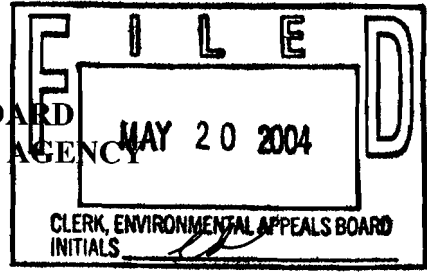


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



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

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

On May 6, 2004, the Illinois Environmental Protection Agency ("IEPA") filed a Motion for Leave to File Motion for Voluntary Partial Remand ("Motion for Leave to File for Remand"), and a Motion for Voluntary Partial Remand ("Partial Remand Motion"), requesting that the Board remand to IEPA the Environmental Species Act ("ESA") consultation issue raised by the Petitioners¹ in the above-captioned case. On May 11, 2004, the Petitioners filed Petitioners' Response to IEPA Motion for Voluntary Partial Remand and Cross Motion for Complete Remand ("Petitioners' Cross Motion"), arguing that a partial remand is inappropriate and that the Board should remand the entire permit to IEPA. For the reasons described below, IEPA's Partial Remand Motion and Petitioners' Cross Motion are both denied. The Board will instead stay its

¹ The petition for review in this case was filed by 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").

consideration of the remaining issues raised in the petition for review pending the outcome of the ESA consultation process.

I. INTRODUCTION

On November, 17, 2003, Petitioners challenged the PSD permit that 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 (“November 17 petition”). By Order dated February 3, 2004 (“February 3 Order”), the Board granted Petitioners’ December 19, 2003 motion for leave to amend their November 17 petition to include a challenge to the validity of the IEPA-issued PSD permit based on U.S. Environmental Protection Agency (“EPA”), Region V’s allegedly unlawful failure to comply with section 7 of the ESA.² In the February 3 Order, the Board specifically requested a response from the EPA’s Office of General Counsel (“OGC”) and Region V regarding the ESA-related arguments in the Amended Petition. *See* February 3 Order at 12. We identified four particular issues for OGC and Region V to address. *Id.* After several extensions of time,³ on May 6, 2004, OGC filed a response on behalf of itself and Region V.

² Among other things, Section 7 of the ESA requires all federal agencies, in consultation with the Secretary of Interior, 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). The Petition also includes nine other issues challenging particular permit conditions included in the October 10 permit. *See generally* Amended Petition.

³ The OGC/Region V response was originally due on February 18, 2004. However, in a February 4, 2004 Order the Board extended that deadline until March 22, 2004. On March 16, 2004, OGC filed an unopposed motion, on behalf of itself and EPA Region V, for an extension of time to file a response to the ESA-related challenges raised in the Petitioners’ December 19, 2003 Amended Petition for Review (“Amended Petition”). The Board granted OGC’s motion on

Response of the Office of General Counsel to the Board's February 3, February 4, and March 19, 2004, Orders ("OGC Response").⁴ Also on May 6, IEPA filed its Partial Remand Motion, indicating that Region V had agreed to "voluntarily recommence the consultation process under the ESA as soon as practicable," and requesting that the Board remand the consultation issue "to facilitate the recommencement of consultation by Region 5 authorities." Partial Remand Motion at ¶¶ 4, 5. The Petitioners oppose a voluntary partial remand, and move for a complete remand. *See* Petitioners' Cross Motion.

II. DISCUSSION

In its Motion for Leave to File for Remand IEPA explains: "Since the date of the Illinois EPA's filing of the Response to the Amended Petition,⁵ the Illinois EPA has requested that Region 5 voluntarily recommence the consultation process under the ESA as soon as practicable.

March 19, 2004, establishing May 6, 2004, as the deadline for OGC/Region V's response.

⁴ The OGC Response does not address the merits of the ESA-related legal issue raised in the Petitioners' Amended Petition for Review. Rather, OGC concludes that, in light of the Region's decision to voluntarily consult with the Fish and Wildlife Service ("FWS"), Region V and OGC need not substantively address the issue. OGC Response at 2-3. We agree that a substantive response from Region V and OGC on the ESA-related legal issue raised in the Amended Petition is not necessary at this point in light of Region V's decision to voluntarily engage in ESA consultation.

⁵ After several extension of time to file, IEPA filed its Response to Amended Petition ("IEPA Response") on March 30, 2004, addressing all of the issues raised in the Amended Petition except for the ESA-related claims. (The Board granted IEPA deadline extensions by Orders dated on December 19, 2003, and February 4, and March 19, 2004). The Board extended the deadline for IEPA to respond to the ESA-related issues in the Amended Petition until May 6, 2004; however, IEPA elected in its March 30, 2004, Response – addressing the other issues raised in the Petition – to defer to Region V and OGC on the ESA-related matters.

The Illinois EPA has received agreement from Region 5 in this regard.” Motion for Leave to File for Remand at ¶ 3. Therefore, IEPA concludes that it is “both necessary and appropriate to seek the EAB’s grant of a voluntary partial remand of the ESA consultation issues. Such approval will ensure that Region 5 is vested with the necessary authority to recommence consultation under the ESA.” *Id.* ¶ 4.

