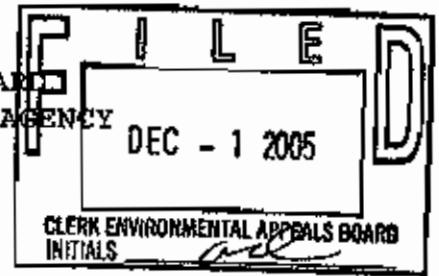


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



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

ORDER REQUESTING OGC TO FILE A BRIEF

I. Introduction

By this Order, the Environmental Appeals Board ("Board") requests the U.S. Environmental Protection Agency's Office of General Counsel ("OGC") to file a brief addressing a number of issues related to the above-captioned matter. These issues arise in the context of a permit issued by the Illinois Environmental Protection Agency ("IEPA") under the Clear Air Act prevention of significant deterioration ("PSD") program delegated to the State of Illinois by U.S. EPA Region V.¹ These issues are issues of

¹ IEPA is authorized to make PSD permitting decisions for new and modified stationary sources of air pollution in Illinois pursuant to a delegation agreement with Region V. See 40 C.F.R. §§ 52.21(u), .719-.744; 46 Fed. Reg. 9580 (Jan. 29, 1981). Because IEPA acts as EPA's delegate under the PSD program, IEPA's PSD permits are considered EPA-issued permits, and appeals of the permit decisions are heard by the Board pursuant to 40 C.F.R. § 124.19. See 40 C.F.R. § 124.41; see also *In re Kendall New Century Dev.*, PSD Appeal No. 03-01, slip op. at 3 n.1 (EAB, April 29, 2003), 11 E.A.D. ____.

first impression, and the Board believes that OGC's views on this matter will assist it in the resolution of this case.

A summary of the procedural history of this case is provided below, followed by our request.

II. *Procedural History*

On November 17, 2003, Petitioners, the American Lung Association of Metropolitan Chicago, Citizens Against Ruining the Environment (Lockport), Clean Air Task Force, Lake County Conservation Alliance, and Sierra Club, filed a timely petition for review challenging a PSD permit issued by IEPA to Indeck-Elwood, LLC. A month later, Petitioners filed a motion to amend their petition raising a single new issue: whether the U.S. EPA, acting through Region V, failed to comply with section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536.² IEPA opposed Petitioners' motion arguing that the Board lacked jurisdiction to entertain the issue because ESA is not an explicit requirement of and does not directly relate to the PSD program.

² Section 7 of the ESA requires all federal agencies to, among other things, ensure through consultation with the Secretary of Interior, whose authority in the instant case is exercised by the U.S. Fish and Wildlife Service ("FWS"), that their actions are not likely to jeopardize the continued existence of any endangered or threatened species. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

The Board read Petitioners' new issue as raising a challenge to the validity of the entire permit, rather than raising a legal issue disassociated from the PSD regulations and the permitting responsibilities of the EPA, and granted Petitioners' request. In its order, the Board explained that the particular circumstances in this case, where there was no discernible prejudice to the permittee, the amended petition was filed before any responsive pleadings, and the issue raised involved important policy considerations, warranted deviation from our general practice of only entertaining issues raised during the 30-day filing deadline for filing petitions. See Order (1) Granting Motion for Leave to File Amended Petition and (2) Requesting Region V and/or OGC to File a Response (Feb. 3, 2004).

In that same order, the Board notified Region V and OGC of the new issue on appeal and requested that they respond to the new issue by addressing the following matters: (1) explain whether ESA consultation is required under the PSD program, and, if so, how such consultation is to be carried out in the context of a delegated state program; (2) provide an explanation for Region V's assertion that it "lacks discretionary authority" to consult with U.S. Fish and Wildlife Service ("FWS")³ regarding the subject PSD permit; (3) otherwise respond to the merits of

³ See *supra* note 2.

Petitioners' contention that the consultation provisions of the ESA were violated; and (4) include as attachments any documents referenced in responding to the foregoing matters. *See id.*

After several extensions of time, on May 6, 2004, OGC filed a response on behalf of itself and Region V. OGC's response did not address the merits of the ESA-related issues in the amended petition. Rather, OGC concluded that because Region V had decided to voluntarily engage in the consultation process with the FWS, a response to the questions posed by the Board in its February 3, 2004 Order was no longer necessary because the issues were moot. On that same day, IEPA filed a motion for partial voluntary remand on the ESA-related issue based on Region V's agreement to voluntarily consult with FWS. Shortly thereafter, Petitioners filed a motion for a full remand. On May 20, 2004, the Board issued an order denying IEPA's and Petitioners' requests for partial and full remand, and staying its consideration of the petition pending the outcome of the ESA consultation process. *See Order Denying Respondent's Motion for Voluntary Partial Remand and Petitioners' Cross Motion for Complete Remand, and Staying the Board's Decision on the Petition for Review (May 20, 2004).*

A year after the Board's order staying its consideration of the petition, the Board issued another order requiring that

Region V submit a status report on the progress of its ESA consultation. See Order Requiring Status Report (May 27, 2005). The Region filed its status report on July 17, 2005, explaining that representatives of Region V, IEPA, FWS and Indeck-Elwood met and exchanged information during the course of a year on the potential impact of the proposed power plant on four listed species. The consultation process concluded with the determination by Region V and the FWS that the four listed species are not likely to be adversely affected by the construction and operation of the proposed power plant.

