



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 17 2006

OFFICE OF
GENERAL COUNSEL

Ms. Eureka Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1341 G Street NW, Suite 600
Washington, DC 20005

Re: Indeck-Elwood, LLC, PSD Appeal No. 03-04

Dear Ms. Durr:

Enclosed for filing with the Environmental Appeals Board in the above-captioned matter is an original and five copies of the Brief of EPA Office of General Counsel: (1) Responding to Question of Whether the Board Needs to Consider ESA Issues; and (2) In the Alternative, Requesting Extension of Time to Address Substantive Issues if Necessary. Copies of this document have been served upon the Petitioners, Respondent, and permit applicant in accordance with the enclosed Certificate of Service.

Thank you for your assistance with this matter.

Sincerely,

A handwritten signature in cursive script that reads "Brian L. Doster".

Brian L. Doster, Attorney
Air and Radiation Law Office
(202) 564-1932

Enclosures

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

In re:)
)
Indeck-Elwood, LLC)
)
Permit No. 197035AAJ)

PSD Appeal No. 03-04

BRIEF OF EPA OFFICE OF GENERAL COUNSEL:
(1) RESPONDING TO QUESTION OF WHETHER THE BOARD NEEDS TO
CONSIDER ESA ISSUES; AND
(2) IN THE ALTERNATIVE, REQUESTING EXTENSION OF TIME TO
ADDRESS SUBSTANTIVE ISSUES IF NECESSARY

The Office of General Counsel (OGC) of the Environmental Protection Agency (EPA) responds as follows to the Environmental Appeals Board's December 1, 2005 Order Requesting OGC to File a Brief in the above-captioned matter involving the issuance of a Prevention of Significant Deterioration (PSD) permit by a delegated state permitting authority -- the Illinois Environmental Protection Agency (IEPA). The Board's Order requested that OGC address the following questions regarding the interplay between the Endangered Species Act (ESA) and the Clean Air Act PSD permitting requirements: (1) whether the Board needs to reach the ESA issues to resolve the appeal of the Indeck-Elwood permit; (2) whether ESA consultation is required in conjunction with the issuance of a PSD permit and, if so, how that process should be conducted; and (3) whether the information typically generated during an ESA consultation would be required to be included in a PSD permit application even if ESA consultation was not required.

In short, the Board does not need to reach the ESA issues to resolve the present appeal. The ESA issues are now moot because EPA Region V voluntarily completed an informal consultation with the United States Fish and Wildlife Service (FWS). Region V found, and FWS concurred in writing, that issuance of a PSD preconstruction permit to Indeck-Elwood was "not likely to adversely affect" any federally-listed species or designated critical habitat of such species. Because the consultation was completed and concluded in this manner, the Board does not need to reach the ESA issues in this case to resolve this appeal. Furthermore, the ESA does not require public comment on the consultation.

Since the ESA issues presented in this case have been mooted by Region V's voluntary consultation, OGC does not address the Board's second and third questions in this brief. However, if after reviewing this response, the Board were to conclude that it does need to reach the ESA issues to resolve this appeal, OGC respectfully requests an additional 60 days to respond to the Board's second and third questions.

Finally, although not included in the Board's December 1 Order, Petitioners' arguments raise an independent question under the Clean Air Act of whether there are grounds to supplement the record for the PSD permit or provide an additional opportunity for public comment on that permit. OGC sees no basis to question IEPA's decision not to take these actions.

I. The Board Need Not Address the Endangered Species Act Issues In This Case

ESA Section 7(a)(2) requires federal agencies to insure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of federally-listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat of such species. 16 U.S.C. § 1536(a)(2). Section 7(a)(2) applies only to actions where there is discretionary federal involvement or control. 50 C.F.R. § 402.03. Where an action that is subject to Section 7(a)(2) may affect listed species, the federal agency consults with either one or both of the relevant wildlife agencies (the FWS or National Oceanic and Atmospheric Administration (NOAA) Fisheries depending on the type of species involved) regarding the effects of the action on listed species. Such consultation may be conducted either formally or informally. *See* 16 U.S.C. §1536(a)(2); 50 C.F.R. §§ 402.13, 402.14. Section 7(a)(2) of the ESA neither authorizes nor requires public involvement in the interagency consultation process. *See* 51 Fed. Reg. 19926, 19928 (June 3, 1986).

A. The ESA Issues Are Now Moot Given Region V's Voluntary Consultation

The Petitioners argued in their Amended Petition for Review that EPA failed to comply with the ESA because it did not consult with the FWS regarding the potential impacts on listed species that might result from issuance of the PSD permit to Indeck-Elwood. This issue is now moot because EPA Region V voluntarily consulted in this case and met the requirements of Section 7(a)(2) of the ESA. Through an informal ESA consultation, Region V analyzed the possible effects and concluded that the issuance of a permit to the proposed Indeck-Elwood facility was not likely to adversely affect listed

species or their designated critical habit. The FWS concurred in writing with this finding. *See Status Report (July 17, 2005) and Attachments.* Region V's determination, with the written concurrence of the FWS, concluded the informal consultation and fully satisfied the requirements of ESA Section 7(a)(2). 50 C.F.R. § 402.13(a).