In support of its conclusion that a partial voluntary remand is appropriate, IEPA argues that a “remand of the consultation issue is arguably necessary to facilitate the recommencement of consultation by Region 5,” citing 40 C.F.R. § 124.19(d) as authority that “a Regional Administrator, any time prior to the EAB’s rendering of a decision to review or deny review of a permit decision, may withdraw the permit and prepare a new draft permit ‘addressing the portions so withdrawn.’” Partial Remand Motion at ¶¶ 5, 6. According to IEPA, this provision “clearly recognizes that an issue or particular component of an appeal may be withdrawn and thus separated from the rest of the appeal.” *Id.* at ¶ 6.

While section 124.19(d) does contemplate the voluntary withdrawal of contested permit conditions, it cannot be read as broadly as IEPA suggests. This provision, by its own terms, allows the Regional Administrator to “withdraw the *permit* and *prepare a new permit* under §124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for public hearing as would apply to any other

draft permit subject to the part.” 40 C.F.R. § 124.19(d) (emphasis added).⁶ However, IEPA does not propose, in its Partial Remand Motion, to “withdraw” any part of Indeck’s permit, or for that matter, to “prepare a new permit” for public review and comment. Rather, as far as we can tell, IEPA proposes to leave the permit intact, and requests that the Board “remand” the ESA consultation issue, without disturbing the effectiveness of any element of the existing permit. This, quite simply, is not what section 124.19(d) addresses.⁷ Thus, IEPA’s conclusion that the “plain language of the Part 124 provision clearly recognizes that an issue or particular component of an appeal may be withdrawn and thus segregated from the rest of the appeal,” simply is incorrect in the present context. *See* Partial Remand Motion at ¶ 6. IEPA has not properly invoked section 124.19(d), and it would distort that provision by applying it in this situation.

The inapplicability of section 124.19(d) is not necessarily fatal to a request for voluntary remand. While section 124.19(d) provides for a Region’s withdrawal of a permit, or permit condition, as a matter of right, the Board, at its discretion, has granted voluntary remands independent of Section 124.19(d). *See In re Hub Partners, L.P.*, 7 E.A.D. 561, 563, n.14 (EAB

⁶ As EPA explained, this provision was intended to “clarify that the Regional Administrator may withdraw and reissue any NPDES, UIC, or PSD permit (or a contested condition thereof) prior to a decision of the EAB to grant or deny review under § 124.19(c). * * * This proposal, once finalized, will serve the public interest by shortening the time for appeals that may be brought by interested citizens, allowing for the more timely resolution of these appeals, with a shorter stay of conditions.” 61 Fed. Reg. 65267, 65281 (Dec. 11, 1996).

⁷ As illustrated in *In re Washington Aqueduct Treatment Plant* (NPDES Appeal No. 03-07 (EAB Dec. 15, 2003)) and *In re Government of the District of Columbia* (NPDES Appeal No. 00-04 & 01-09, slip op. at 40 (EAB Feb. 20, 2002)), section 124.19(d) applies in cases where the Region elects to retract a permit, or part of a permit, amend the permit, and reissue the permit through the ordinary PSD public participation process.

1998) (referencing a voluntary remand for additional consideration of, and response to, comments already in the record); *In re GMC Delco Remy*, 7 E.A.D. 136, 154, 167 (EAB 1997).

A voluntary remand is generally available where the permitting authority has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision before reissuing the permit. Here, it appears that IEPA does not request a “remand” of the permit itself, or of any particular permit condition, but rather requests remand of the Petitioners’ ESA consultation argument. That is, Region V requests “a voluntary remand of the consultation issue” (Partial Remand Motion at ¶ 5), but proposes that the entire permit remain before the Board, and that the Board may complete its evaluation of the record and issue a decision as to every challenged permit condition, even before Region V has completed the ESA consultation process. This approach is facially flawed.

IEPA’s construct seemingly presupposes that none of the permit conditions will change as a result of the ESA-consultation process.⁸ While it is *conceivable* that the consultation process will not lead to changes to the permit, we may not presume this to be the case in our disposition of the current petition for review. Indeed, the very purpose of the consultation process is to identify and prevent potential adverse impacts on protected species, by modifying agency actions to minimize such impact.⁹ The relevant language of the ESA states:

⁸ Interestingly, IEPA acknowledges in its Partial Remand Motion that “certain components” of the permit may change. *See infra* note 15.

⁹ We reference here the substantive requirements of ESA § 7 merely to illuminate the nature of the process into which Region V has voluntarily entered. This discussion in no way

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior],¹⁰ insure that any action authorized, funded, or carried out by such agency (hereinafter . . . “agency action”)¹¹ is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary. . . to be critical, unless such agency has been granted an exemption for such action.

16 U.S.C. § 1536(a)(2) & (3).¹²

Assuming, as seems appropriate, that changes to the permit could occur, it would be premature for the Board to rule on any element of the current permit that might be affected.¹³

reflects any determination by the Board regarding the applicability of the ESA in the PSD permitting context.