After receiving Region V's status report, the Board scheduled a status conference, which was held on July 20, 2005. IEPA and Petitioners participated in the status conference, with a representative of Indeck-Elwood observing. The objective of the conference was to discuss the case status and anticipated future actions. After the status conference, the Board determined that additional briefing was necessary. Accordingly, the Board then issued an order lifting the stay and requesting IEPA and Petitioners to respond to certain questions arising from the ESA consultation. See Order Lifting Stay and Requiring Additional Briefing (July 21, 2005). Specifically, the Board sought IEPA's views and Petitioners' responses to the following:

- (1) whether IEPA intended to take some additional action to incorporate the ESA consultation materials into the record for

Indeck's PSD permit in order to address the ESA-related issue raised in the amended petition and, if so, what would that action be. If not, what would the legal basis be for determining that no such action is required; (2) whether it is appropriate to allow Petitioners to further amend the petition for review in light of the ESA consultation proceeding and resultant technical analyses; and (3) whether there is any other issue essential to the Board's determination of the appropriate procedural course for this case.

After various requests for extension of time, IEPA filed its ESA-related brief on October 21, 2005. With respect to the first question IEPA responded that it does not intend to incorporate the ESA materials into the permit record. IEPA explained that "[g]iven the lack of relevant standards for addressing ESA-related matters within the PSD program, the IEPA 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." See Supplemental Brief (Oct. 19, 2005) at 3. IEPA added that "[p]erhaps 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." *Id.* at 4. IEPA further stated that the reopening of the public comment period is not

necessary in this case because the information developed during the consultation process did not raise "substantial new questions," in light of the outcome of the consultation that no species "are likely to be adversely affected." See *id.* at 6-7. With respect to the second question, IEPA concluded that Petitioners should not be allowed to further amend their petition. IEPA did not address the third question.

Petitioners filed their ESA-related brief on November 17, 2005, arguing, among other things, that the information generated during the consultation process goes to the heart of at least two PSD requirements, the soils and vegetation analysis required by 40 C.F.R. § 52.21(o)(1), and the BACT collateral effects analysis required by 40 C.F.R. § 52.21(b)(12). Therefore, in Petitioners' view, the permit should be remanded independently of any ESA obligations because the permit application was inadequate, and consequently, the requisite opportunity for public comments was not provided. Petitioners request that the administrative record be reopened to add the ESA consultation documents and that the public be afforded an opportunity to comment on a new final permit.

With regard to the ESA consultation, Petitioners argue that Region V has now, after the consultation with FWS in Indeck, begun to consult with the FWS before PSD permits are issued.

Petitioners cite four air permits, including two for facilities in Illinois, in which the Region has allegedly initiated consultation prior to issuance of the permits. Petitioners also reference a draft Statement of Basis for one of these permits in which the Region allegedly stated that "The EPA cannot issue a permit if FWS decides to commence a consultation process to determine the adverse impact on the species and the steps the applicant would have to take to mitigate the damage. Permit issuance would have to wait until the consultation process was completed." Petitioner's Brief Responding to Board's July 21, 2005 Order and IEPA's Supplemental Brief at 14.

III. *Request for Briefing*

After a preliminary examination of the ESA-related briefs, the Board is concerned that the ESA issues may not have been fully mooted by the ESA consultation process initiated by Region V and may yet need to be addressed in order to resolve this appeal. Accordingly, the Board believes that further briefing from OGC would be helpful in this case, and hereby requests OGC to address the following matters:⁴

⁴ The questions identified in this Order are intended solely to aid the Board in its review of this case. This Order should not be interpreted to suggest the Board has made any determinations on the merits regarding any of the facts, issues or legal matters relating to this matter.

(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.

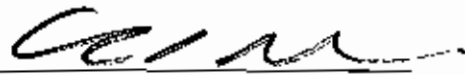
(3) Is the information typically generated during an ESA section 7 consultation information that would be required to be included in a PSD application even absent a requirement for ESA consultation? If so, describe in more detail how such information relates to specific PSD requirements.

It is requested that OGC file its brief by no later than Monday, January 16, 2006.⁵

⁵ Documents are "filed" with the Board on the date they are received.

So ordered this 1st day of December 2005.

ENVIRONMENTAL APPEALS BOARD

By: 
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

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

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