permit application. *See*, Paragraph 1 of “General” provision at 46 Fed. Reg. 9580 (January 29, 1981). In the event that Region V determines that the Illinois EPA “persistently” fails to implement preconstruction review or is not otherwise complying with the agreement, Region V may revoke the delegation in its entirety. *Id.*, Paragraph 6 of “Program Supervision.” Given the breadth of the agreement, it certainly appears that the Illinois EPA was intended to make any and all decisions relating to the PSD permit program.

As with the PSD regulations, the Illinois EPA’s delegation agreement is silent with respect to the treatment of ESA-related issues. The agreement does not address the potential need for ESA consultation by Region V or obligate the Illinois EPA to fulfilling any PSD requirements involving the same. Excluding the references to the two delegation agreements previously cited by Petitioners in their Response to IEPA Motion for Voluntary Partial Remand and Cross Motion for Complete Remand,² the Illinois EPA is unaware of any other delegation agreements that touch upon ESA-related concerns.

² In both of the cases cited by Petitioners, the delegated permit authorities apparently have been required to “refrain” from issuing any permit until the federal agency consultation requirements under Section 7 have been satisfied. Had the same language been in place in Illinois’s delegation agreement, the Illinois EPA would arguably still confront the dilemma, posed by the Board’s inquiry, of ascertaining what measures are rightly within the realm of PSD permitting.

iii. Written or informal guidance

In the absence of historical precedent concerning a given PSD issue, it is not uncommon for delegated permit authorities to seek written or informal guidance from the various Regions or from available databases posted on USEPA's Headquarters and regional web-sites. Except for the Board's limited discussion in recent rulings on this case, however, the Illinois EPA is unaware of any written documentation or guidance regarding the applicability of ESA consultation to PSD permitting through either delegated or state-approved PSD programs.

It should also be noted that a lack of meaningful guidance from Region V and Headquarters staff was a contributing factor in the Illinois EPA's decision to forego further permitting action at this time. Despite several informal discussions with various USEPA representatives on the subject of the Illinois EPA's available permitting options, the Illinois EPA was unable to discern a clear or consistent message from federal authorities. From its own past experiences, the Illinois EPA recognizes the difficulty of reaching consensus within an organization and in speaking with one voice. Nonetheless, the uncertainty and confusion that was evident from these discussions is clearly emblematic of the larger issue and supports the Illinois EPA's view, as discussed below, that the Board should decline a case-by-case consideration of ESA-related claims in the context of PSD permits until a more uniform, regulatory-style approach can be implemented.

iv. Policy considerations

The Illinois EPA is also troubled by the potential policy implications that might arise from a case-by-case analysis towards the type of ESA-related issues presented in

this case. If a delegated permit authority must administer its current PSD program with a constant eye towards USEPA's consultation requirements, it calls into question several logistical uncertainties that are not currently addressed by the existing framework of the PSD regulations. For example, a permit authority would need to determine which PSD projects must be screened for ESA-related purposes, how they are to be screened, the timing of such screening in relation to the review of relevant air quality analyses and permit development, as well as projected delays in PSD permitting. Ensuring a complete record of the permit may also be problematic for a delegated permit authority where, as here, federal authorities were instrumental in compiling most of the documentation.

Another one of the intricacies of the threshold issue is the potential for disparities between delegated permit programs and state-approved PSD programs. The Illinois EPA can only venture a guess that most state-approved PSD programs do not contemplate the implications of ESA consultation. It is further surmised that the delegated programs previously cited by Petitioners are an exception to the rule. If the Illinois EPA, as a delegated permit authority, is compelled to assimilate the federal agency consultation requirements of the ESA within its PSD permitting program, can it be assured that existing state-approved programs will be subject to the same uniform approach? Without the appropriate mechanisms in place, delegated PSD permit authorities would undoubtedly worry about state-approved programs enjoying an unfair advantage in the administration of the same or equivalent permit program.

v. Overview

The Illinois EPA takes its responsibilities under the federally-delegated PSD program seriously, and it would not shirk or consciously disregard the duties derived

from the applicable requirements of the PSD program, the delegation agreement or USEPA guidance. Ordinarily, a delegated permit authority is able to rely upon a body of guidance documents, determination letters or even the Board's past rulings in discerning the necessary or appropriate path for administering the PSD program. In this instance, in which the Board has asked a relatively straightforward question as to how the PSD permitting will address ESA-related materials, there is simply no path to follow.

