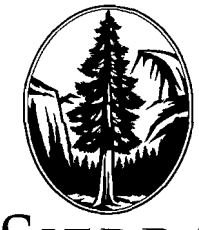

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April 13, 2006

VIA HAND DELIVERY

Ms. Eurika Durr, Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W., Suite 600
Washington, DC 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 PETITIONERS' BRIEF RESPONDING TO EPA OFFICE OF AIR AND RADIATION BRIEF AND REQUEST FOR LEAVE TO FILE AMENDED PETITION SHOULD THE BOARD NOT REMAND THE PERMIT.

Copies of this filing have been served on Respondent Illinois Environmental Protection Agency, U.S. EPA's Office of General Counsel and Region 5, and Indeck-Elwood, LLC.

Sincerely,

Bruce Nilles

Bruce Nilles, Attorney
Sierra Club

Enc:

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

IN THE MATTER OF INDECK-ELWOOD LLC	))	PSD APPEAL NO: 03-04

PETITIONERS' BRIEF RESPONDING TO EPA OFFICE OF AIR AND RADIATION BRIEF AND REQUEST FOR LEAVE TO FILE AMENDED PETITION SHOULD THE BOARD NOT REMAND THE PERMIT

Petitioners submit this brief in response to the March 17, 2006 brief of EPA's Office of Air and Radiation (*OAR Brief*). Specifically, Petitioners respond to OAR's arguments that 1) Petitioners' ESA claim is moot, and 2) ESA and PSD permitting may proceed in parallel. The ESA claims cannot be dismissed on mootness grounds because there remain unresolved allegations of procedural and substantive ESA violations. The requirements in the CAA and the PSD program framework contained in Part 124 require that ESA consultation on a PSD permit application must be integrated with the permit review, and completed before a draft PSD permit is issued. Finally, Petitioners renew their request that the Board remand the permit or, in the alternative, grant Petitioners leave to file an amended petition. For ease of comparison, this brief's headings track the headings in OAR's brief.

I. Background

On October 10, 2003, the same day IEPA issued the Indeck PSD permit, Region V rejected a request from the U.S. Fish and Wildlife Service (FWS) to engage in an ESA consultation for the PSD permit by asserting that "EPA consultation ... was not appropriate because EPA lacks discretionary authority." Letter from Cheryl Newton, Acting Air & Radiation Director, Region V, EPA to John Rogner, Field Supervisor, FWS

(Oct. 10, 2003) (hereinafter *FWS Letter*) (*Amended Petition*, Ex. P). Not surprisingly, IEPA relied on Region V's legal conclusion to reject public comments urging the agency to ensure protection of endangered species. *Responsiveness Summary for Public Questions and Comments on the Construction Permit Application for Indeck-Elwood LLC* (Oct. 2003), *Amended Petition*, Ex. B., #142 ("The Illinois EPA also contacted the United States Fish and Wildlife Service. Subsequent discussions revealed that consultation was not required at the federal level."). Petitioners responded with the instant appeal alleging, *inter alia*, that Region V failed to comply with its ESA consultation obligations prior to the Indeck permit being issued. *Amended Petition* 36.

In response, the Board in 2004 asked EPA's Region V and OGC to answer four questions, including these two: "(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) regarding the subject PSD permit." *Board Order* (Feb. 3. 2004). Region V and OGC then adroitly ducked both of these questions for the remainder of 2004 and all of 2005. During that time, Region V and the FWS did undertake a process that EPA has repeatedly referred to as a "voluntary" ESA consultation.[1] This multi-agency, multi-month process generated a significant volume of new information. *See Petitioners Nov. 17, 2005 Brief* 2 (the process generated more than 300 pages of technical reports, two computer discs with modeling data and many additional pages of correspondence amongst the agencies).

[1] *See e.g. Brief of EPA Office of General Counsel: (1) Responding to Question of Whether the Board Needs to Consider ESA Issues; and (2) In the Alternative, Requesting Extension of Time to Address Substantive Issues if Necessary*, 2 (Jan. 17, 2006) ("The ESA issues are now moot because EPA Region V *voluntarily* completed an informal consultation with the United States Fish and Wildlife Service (FWS).") (emphasis added).

