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BEFORE THE ENVIRONMENTAL APPEALS BOARD 303 JAN 12 AM 9: 47
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. ENVIR. APPEALS BOARD

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

**RESPONSE TO PETITIONERS' MOTION REQUESTING
LEAVE TO FILE AMENDED PETITION FOR REVIEW**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorneys, and files with the ENVIRONMENTAL APPEALS BOARD ("Board") this Response to the Motion Requesting Leave to File an Amended Petition for Review submitted by the Petitioners, SIERRA CLUB, *et al.*, (hereinafter referred to collectively as "Sierra Club") in the above-captioned matter.

Petitioners filed a Petition for Review with the Board on or about November 14, 2003, seeking a review of a Prevention of Significant Deterioration ("PSD") permit determination by the Illinois EPA involving INDECK-ELWOOD, LLC, ("Indeck-Elwood"). The Board received the Petition on November 17, 2003. Thereafter, the Board's clerk sent a copy of the Petition, together with a cover letter detailing instructions for responding to the appeal, to the Illinois EPA on November 20, 2003. The Illinois EPA received the materials on November 26, 2003.

On December 18, 2003, Petitioners filed a Motion Requesting Leave to File an Amended Petition (hereinafter "Motion"), a Memorandum in Support of Motion

(hereinafter "Supporting Memorandum") and an Amended Petition for Review (hereinafter "Amended Petition") with the Board. The Illinois EPA received a copy of the filing on December 22, 2003.

As set forth in their Supporting Memorandum, the Petitioners seek leave to amend their earlier Petition for Review to allow the insertion of a new basis for appeal that derives from the requirements of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. Specifically, Petitioners argue that Region V of the United States Environmental Protection Agency ("U.S. EPA") failed to "consult" with the United States Fish and Wildlife Service regarding the permitting of Indeck's proposed electricity generation facility and its potential effects upon the eastern prairie fringed orchid and leafy prairie clover, both of which are endangered species present in the nearby area of the Midewin National Tallgrass Prairie. According to the Petitioners, U.S. EPA's failure to comply with the federal agency "consultation" requirements of the ESA prior to the issuance of the PSD approval was "unlawful and clearly erroneous." *See, Amended Petition for Review* at pages 38-44, citing to 16 U.S.C. § 1536. Further, the Petitioners contend that the lack of federal agency consultation presents a "significant policy issue" which the Board should, in its discretion, choose to review as part of this PSD appeal. *See, Amended Petition for Review* at pages 44-47.

As a preliminary matter, the responsibilities borne by U.S. EPA under the ESA are generally considered non-delegable and do not bind delegated state or other permit authorities. *See, Home Builders Association of Greater Chicago v. U.S. Corps of Engineers*, 335 F.3d 607, 618 (7th Cir. 2003)(the ESA, by its "express terms," does not apply to "state-level actors"); *In re: Metcalf Energy Center*, PSD Appeal Nos. 01-07 and

01-08, *slip opinion* at page 41 (EAB, August 10, 2001)(noting that U.S. EPA, Region IX, had reserved the responsibilities under the ESA to itself pursuant to the delegation agreement with the Bay Area Air Quality Management District). Accordingly, the substance of the Amended Petition challenges action undertaken by Region V authorities, not the Illinois EPA, with respect to the ESA. Petitioners admit as much in their Supporting Memorandum. *See, Supporting Memorandum* at page 5.

Petitioners contend that the Board should allow its Amended Petition on the grounds that it is both timely and necessary to ensure adherence to the ESA's "affirmative obligation" of federal agency consultation. *See, Supporting Memorandum* at pages 5-6. The Illinois EPA observes that the introduction of a new basis for appeal is plainly outside of the original filing requirement imposed by the Part 124 regulations; it is nonetheless acknowledged that little, if any, prejudice has been caused by the relatively short delay in the amended filing. The Illinois EPA also understands that any potential arguments concerning whether Petitioners have complied with the Board's various procedural requirements may be addressed, as appropriate, in the formal Response.¹ However, in the interest of economy, the Illinois EPA respectfully requests that the Board consider, in its deliberation of the Petitioners' recent filing, a threshold jurisdictional issue. In short, is the Board vested with the requisite jurisdiction to review ESA-related issues in a PSD permit appeal?