Because Region V voluntarily completed the very process that Petitioners allege EPA was required to undertake pursuant to the ESA, the issue of whether or not EPA was required to consult is moot. The Board has previously recognized that the issue of ESA compliance is moot once consultation is completed, even when the consultation is completed after the permitting authority has issued the permit. *See In Re Ash Grove Cement Company*, 7 E.A.D. 387, 429 (EAB 1997) (involving challenge to a RCRA permit); *see also In Re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121, 174 (EAB 1999) (declining to decide how Executive Order 12898 on environmental justice should be implemented in the context of delegated PSD programs in a case where the EPA Region conducted the analysis called for in that order).

B. The ESA Does Not Require Public Comment On Region V's Voluntary Consultation

Petitioners also suggest in their November 17, 2005 Brief that they should have an opportunity to comment on the consultation before a final permit can issue in this case. However, Petitioners ignore that consultation under the ESA is inherently intragovernmental as between the relevant federal agencies (with potential for involvement by permit applicants). The ESA and implementing regulations do not provide for public involvement in or comment on the consultation process. *See* 51 Fed. Reg. at 19928. Therefore, Petitioners derive no right to comment on Region V's consultation from the ESA or implementing regulations.

II. If The Board Concludes That It Must Address ESA Issues, OGC Requests An Extension of Time to Address the Board's Questions Concerning Applicability of the ESA to PSD Permitting

If the Board is not persuaded that it does not need to address the ESA issues in order to resolve this appeal, OGC respectfully requests an additional 60 days to provide a response to the second and third questions in the Board's Order Requesting OGC to File A Brief. These two questions (including the subparts to question two) raise important legal and policy issues of nationwide significance that are currently under review in the Office of Air and Radiation, in consultation with other EPA offices. An additional 60 days would permit thorough consideration of these issues in the intra-agency review process and allow the Board to have the benefit of this analysis before addressing these questions. OGC respectfully urges the Board not to resolve these questions without providing EPA program offices with this opportunity to present their views.

OGC contacted counsel for Petitioners and counsel for Respondent IEPA regarding their position on an extension. Petitioners are opposed to any extension of time. Respondent does not oppose OGC's alternative request for additional time.

III. OGC Has No Basis to Question IEPA's Decision Not To Supplement the Record or Consider Additional Public Comments on the PSD Permit

Because Petitioners seek to rely on documents prepared after the IEPA's final permit decision to demonstrate that IEPA did not have a sufficient basis to issue this PSD permit under the Clean Air Act, the Board must still decide (based on the requirements of the Clean Air Act) whether the Petitioners have established grounds to supplement the record and, furthermore, to comment on that record. Although the ESA consultation process generated the documents the Petitioner seeks to rely upon, these issues do not arise under the ESA. These record and public comment issues are present because new

documents that are alleged to have relevance to the PSD permit proceeding were prepared after IEPA issued the final permit. Because Petitioners cannot establish a right to comment on the consultation materials under the ESA, general assertions of the right to comment on the consultation materials are insufficient. Petitioners must establish specific grounds under the Clean Air Act and EPA regulations to supplement the record with particular documents or submit additional public comments after issuance of the PSD permit.

In PSD appeals, the Administrator has said that the close of the public comment period should generally be used as the reference by which the adequacy of the administrative record is judged, absent unusual delay between the close of the public comment period and the date of permit issuance, or the presence of other extraordinary circumstances. *In the Matter of Columbia Gulf Transmission Co.*, PSD Appeal No. 88-11, Order on Motion for Stay at 3 n. 3 (Adm'r July 3, 1990); *In the Matter of: Pennsauken County, New Jersey, Resource Recovery Facility*, PSD Appeal No. 88-8, Remand Order at 2 n. 10-11 (Adm'r Nov. 10, 1988).¹ Unusual delay or extraordinary circumstances are required to supplement the record because of the countervailing need to conclude administrative proceedings in an orderly fashion. Permitting actions might never end if they were always subject to reopening whenever a new circumstance arises. *See, Columbia Gulf* at 2; *Pennsauken* at 5 n. 11.

¹ *See also, In the Matter of: Liquid Air Puerto Rico Corp.*, NPDES Appeal No. 92-1, Order Denying Reconsideration at 4-6 n. 6 (EAB July 12, 1994) (Board found no grounds to supplement the record because the Petitioner had failed to utilize an earlier opportunity to submit the information), *In the Matter of: St. Lawrence County Solid Waste Disposal Authority*, PSD Appeal No. 90-9, Notice of Decision to Review at 2 n. 3 (Adm'r July 17, 1990) (permitting authority ordered to consider new NSPS regulations promulgated during a 15-month delay between the close of the public comment period and the issuance of the permit).