The issue of the ESA's applicability to the PSD program is a novel idea of relatively recent origin, in contrast to the nearly twenty-five years of regulatory experience which comprises the PSD program itself. As a direct result, the regulatory means for facilitating the consideration of federal agency consultation under Section 7 are almost universally nonexistent. In the Illinois EPA's view, the Board should not attempt to reconcile an entire regulatory program of the Clean Air Act, consisting of separate state-approved programs and delegated authorities, with USEPA's environmental obligations arising under the ESA. To introduce the ESA-related issues into PSD permitting through trickle-down litigation could wreak havoc with PSD's implementation, especially if delegated permit authorities or state-approved programs are insufficiently prepared for the consequences of such decisions.

Rather, the Illinois EPA respectfully suggests that the appropriate venue for addressing novel ideas is through agency rule-making and/or formal guidance. If USEPA ultimately determines that ESA consultation should be implemented as part of the PSD program, as it is in other federal environmental programs, then the process can at least be implemented in a uniform manner and avoids significant disruption in the permit program. In the meantime, federal agency consultation under the ESA would remain a

statutory obligation, the enforcement of which would still be augmented by the statutory right of direct judicial review provided by the ESA itself.

Based on the foregoing, the Illinois EPA urges the Board to decline consideration of the Petitioners' ESA claim on the basis that the issue, albeit an "important policy consideration," does not warrant the exercise of the Board's reviewing discretion. Admittedly, the Board has previously ruled in this case that the absence of a specific reference to ESA in the PSD regulations is not "necessarily preclusive" of the Board's jurisdiction.³ However, the absence of a workable framework for guiding the administration of PSD in cases involving ESA-related matters, the potential for administrative turmoil and the more desirable venue for addressing a significant policy issue are factors that present a strong basis for the Board to decline review. It does not stand to reason that every issue reflecting an important policy consideration mandates the Board's review.

B. Whether Petitioners should be allowed an opportunity to amend their current petition for appeal in order to address any new issues arising from the ESA consultation.

The Illinois EPA does not support allowing Petitioners any further opportunity to amend their present appeal. The Board has generally refused to grant amended petitions seeking new issues outside of the 30-day filing period prescribed by 40 C.F.R. §124.19. *See, In re: Indeck-Elwood, LLC*, PSD Appeal No. 03-04, Order Granting Motion for Leave to File Amended Petition and Requesting Region V and/or OGC to File a Response, dated February 3, 2004. In addition to protecting an applicant's right to a

³ Order of the Board Granting Motion for Leave to File Amended Petition and Requesting Region V and/or OGC to File a Response, dated February 3, 2004, citing the environmental justice cases of *In re: Chemical Waste Management of Indiana*, 6 E.A.D. 66, 76 (EAB 1995) and *In re: Ecoelectrica, L.P.*, 7 E.A.D. 56, 67, note 15 (EAB 1997). This case is distinguishable from the Board's review of environmental justice issues in the PSD permitting context for the same reasons mentioned in the text above.

prompt disposition of the permitting dispute, the Board has found the general rule useful in preempting “an unwarranted expansion of a party’s right to appeal.” *Id.*, citing *In re: Zion Energy, LLC*, 9 E.A.D. 701, 707 (EAB 2001).

To the extent that Petitioners seek review of an ESA-related issue, such as challenging the adequacy of the federal agency consultation, the Illinois EPA urges the Board to deny review. While the timing of the issue might not be considered unreasonable given that Region V only recently concluded its consultation, the Illinois EPA contends that the Board should decline its review for the same reasons mentioned in the preceding argument. On the other hand, Petitioners may seek to amend their petition with an issue not directly relating to the ESA but, rather, one that owes its existence to documentation generated during the consultation. Unless the issue derives specifically from an ESA-related issue, which formed the basis for the Board’s original stay of the proceedings, the Illinois EPA requests that the Board deny review on the separate grounds that any such issue is a likely attempt to further expand Petitioners’ issues beyond those already properly preserved for appeal.

III.

CONCLUSION

The Illinois EPA respectfully requests that the Board decline review of both of the ESA-related issues, as raised in its July 21, 2005 order, in a manner consistent with the views expressed herein or, in the alternative, order such relief that is deemed just and appropriate.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,



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Dated: October 19, 2005
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2005, I did send, by express mail for next-day delivery, one (1) original and five (5) copies of the following instrument entitled **SUPPLEMENTAL BRIEF** of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, 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 directed 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
Chicago, Illinois 60604-3507

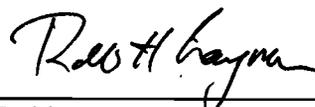
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