To date, the Board has not squarely addressed this issue but, judging from a review of at least one prior ruling, it has clearly been anticipated. In the *Metcalf Energy Center* decision, *supra*, petitioners raised questions about the possible impacts of a PSD

¹ The time for filing a Response to the original Petition for Review was extended by the Board, upon request by the Illinois EPA, to on or before February 5, 2004.

permitting project on nearby listed species. The Board resolved the issue on procedural grounds, finding that the petitioners had not provided specificity to their argument or identified supportable reasons for the Board to undertake review. Although the Board did not reach the issue of jurisdiction, a footnote in the ruling pointedly suggested that ESA-related issues might not enjoy the same jurisdictional treatment as appeals drawn from other statutory schemes. *See, In re: Metcalf Energy Center, slip opinion at page 42, footnote 20.*

In practice, the Board has not hesitated to carve out certain matters that are outside the scope of its review in permit appeals. The Board's approach in any given case is shaped by those regulations that govern the permit and/or permitting conditions and that are the subject of appeal. The Board's Practice Manual generally observes that jurisdiction is principally established "by regulation." *See, The Environmental Appeals Board Practice Manual at page 2 (September 2002).* The narrative discussion contained within U.S. EPA's original rule-making, which formally created the Board in February 1992, implies the same conclusion, referring to the Administrator's delegation of authority to the Board to review penalty and permit appeal cases "arising under" the specified environmental programs.²

In permit appeals brought under the Clean Air Act's PSD program, the Board's review is governed by the PSD regulations. Issues that are "covered" by the PSD regulations are reviewable; issues that fall outside of the purview of the regulations will not warrant the Board's review even if they satisfy the Board's other procedural

² *See, 57 Federal Register 5320, 5320-5321, entitled Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications (February 13, 1992).* The rule-making identified the various types of matters that the Board is permitted to review under both the applicable regulatory and delegated authority from the U.S. EPA Administrator and outlined the specific appellate functions that the Board must serve.

requirements. *See supra, In re: Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999). Stated more broadly, the Board's permit review process for PSD permit appeals "is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality." *Id.* Unless the permitting issue is an "explicit" requirement of, or "directly relates" to, the PSD program, the Board has consistently refused to assume jurisdiction in the matter. *Id. at pages 161-162; see also, In re: Sutter Power Plant*, PSD Appeal Nos. 99-6 and 99-73 at page 6 (EAB, December 2, 1999)(land use planning and emission reduction credits were not governed by PSD regulations); *Metcalf Energy Center, supra* (partial load emissions of certain toxic pollutants held not reviewable under PSD regulations); *In re: Three Mountain Power, LLC*, PSD Appeal No. 01-05, *slip opinion* (EAB, May 30, 2001)(permit condition relating to emission offsets was not covered under PSD program).

The inquiry undertaken by the Board in determining its jurisdiction looks to "how the issue is framed in the petition for review, such as the basis upon which relief is being sought." *See, In re: Knauf Fiber Glass, GmbH, supra* at pages 161-162. In this instance, Petitioners have framed the relevant issue in terms of U.S. EPA's failure to undertake consultation as mandated by the ESA. The ESA is not expressly mentioned in the statutory or regulatory components of the PSD program. In contrast with other federal environmental programs that explicitly incorporate ESA-related provisions in their permitting procedures, the Board has previously observed that the PSD program does not contain any such "comparable" requirements. *See supra, In re: Metcalf Energy Center, slip opinion* at page 42, footnote 20; *cf., 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 National Pollutant Discharge Elimination System permit program expressly required U.S. EPA's adherence to the ESA in permitting storm water discharges).

The ESA is also not implicitly incorporated into the PSD program. In their Amended Petition, Petitioners suggest that statutory references to "soils and vegetation" and the protection of both the "environment" and "areas of natural value" provide adequate authority under the PSD program for U.S. EPA to protect endangered species. *See, Amended Petition*, pages 41-42; 45-46. This argument is misplaced. While the PSD program may require permitting authorities to evaluate soils, vegetation and other natural areas in fulfilling some of the program's substantive requirements, it does not follow that the mission and underlying requirements of the ESA are part of the PSD program. The mere mention of "vegetation" in the Section 52.21 regulations does not convert the PSD program into a source of enabling authority for implementing the ESA in PSD permitting.

