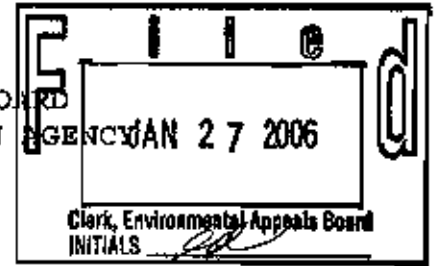


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
Indeck-Elwood, LLC) PSD Appeal No. 03-04
)
Permit No. 197035AAJ)
)

ORDER REQUESTING OGC
TO ANSWER REMAINING QUESTIONS

On December 1, 2005, the Environmental Appeals Board ("Board") issued an order requesting the U.S. Environmental Protection Agency's Office of General Counsel ("OGC") to file a brief answering various questions. See Order Requesting OGC to File a Brief (EAB, Dec. 1, 2005). Specifically, the Board requested OGC to address the following questions:

(1) In OGC's view, does the Board need to reach the ESA issues in this case in order to resolve this appeal, and why or why not?

(2) Is ESA consultation required in conjunction with the issuance of a PSD permit? If so:

(a) Explain the interplay between the ESA consultation process and the issuance of a PSD permit;

(b) Explain whether ESA consultation needs to take place before the issuance of the PSD permit;

(c) Explain how this consultation would be carried out in the context of a delegated state PSD program;

(d) Explain whether the documents generated during an ESA consultation must be part of the record for the PSD permit. If not, explain how consultation without making the records available satisfies the ESA and PSD requirements.

(3) Is the information typically generated during an ESA section 7 consultation information that would be required to be included in a PSD application even absent a requirement for ESA consultation? If so, describe in more detail how such information relates to specific PSD requirements.

Id. OGC filed its response on January 17, 2006, addressing only the first question. According to OGC, the ESA issues presented in this case have been mooted by Region V's voluntary consultation and therefore there is no need for OGC to address the second and third questions. See 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 at 1-4.

After examining OGC's response, the Board does not believe that it can resolve the issues presented in this case without consideration of the second and third issues that OGC was asked to address. In its brief, OGC requests, in the alternative, a 60-day extension of time to respond to the remaining questions. See *id.* at 5 ("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 provided a response to the second and third questions"). OGC points out that these questions raise important legal issues of nationwide significance that are currently under review in the Office of Air and Radiation, in consultation with other EPA offices. *Id.* OGC represents that an additional 60 days would permit thorough consideration of these issues in the intra-agency review process, and urges the Board not to resolve these questions without providing EPA program offices with this opportunity to present their views. *Id.* Finally, OGC informs the Board that the Petitioners in this case, American Lung Association of Metropolitan Chicago, Citizens Against Ruining the Environment (Lockport), Clean Air Task Force, Lake County Conservation Alliance and Sierra Club, are opposed to any extension of time.


While the Board has made no determination as to whether it needs to reach the ESA issue to resolve this appeal, the Board believes that OGC's answers to questions 2 and 3 set forth in the

Board's December 1, 2005 order will assist the Board's consideration of this matter. Because the Board recognizes that these questions raise important legal issues of nationwide significance and that intra-agency review will help assure a more thorough response, the Board hereby grants OGC's request for an extension of time.

Accordingly, the Board hereby requests OGC to file a brief addressing the second and third questions by no later than March 17, 2006.¹

So ordered this 27th day of January 2006.

ENVIRONMENTAL APPEALS BOARD

By: 
Edward E. Reich
Environmental Appeals Judge

¹ Documents are "filed" with the Board on the date they are received.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Requesting OGC to Answer Remaining Questions, PSD Appeal No. 03-04, were sent to the following persons in the manner indicated:

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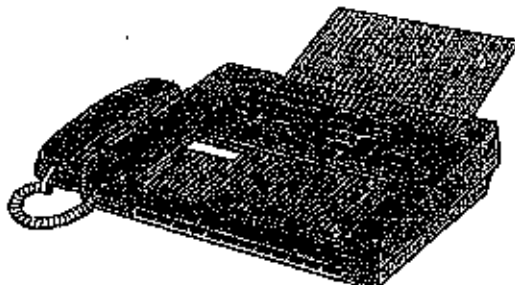
Date: JAN 27 2006


Annette Duncan
Secretary



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FACSIMILE COVER SHEET



TO: <i>Richard Ossio</i>		FAX #: <i>564-5603</i>	
Nivea Berrios	Scott Fulton	Edward Reich	
Carlos Da Rosa	David Heckler	Patrice Simms	
<i>X</i> Annette Duncan	Mildred Johnson	Kathie Stein	
Eurika Durr	Suzanne Krolikowski	Alice Wegman	
Timothy Epp	Cheryl Mackay	Michelle Wenzel	
		Anna Wolgast	
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<p>REMARKS: <i>In deck-Edward, LLC -Order Requesting OGC To Answer Remaining Questions</i></p>			