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<input type="checkbox"/>	Carlos Da Rosa	<input type="checkbox"/>	David Heckler
<input type="checkbox"/>	Annette Duncan	<input type="checkbox"/>	Mildred Johnson
<input checked="" type="checkbox"/>	Eurika Durr	<input type="checkbox"/>	Suzanne Krolkowski
<input type="checkbox"/>	Timothy Epp	<input type="checkbox"/>	Cheryl Mackay
<input type="checkbox"/>		<input type="checkbox"/>	Edward Reich
<input type="checkbox"/>		<input type="checkbox"/>	Patrice Simms
<input type="checkbox"/>		<input type="checkbox"/>	Kathie Stein
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<input type="checkbox"/>		<input type="checkbox"/>	Michelle Wenzel
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<p>REMARKS: <i>Per your request in the Order Lifting Stay and Requesting Additional Briefing on re: Arnold - Edward, LLC P5B 03-04.</i></p>			

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Job number : 204
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End time : Dec-29 04:52pm
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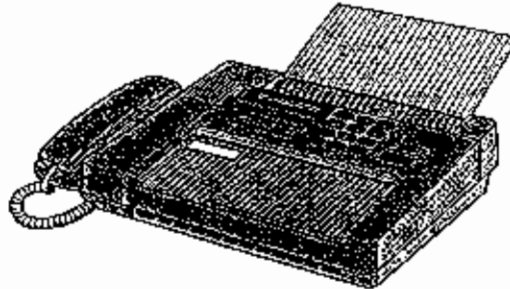
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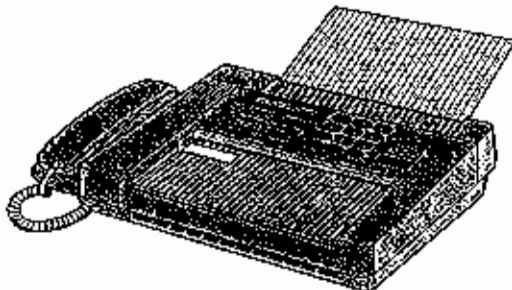


TO: <i>Margery Arnold</i>		FAX #: <i>720) 406-5301</i>			
<input type="checkbox"/>	Nivea Berrios	<input type="checkbox"/>	Scott Fulton	<input type="checkbox"/>	Edward Reich
<input type="checkbox"/>	Carlos Da Rosa	<input type="checkbox"/>	David Heckler	<input type="checkbox"/>	Patrice Simms
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REMARKS: <i>Per your request is the Order Lifting Stay and Requiring Additional Briefing. In re: Indeck - Elwood, LLC PSD 03-04.</i>					



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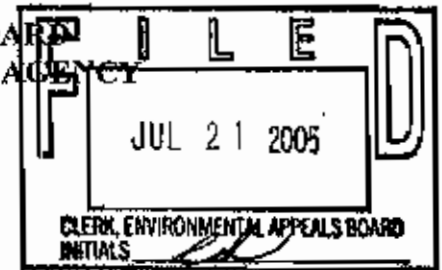
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<input type="checkbox"/>	Carlos Da Rosa	<input type="checkbox"/>	David Heckler	<input type="checkbox"/>	Patrice Simms
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REMARKS: <i>Index PSD 03-04 Order Lifting Stay and Requiring Additional Briefing</i>					

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



In re:)

Indeck-Elwood, L.L.C.)