It should be noted that the Petitioners' argument is also distinct from that advanced in its earlier Petition for Review, where the Petitioners claim that the Illinois EPA's Best Available Control Technology ("BACT") determination failed to consider the impact to soils and vegetation located in the nearby prairie preserve. *See, Petition for Review* at pages 8-13. The latter argument is, at the very least, arguably linked to the PSD program's substantive BACT requirements; the former is most certainly not, lest every conceivable environmental or public health concern will serve as a pretext for a "more protective BACT." *See, Amended Petition* at page 46; *cf., Metcalf Energy Center, supra* (issue pertaining to toxic pollutants was not framed in terms of possible collateral

impacts associated with the BACT determination and thus was not reviewable under PSD program). For these reasons, no implied nexus should be found to exist between the PSD approval issued by the Illinois EPA under its delegated PSD permitting authority and the failure of U.S. EPA to perform its consultation obligations under ESA.

Other factors may be relevant in evaluating the scope of the Board's jurisdiction. As part of its winnowing process for determining those issues within its jurisdiction, the Board frequently examines whether other avenues of review are available. In many instances, the Board recognizes that issues discovered to be outside the scope of the PSD program are more suitable for review under other regulatory programs. *See, In re: Knaut Fiber Glass, GmbH, supra* at pages 162.

In this instance, the ESA contains a citizen suit provision that authorizes judicial review to enjoin any person alleged to be in violation of the ESA, including the federal agency "consultation" requirements. *See, 16 U.S.C. § 1540(g)*. In addition, the Sierra Club recently mounted a legal challenge against the U.S. EPA in the Seventh Circuit Court of Appeals that relates to the same "consultation" requirements under the ESA. *See, Supporting Memorandum* at page 2, including footnotes 2 and 3. Petitioners do not lack for opportunities to obtain review of alleged noncompliance with the ESA. For this reason, the Board's refusal to accept jurisdiction of the ESA issue will not cause undue hardship and will likewise avoid the unnecessary duplication of review and spent resources over the identical controversy.

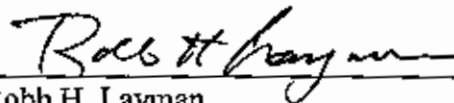
The Illinois EPA recognizes that its role in the context of the Petitioners' ESA claim is limited. Moreover, it is not the Illinois EPA's intent, in this Response, to diminish the importance of the ESA and the achievement of its meaningful goals. As the

principal respondent to this appeal, however, the Illinois EPA questions the need and efficacy for addressing the merits of the ESA issue if the Board, on the basis of past precedent that narrowly construes its jurisdiction in PSD permit appeals, is prepared to decline jurisdiction in this matter.

WHEREFORE, the Illinois EPA respectfully requests that the Board deny the Petitioners' Motion for Leave to File its Amended Petition for the reason that jurisdiction over the ESA claim is lacking or, in the alternative, to award such other relief that is just and appropriate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,



Robb H. Layman
Assistant Counsel
Division of Legal Counsel

Dated: January 9, 2004
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January 2004, I did send, by express mail for next-day delivery, one (1) original and five (5) copies of the following instruments entitled **MOTION FOR LEAVE TO FILE RESPONSE** and **RESPONSE TO PETITIONERS' MOTION REQUESTING FOR LEAVE TO FILE AMENDED PETITION FOR REVIEW** 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 instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

Bertram C. Frey,
Acting Regional Counsel
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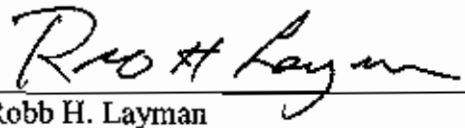
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A copy of the instruments was also faxed to the Clerk of the Board and to the aforementioned persons on this same date.



By: Robb H. Layman
Assistant Counsel
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This filing is submitted on recycled paper.