



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

RECEIVED
U.S. E.P.A.

2004 MAR 16 AM 10:53

ENVIR. APPEALS BOARD

MAR 16 2004

OFFICE OF
GENERAL COUNSEL

VIA HAND DELIVERY

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1341 G Street, NW, Suite 600
Washington, D.C. 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 case, please find enclosed an original (1) and five (5) copies of the Office of General Counsel's and Region 5's Motion for Extension of Time.

Copies of this Motion have been served upon the Petitioner and Respondent of record in accordance with the enclosed Certificate of Service. Thank you for your assistance in this matter.

Sincerely,

Michael W. Thrift, Attorney
U.S. EPA OGC (2344-A)
(202) 564-5596

Enclosures

20

RECEIVED
U.S. E.P.A.

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

2004 FEB 16 AM 10:53
ENVIR. APPEALS BOARD

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

MOTION FOR EXTENSION OF TIME TO FILE
RESPONSE OF THE OFFICE OF GENERAL COUNSEL
TO THE BOARD'S FEBRUARY 3, 2004, ORDER

1. On February 3, 2004, the United States Environmental Protection Agency ("EPA") Environmental Appeals Board ("EAB," or "Board") filed an Order ("February 3 Order") in the above-captioned matter in which it requested that EPA's Region 5 and/or Office of General Counsel ("OGC") respond to the issue raised in Petitioners' December 19, 2003, amended petition for review, regarding whether EPA, acting through Region V, failed to comply with section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536.¹ Specifically, the

¹Section 7 of the ESA requires all federal agencies to, among other things, ensure in consultation with the Secretary of the 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 or result in the destruction or adverse modification of designated critical habitat of such species. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

Board asked Region 5 and/or OGC to address the following matters:

- (A) Explain whether ESA consultation is required under the Prevention of Significant Deterioration ("PSD") program of the Clean Air Act ("CAA"), and, if so, how such consultation is to be carried out in the context of a delegated state program;
- (B) Provide an explanation for Region 5's assertion that it "lacks discretionary authority" to consult with FWS regarding the subject PSD permit;
- (C) Otherwise respond to the merits of Petitioners' contention that the consultation provisions of the ESA were violated; and
- (D) Include as attachments any documents referenced in responding to the foregoing matters.

February 3 Order, at 12. The Board's Order stated that any response filed by the Region and/or OGC shall be filed no later than February 18, 2004. Id.

2. Subsequently, in response to Respondent Illinois Environmental Protection Agency's ("IEPA's") February 3, 2004, Motion for Additional Extension of Time to File Response ("IEPA Motion"), the Board in a February 4, 2004, Order ("February 4 Order") amended its February 3 Order to extend the deadlines for filing Responses both by IEPA and by OGC/Region 5 to March 22, 2004. February 4 Order at 2-4. The IEPA Motion explained, among other things, that IEPA's attorney had "spent considerable time in acquiring a familiarity with the case and researching several legal issues that are being raised in the Petition[.]" and that the Board's granting of the requested extension "will ensure that the Response will fully address all of the technical and legal issues raised by the Petitioners in their appeal." IEPA Motion at 2.

3. The Board's February 3 Order, as amended, asks OGC and/or Region 5 to address

a legal question of first impression – specifically, whether ESA section 7(a)(2) requirements apply to federal PSD permits issued by delegate states – for which there is no reported ruling by this Board or by any court providing an explicit answer. Moreover, the answer to this legal question may have consequences for other CAA programs, outside of the PSD context. See, e.g., the CAA title V federal operating permits program implemented by EPA and/or delegate states under 40 C.F.R. Part 71.

4. OGC and Region 5 staff, including the undersigned OGC attorney, have diligently researched the applicable law and policy that is relevant to answering the legal question raised in the Board's February 3 Order, and are continuing to develop a position in response that fully reflects the position of EPA. However, the Agency has not yet completed the development of its position, and will need additional time to do so before OGC and/or Region 5 will be able to respond in any way to the Board's February 3 Order. Currently, based on discussions with some of those offices and programs, OGC anticipates that approximately another six weeks will be necessary to allow OGC and/or Region 5 to respond. Accordingly, on behalf of itself and Region 5, OGC hereby requests an extension of time of 45 days in which to file its Response with the Board.

5. The Board's granting of this extension of the filing date will ensure that any Response filed by OGC and/or Region 5 with the Board will be fully informed by the potential ramifications it has for the PSD program and other CAA programs. It will also allow OGC and/or Region 5, if appropriate, to confer with the Parties in the matter regarding the Agency's

position, when adopted, and any possible options for resolving the instant legal question without requiring further consideration by the Board.

6. Prior to the filing of this motion, counsel for OGC contacted counsel for Petitioner Sierra Club and counsel for Respondent IEPA, both of whom indicated that they have no objection to the proposed extension of time.

WHEREFORE, on behalf of itself and Region 5, OGC respectfully requests that the Board grant this Motion for Extension of Time to File Response and thereby allow the filing of the Response to be served with the Board no later than Thursday, May 6, 2004.

DATED: March 16, 2004

Respectfully submitted,



Michael W. Thrift
Attorney
U.S. Environmental Protection Agency
Office of General Counsel (2344-A)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
(202) 564-5596

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Extension of Time in the matter of Indeck-Elwood LLC, PSD Appeal No. 03-04, was placed in the United States Environmental Protection Agency's mail system today in order to be sent by first class mail, postage pre-paid, to the following:

Bruce Nilles
Sierra Club
200 N. Michigan Ave., Suite 505
Chicago, IL 60601

Keith Harley
Chicago Legal Clinic, Inc.
205 W. Monroe, 4th Floor
Chicago, IL 60606

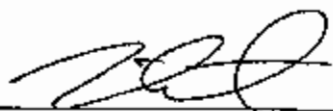
Ann Brewster Weeks
Clean Air Task Force
88 Summer Street, 8th Floor
Boston, MA 02110

James Schneider
Indeck-Elwood LLC
600 N. Buffalo Grove Road
Buffalo Grove, IL 60089

Verena Owen
Lake County Conservation Alliance
421 Ravine Drive
Winthrop Harbor, IL 60096

Robb. H. Layman
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

DATED: March 16, 2004


Michael W. Thrift
U.S. Environmental Protection Agency
Office of General Counsel(2344-A)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460