In addition, Petitioners must also demonstrate that the information contained in the new documents was not reasonably ascertainable at the time of the comment period. Under EPA's permitting regulations, all interested persons "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period." 40 C.F.R. §124.13. The Board has previously rejected attempts to supplement the record with new information where the new information was reasonably ascertainable during the comment period. *See, In Re: Sumas Energy 2 Generation Facility*, PSD Appeal No. 05-03, slip op. at 19 n. 18 (EAB May 27, 2005); *In Re: General Motors Corporation, Inland Fisher Guide Division*, 5 E.A.D. 400, 404-5 (EAB 1994) (RCRA Appeal No. 93-5).

There is no cause to allow additional public comment if new information would not lead to any change in the PSD permit or if the new information is not necessary to support the permit decision. In cases where the permitting authority sought to supplement the record to correct a deficiency in the support for the permit, the Board required public comment on the new information. *See, In Re: Hawaii Electric Light Co.*, 8 E.A.D. 66, 102-103 (EAB 1998). In the *Columbia Gulf Transmission Company* case, cited above, Administrator Reilly allowed a PSD permit applicant to supplement the record with additional cost information that supported the original permitting decision of a delegated state (Kentucky), but in fairness also allowed the Petitioner (Region IV) to supplement the record with new information on control-technology advances. However, the Administrator did not require an additional opportunity for the public to comment if the new information did not lead to a revision of the permit conditions. The Administrator reasoned as follows:

The ultimate purpose of public comment is to determine whether the conditions of the permit should be changed. Nothing in the statute, or the regulations, can reasonably be read as mandating solicitation of public comment on information qua information. Therefore, if as is possible under the movant's proposal, 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.

Columbia Gulf at 3 n. 3 (internal citations omitted).

In response to the Board's Order Lifting Stay and Requesting Additional Briefing (June 21, 2005), IEPA considered whether it should add the documents generated in the consultation to the record for the Indeck-Elwood permit or accept public comments upon these materials. Because the consultation lead to a finding that listed species are not likely to be adversely affected by the proposed project, IEPA concluded there was no basis to supplement the record for its PSD permit decision or take additional public comment because of the consultation. Section 124.14(b) of EPA's permitting regulations provides that the permitting authority may prepare a new draft permit, revise its statement of basis, or reopen the comment period if any data or information submitted during the public comment period appears to raise "substantial new questions" concerning the permit. 40 C.F.R. §124.14(b).² IEPA determined that the ESA consultation process, including the information compiled through that process, did not raise any substantial new questions under the Clean Air Act concerning the permit issued to Indeck-Elwood. IEPA Supplemental Brief at 7.

OGC has no basis to question IEPA's decision not to supplement the record or provide an additional opportunity for public comment on the PSD permit. Although the

² Provided the Board has not yet granted or denied review of the IEPA's permit decision, IEPA also has the discretion after issuance of the final permit to withdraw the final permit, prepare a new draft permit, and provide an opportunity for additional comment on the permit. 40 C.F.R. §124.19(d).

review of this permit by the Board was delayed, there was not an unusual delay between the close of the comment period and the issuance of the PSD permit. Extraordinary circumstances do not appear to be present because the consultation led to a conclusion that the project was not likely to adversely affect listed species. The potential effects of the facility were apparently ascertainable during the comment period because one of the Petitioners argued in comments that “there is significant evidence to suggest that the total impacts from the plant, considering all media, would have a significant effect on soils, vegetation, and visibility.” Petitioners Supplemental Response Brief at 10. Finally, IEPA has not sought to bolster its rationale for the PSD permit decision using documents compiled in the ESA consultation, and IEPA concluded that this process did not raise substantial new questions that could lead to a change in the PSD permit.

WHEREFORE, the Office of General Counsel respectfully submits that the Board has no need to reach the ESA issues to resolve this specific case involving a PSD permit for the Indeck-Elwood facility. In the alternative, if the Board were to conclude that the ESA issues in this case are not moot, OGC requests an additional 60 days to provide its views on the Board’s questions concerning the applicability of the ESA to PSD permitting under the Clean Air Act.

Dated: January 17, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief of Office of General Counsel and Alternative Request for Extension of Time were served on the following persons in the manner indicated below:

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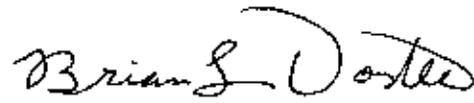
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A handwritten signature in cursive script that reads "Brian L. Doster". The signature is written in black ink and is positioned above a horizontal line.

Brian L. Doster