OAR now takes the position that the public has no right to review and comment on this material and that the material should not be added to the *Indeck* administrative record. *OAR Brief* 5.

During the permitting process IEPA brushed off concerns about the threat Indeck's coal plant posed to the Midewin and endangered species: "No evidence has been supplied that indicates any effects, much less significant effects, would occur. In Illinois EPA's judgment, no such impacts should be anticipated as a result of the emissions of the plant." *Responsiveness Summary,* #56. In response to questions about potential acid deposition on the Midewin's soils and endangered plant species IEPA baldly asserted "[a]cid rain is generally a 'transport' phenomenon. ... Accordingly, a localized contribution to acid rain should not be anticipated from the proposed plant." *Responsiveness Summary*, #53.

The "voluntary" consultation process, however, generated significant new information about the impacts of Indeck's expected air emissions on endangered species, suggesting strongly that IEPA's assertions that there would be no threat of harm to endangered species from Indeck's expected emissions were clearly erroneous. *See Petitioners' Brief Responding to Board's July 21, 2005 Order and IEPA's Supplemental Brief*, 3-4, (Nov. 17, 2005) (identifying significant findings from the "consultation" including, (1) that twice as many endangered species are at risk as previously identified, (2) that rain falling on the Midewin and its endangered plants could have a pH as low as 2.6, (3) that background levels of nitrogen deposition, even without Indeck's additional pollution have shown to cause deleterious impacts to plant communities, and (4) that

Indeck's hydrogen fluoride emissions are not insignificant for the Hine's Emerald dragonfly).

On March 17, 2006, after receipt of yet a third order from this Board asking for the agency's views on ESA applicability, EPA, this time through the Office of Air and Radiation, finally answered: "EPA's view is that section 7(a)(2) of the ESA applies to issuance of federal PSD permits under the CAA." *OAR Brief* 5. On the next page of its brief OAR explained that "section 165 arguably provides EPA limited discretion to consider and address impacts on listed species that may result from issuance of a federal PSD permit." *OAR Brief* 6.

The Endangered Species Act

Under the ESA, "Congress intended endangered species to be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. 153, 174 (1978). Section 7(a)(2) directs each federal agency to consult with the Secretary to ensure that any action which it authorizes, funds, or carries out " 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 ...." 16 U.S.C. § 1536(a)(2). "Covered ESA Federal actions include the granting of permits." *In re Dos Republicas Resources Co., Inc.* 6 E.A.D. 643, 649 (EAB, 1996); 40 C.F.R. § 402.02 ("Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States ... Examples include ... (c) the granting of licenses [or] permits ....").

In addition to prohibiting jeopardy (*i.e.* pushing a species into extinction), the ESA also directs agencies to use their authorities to conserve endangered species. "It is

further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c)(1). As this Board has explained, "[c]onservation activities seek to bring an endangered species back to an improved condition, further from extinction." *Dos Republicos*, 6 E.A.D. at 673; 16 U.S.C. § 1532(3) (defining, *inter alia*, "conservation").

II. Petitioners' ESA Claims are Not Moot

OAR asserts that Plaintiffs' ESA claims are moot "by virtue of EPA's conclusion of informal consultation with the U.S. Fish and Wildlife Service (FWS)" and urges the Board not to reach any of the ESA questions set forth in its orders in deciding this appeal. *OAR Brief* 1.

Petitioners' ESA issues are not moot. The "voluntary" consultation process that EPA undertook post-hoc was not in accordance with the ESA's procedural and substantive consultation requirements. *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1128-29 (9th Cir. 1998) ("Procedural violations of the ESA are not necessarily mooted by a finding by the FWS that a substantive violation of the ESA has not occurred. The process ... itself offers valuable protections against the *risk* of a substantive violation and ensures that environmental concerns will be properly factored into the decisionmaking process as intended by Congress.") (*emphasis in original*).