¹⁰ With respect to terrestrial species the Secretary of the Interior acts through the U.S. Fish & Wildlife Service to implement the requirements of this section of the ESA.

¹¹ The term “agency action” has been broadly defined both by the Secretary of the Interior, in regulations implementing the ESA, and by subsequent case law. *See* 50 C.F.R. § 402.02 (defining action to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. . . . [including] permits.”); *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 696, 974 (9th Cir. 2003).

¹² In fulfilling the requirements of paragraph 7 of the ESA, Federal agencies are required to use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2).

¹³ Presumably, any necessary changes would be reflected in a new permit (or new permit conditions) that would be subject to Board review upon issuance.

Were we to complete our examination of the record prior to completion of the ESA consultation process, and reach a decision on the remaining nine issues in the petition for review, in effect, we would be exercising our appellate jurisdiction before the permitting authority has finished evaluating the underlying permit decision. This is simply inconsistent with the Board's role in the PSD permit process.¹⁴ Because it is impossible at this juncture for us to predict which permit conditions, if any, might change as a result of the ESA consultation process, we cannot appropriately issue a decision on any of the contested permit conditions.¹⁵ Clearly, therefore, the Board's final examination of the record in this case, and any decision on the petition for review, must await the outcome of the ESA consultation process.

On the other hand, we view the Petitioners' argument that we must remand the entire permit to IEPA during the pendency of the ESA-consultation process as unduly restrictive. *See* Petitioners' Cross Motion at 11. Presumably, if Region V and FWS determine during the

¹⁴ The Board reviews a "PSD final permit decision," after it "has been issued under [40 C.F.R.] § 124.15." 40 C.F.R. § 124.19(a). The function of a remand is to effectuate the withdrawal or return of a final decision, or some portion thereof. Interestingly, because IEPA's request for a remand fails to identify any element of its decision as being withdrawn or returned, it begins to look more like a request for dismissal of the ESA-related issue, and less like a motion for remand. We note in this regard, that Petitioners are free to withdraw any issues they have raised in their appeal; however, as yet, they have not done so.

¹⁵ The Petitioners argue that "the nine remaining issues in the Indeck appeal are directly related to the adequacy of Indeck's permit, and whether the permit does or does not protect Midewin's endangered species," suggesting that Petitioners believe changes to these contested permit conditions may be necessary. Petitioners' Cross Motion at 10. Similarly, IEPA states that "components of the permit may or may not change as a result of the recommended consultation process." Partial Remand Motion at ¶ 7. Assuming that changes do occur, they will presumably be implemented under EPA's PSD authority (e.g., as modifications to the BACT analysis to account for collateral environmental impacts on protected species).

consultation process that changes to the permit are appropriate to avoid harming protected species, then IEPA will withdraw and reissue any affected permit condition(s) pursuant to section 124.19(d). If the consultation process does not result in substantive changes to the permit, however, IEPA need not withdraw any portion of the permit, and the Board may lift its stay, complete its examination of the record, and issue a decision on the current petition for review. Thus, while the Board will stay its final evaluation of the current petition for review until it is clear whether the consultation process will result in substantive changes to the PSD permit, we are not at this point compelled to remand the permit to IEPA in its entirety, nor would doing so be in the interests of judicial efficiency.¹⁶

III. CONCLUSION


For the reasons explained above, IEPA's Partial Remand Motion and Petitioners' Cross Motion for Complete Remand are DENIED. Additionally, the Board's consideration of the remaining nine issues in the Amended Petition is stayed pending the outcome of the Region V/FWS ESA consultation process.¹⁷

¹⁶ Since the Board has already made considerable headway in its examination of the record, we anticipate that a decision on the permit could issue relatively quickly once the outcome of the consultation process is known.

¹⁷ In light of the Board's decision to deny Petitioners' motion for complete remand, we are extending the Petitioners' deadline for filing their reply until June 1, 2004. *See* Petitioners' Cross Motion at 12 n.6. Although we have stayed our consideration of the petition for review, in order to facilitate an expedited decision upon conclusion of the ESA consultation process, we believe there is significant benefit to having the Petitioners file their reply to the arguments in the March 30, 2004 IEPA Response. To the extent that the parties and/or the Board believe that additional briefing is necessary once the consultation process has concluded, the Board will

So ordered this 20th day of May, 2004.¹⁸

ENVIRONMENTAL APPEALS BOARD

By: 
Ronald L. McCallum
Environmental Appeals Judge

issues appropriate orders, as required, at that time.

¹⁸ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing 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, PSD appeal No. 03-04, were sent to the following persons in the manner indicated:

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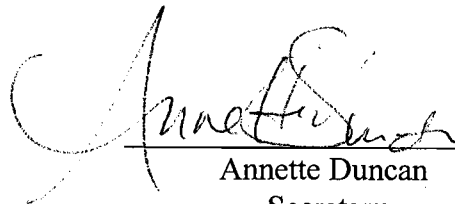
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