Permit No. 197035AAJ)
_____)

PSD Appeal No. 03-04

**ORDER LIFTING STAY
AND REQUIRING ADDITIONAL BRIEFING**

On July 20, 2005, the Board convened a Status Conference, by video-link, with the parties to the above-captioned case.¹ Also in attendance were representatives of Indeck, the permit applicant. The objective of the conference, as expressed in the Board's July 6 scheduling order, was to "discuss the current case status and anticipated future actions." Order Scheduling Status Conference at 4. As explained at the Status Conference, the Board originally stayed this case in order to permit Region V to engage in a voluntary consultation with the U.S. Fish and Wildlife Service ("FWS") pursuant to Section 7 of the Endangered Species Act.² *See generally*

¹ The case involves a petition for review filed on November, 17, 2003, and amended on December 19, 2003 ("Amended Petition"), challenging a PSD permit that the Illinois Environmental Protection Agency ("IEPA") issued on October 10, 2003, to Indeck-Elwood, L.L.C. ("Indeck"), for construction of a 660-megawatt coal fired power plant to be located in Elwood, Illinois. The parties to the case are the permitting authority (IEPA) and the Petitioners (the American Lung Association of Metropolitan Chicago, Citizens Against Ruining the Environment, the Clean Air Task Force, Lake County Conservation Alliance, and the Sierra Club). Petitioners are represented in these proceedings by Mr. Bruce Nilles of the Sierra Club.

² Among other things, Section 7 of the ESA requires all federal agencies, in consultation
(continued...)

Order Denying Respondent's Motion for Voluntary Partial Remand and Petitioner's Cross Motion for Complete Remand, and Staying the Board's Decision on the Petition for Review ("Stay Order") (May 20, 2004). Region V initiated the ESA consultation process in response to the Petitioners' challenge to the validity of the IEPA-issued PSD permit based on Region V's allegedly unlawful failure to comply with section 7 of ESA. *See* Stay Order at 1-4. Now that the consultation process has come to a close (*see* Region V Status Report (filed June 17, 2005)), the stay is hereby lifted.³

Additionally, as discussed at the Status Conference, the Board believes that some additional briefing by the parties is prudent at this juncture.⁴ Specifically, the Board is interested in the IEPA's views on, and Petitioners' responses to, the following issues:

²(...continued)

with the Secretary of Interior (in this case acting through the FWS), to ensure that their actions do not jeopardize the continued existence of any endangered or threatened species. *See* 16 U.S.C. § 1536(a)(2).

³ Region V explained in its Status Report that "[r]epresentatives of Region V, [IEPA], FWS, and Indeck-Elwood * * * met and exchanged information during the course of the year on the potential impact of the proposed power plant * * * on four listed species." Status Report at 1. Region V explained also that it had "concluded that the aforementioned species are not likely to be adversely affected by the construction and operation of the proposed [plant]," and that "FWS [had] concurred with Region V's determination" thus concluding the consultation process. *Id.* The agencies' respective determinations, along with a discussion of the supporting analyses, are memorialized in letters attached to Region V's Status Report. *See Id.*

⁴ This conclusion is consistent with our Stay Order, in which we explained that "[t]o the extent * * * the Board believe[s] that additional briefing is necessary once the consultation process has concluded, the Board will issue appropriate orders, as required, at that time." Stay Order at 9 n.17.

(1) whether IEPA intends to take some additional action at this point 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 Petitioners' Amended Petition –

- if so, what action IEPA intends take (for example, will such action include a period of notice and comment to provide the public with an opportunity to offer comments on the ESA-related materials);
- if not, on what legal basis has it been determined 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) any other issue that it believes is essential to our determination of the appropriate procedural course for this case.

Accordingly, the parties are hereby directed to file supplemental briefs according to the following schedule.⁵ No later than August 22, 2005, IEPA shall file a supplemental brief with the Board addressing the issues described above. No later than September 12, 2005, the Petitioners shall file a supplemental brief responding to the issues IEPA raises in its supplemental


⁵ A document is "filed" when it is received by the Board.

brief and addressing any other issue the Petitioners believe the Board must resolve in order to determine an appropriate procedural course for this case.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 7/21/05

By: 
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Lifting Stay and Requiring Additional Briefing** in the matter of **Indeck-Elwood, L.L.C.**, PSD appeal No. 03-04, were sent to the following persons in the manner indicated:

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Dated: 7-21-05


Annette Duncan
Secretary