Petitioners have identified several procedural and substantive ESA defects with Region V's "voluntary" consultation process.[2] For example, the ESA regulations provide

[2] In their Amended Petition Petitioners allege that the Region failed to consult as required under section 7(a)(2). OAR now agrees with that position. However, OAR also asserts that the Region V "voluntary" consultation process is legally adequate. Petitioners disagree and have identified various procedural and substantive ESA violations. Consequently, Petitioners are seeking permission to amend their petition

that "[d]uring informal consultation, the Service may suggest modifications to the action that the Federal agency and an applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat." 50 C.F.R. § 402.13(b). In the *Indeck* proceeding, the FWS stated it did not put forward additional mitigation measures for Region V to consider because the permit had already been issued. *FWS Letter* 2. Curtailing the ability of the FWS to propose mitigation measures prior to the conclusion of a consultation process is patently unlawful. ESA Section 7(d) prohibits EPA from making an "irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives." 16 U.S.C. § 1536(d); *see* 50 C.F.R. § 402.09. In this case if FWS's biological opinion "had been rendered before the [permit was issued], the FWS would have had more flexibility to make, and the [action agency] to implement, suggested modifications to the proposed [permit]." *Houston*, 146 F.3d at 1128-29. This constitutes a straightforward section 7(d) unlawful commitment of resources. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

The integrity of the consultation process is also at issue because it was conducted *after* the permit was issued. This presents a serious risk that the Region and FWS did not approach the issue with an open mind, but "rather with a view to defending a decision he or she already has made." *In re Atochem North America,* 3 E.A.D. 498, 499 (Adm'r 1991). This concern is magnified by FWS's statements about the inadequacy of the process:

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should the Board not grant a remand in response to this latest round of briefing. For the purposes of this brief Petitioners simply identifies the ESA violations they have identified, recognizing that they have not yet requested approval and received approval to amend their petition with these new claims.

> [T]his section 7 evaluation was unusual in that the PSD permit had already been issued, and consequently, both agencies were asked to accelerate the consultation process. To exacerbate this issue, this was our first experience with evaluating the impacts to listed species from deposition of air pollutants. The learning curve, we believe, was steep for us, as well as your staff. Under ideal circumstances, the process would have been more deliberative, information exchange more complete, and options for further ensuring that adverse effects are avoided may have been considered. Therefore, we view both the process and the analysis as part of a learning experience and subject to future modification.

FWS Letter 2[3].

Further, EPA's insistence that the consultation was "voluntary" raises additional questions about the seriousness with which the Region embraced the consultation process, despite the Agency's new-found recognition that section 7(a)(2) of the ESA applies to PSD permit reviews. The term "voluntary" is defined as "undertaken of one's own accord," and "acting or done without compulsion or obligation." *The Random House College Dictionary* (1980). EPA's assertion, on the one hand, that the ESA consultation is required, yet on the other hand that it is "voluntary" defies logic and the clear meaning of the word voluntary. EPA's continued assertions about the "voluntary" nature of the consultation, in this context, strongly suggests that this Board should require an additional, "mandatory" consultation process.

Petitioners' claims also are not moot because significant questions remain about the modeling inputs for two pollutants. The agencies conducting the ESA modeling runs to assess air deposition impacts appear to have used emission rates for sulfuric acid mist and hydrogen fluoride lower than required in the Indeck permit. Petitioners uncovered this discrepancy, raised it in their November 17, 2005 filing, and neither IEPA nor OAR have responded. *See Petitioners November 17, 2006 Brief* 11-12 & Ex. 1. Either the

[3] The letter does include the obligatory disclaimer: "Despite these shortcomings, we stand by the process and the conclusions made during the consultation." *FWS Letter* 2.

permit limits are in error, in which case the permit must be modified to comply with BACT requirements, or the modelers used emission rates that are well below the maximum permitted levels and do not reflect the worst-case scenario. EPA must, at a minimum, be asked to explain the wide discrepancy between the permitted emission rates and modeled emission rates used in the ESA analysis.

The agencies' conclusion that the four nearby endangered species are "not likely to be adversely affected" by Indeck's proposed coal plant is, moreover, not supported by the facts in this case, particularly for the leafy prairie clover. According to the FWS this plant is already vulnerable to existing levels of nitrogen deposition and "even small increases could have incremental adverse effects." *FWS Letter* 2. Similarly, there are risks associated with additional sulfuric acid mist deposition burning the plants leaves.

Finally, the ESA analysis did not consider the most recent development: IEPA's proposal to issue Indeck a water discharge permit that authorizes Indeck to use recycled waste water containing high levels of radium and other hazardous air pollutants as non-contact cooling water.[4] Region V has not reinitiated consultation regarding this issue.

[4] On April 28, 2005, IEPA provided public notice on a proposed NPDES permit for Indeck. (The public notice/fact sheet and the draft NPDES permit can be viewed on the IEPA website: www.epa.state.il.us by scrolling down to Public Notices). Indeck proposes to use wastewater from the Joliet Eastside Sewage Treatment Plant ("Eastside") as non-contact cooling water. The cooling water will be stored in an unenclosed cooling tower prior to discharge. IEPA estimates roughly 75% of the volume of the wastewater will be lost through evaporation into the ambient air. Not mentioned in the proposed Indeck PSD permit, but known to occur in the wastewater are copper, suspended solids, ammonia nitrogen, fluoride, cyanide and chlorine compounds. (Eastside operates under NPDES Permit No. IL0022519. Complete information regarding this permit can be accessed through Envirofacts). In an August 15, 2005 filing before the Illinois Pollution Control Board, Joliet disclosed that the Eastside's wastewater contains radioactive elements including radium 226 and radium 228, both regulated HAPs. These radium levels routinely exceed the existing Illinois water quality standard (1 pico-curie per liter) and the Safe Drinking Water Act standard (5 pico-curies per liter). (This document is available at the Illinois Pollution Control Board website: www.ipcb.state.il.us by scrolling to Rulemakings. The complete docket of the radium rulemaking before the Pollution Control Board is available under Case No. R2004-021, "In the Matter of Revisions to Radium Water Quality Standards: Proposed New 35 Ill. Adm. Code 302.307 and Amendments to 35 Ill. Adm. Code 302.207 and 302.525." Joliet's public comment in which it discloses the levels of radium in Eastside's wastewater is listed under Case Activity for the date 8/15/2005).

Because of these multiple ESA-related deficiencies and their ongoing nature, Petitioners' ESA claims cannot be mooted. *Cf. Ash Grove*, 7 E.A.D. at 429 (Board agreed petitioners section 7(a)(2) claim was moot because consultation did occur *and* petitioners do not allege any substantive deficiencies in the permit terms or conditions regarding endangered or threatened species) (*emphasis added*).

III. Petitioners Do Not Disagree With OAR's Assertion That Consultation Applies to the Issuance of PSD Permits and Delegated States Acting on EPA's Behalf

While agreeing with EPA's general premise that ESA consultation applies to and is required by PSD permit reviews, Petitioners strongly disagree with OAR's assertion that the ESA consultation conducted by Region V for the Indeck PSD permit satisfies the minimum requirements of the ESA section 7(a)(2). *See* Section II *supra.*

IV. Petitioners Do Not Disagree With OAR's Assertion That Where Delegated States Issue PSD Permits, EPA Retains Responsibility for ESA Compliance

V. Petitioners Do Not Agree That ESA and PSD Processes May Proceed In Parallel: Rather, ESA Consultation Must Be Completed and Consultation Materials Included In the PSD Record Prior to the Issuance of a Draft PSD Permit

The ESA and the PSD program both offer significant guidance, and arguably a clear mandate, for the deadline by which a PSD permit consultation must be completed. It is also apparent that an ESA consultation process can not lawfully proceed entirely separately from the PSD permitting process as OAR asserts. *OAR Brief* 8.

The use of Eastside's wastewater is not addressed in the record for the Indeck PSD permit and the impact of these pollutants was not addressed in the ESA consultation. The PSD permit does not identify any pollutants or controls relating to the operation of the cooling tower. The evaporative release will contain radioactive elements and other contaminants, including three hazardous air pollutants, radionuclides, cyanide compounds and chlorine. This uncontrolled, radioactive cloud will be released every day for the life of the facility. It will serve as a long-term exposure pathway for human receptors and ecological receptors.

A. Consultation should ordinarily conclude before issuance of a draft permit and commencement of a public comment period.

OAR acknowledges that ESA section 7(d) prohibits an irreversible and irretrievable commitment of resources (OAR Brief 9), and that "generally" this requires that ESA consultation must occur prior to issuance of a final permit. OAR Brief 9. OAR offers one class of exceptions to this rule--cases in which "additional EPA approvals may be necessary before a project may proceed." OAR Brief 9 n.5. The *Indeck* facts fit neither scenario: first, the *Indeck* ESA consultation occurred after the PSD permit was issued, and, second, OAR has not identified any additional EPA approvals Indeck must obtain prior to commencing construction. OAR instead offers only an opinion that the *Indeck* situation does not violate section 7(d) because Petitioners filed a timely appeal and, so as a technical matter the Indeck permit is not a final agency action – therefore Region V is not yet foreclosed from establishing additional measures to protect endangered species. This entirely circular argument boils down to this: There is no Section 7(d) violation because Petitioners filed the instant appeal alleging, *inter alia*, a section 7(d) violation. OAR does not and cannot offer any reasoned legal support for such a position.

OAR's assertion that ESA consultation may in some instances occur after a permit is issued also conflicts with the agency's legal statements in numerous other proceedings. For example, following Petitioners filing the *Indeck* appeal, Region V has undertaken at least four additional ESA consultations *prior to* issuing four additional PSD permits. In at least one of these proceedings the agency expressly stated that consultation must be completed before a permit can be issued. *See Petitioners' November 17, 2005 Brief* at 13-15 and attachments (*e.g.* Ex. 2 at 15, *Draft Statement of Basis for Grand*

Casino Mille Lac PSD Permit, (July 15, 2005), "The EPA cannot issue a permit to construct 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."). Other EPA regions expressly prohibit delegated states from issuing PSD permits until the ESA consultation process is complete.[5] The mandates in section 7(a)(2) and 7(d) can be read in harmony, but only if consultation is completed prior to issuance of a final PSD permit. The statute admits of no exception.

B. The CAA and PSD regulations strongly indicate that an ESA consultation must be completed prior to issuance of a draft PSD permit and the ESA materials must be included in a draft PSD permit record.

The CAA and EPA's PSD regulations provide a strong argument that an ESA consultation must be completed prior to a draft PSD permit being issued. OAR makes several sweeping statements that no such authority exists, but then fails to address specific provisions of the Act and the PSD regulations. *OAR Brief* 10.

There are at least three relevant sections of the CAA and PSD regulations: sections 160(5), 165(a)(2) and 40 C.F.R. Pt. 124. None of these provisions explicitly references the ESA; however, when read together, these provisions strongly suggest that the ESA and PSD permit proceedings must be coordinated closely. Additionally, these

[5] *See e.g.* Attachments to *Petitioners' Response to IEPA Motion for Voluntary Remand and Cross Motion for Complete Remand*, Petitioners Ex. AB, 68 Fed. Reg. 25,875 (May 14, 2003), *Agreement for Partial Delegation of the Prevention of Significant Deterioration (PSD) Program By The United States Environmental Protection Agency, Region 10 to the State of Washington Department of Ecology*, 10 (The State "shall . . . refrain from issuing a final permit until EPA has notified [the State] that EPA has satisfied its obligations . . . under the ESA."); and Petitioners' Ex. AC; *Agreement for Partial Delegation of Federal Prevention of Significant Deterioration (PSD) Program by the United States Environmental Protection Agency, Region 9 to the Nevada Division of Environmental Protection*, 3, ¶H (eff. Mar. 3, 2003) ("In order to assist EPA in carrying out its responsibilities under Section 7 of the [ESA] . . . [Nevada DEP] shall . . . [r]efrain from issuing a final PSD permit until EPA has notified NDEP that EPA has satisfied its obligations, if any, under the ESA").

provisions make clear that in order to comport with the strict public participation and disclosure requirements contained in Part 124, an ESA consultation must be completed and included in the administrative record *before* a draft PSD permit is issued.

Section 160(5) states that the purpose of the PSD program is "to assure that any decision to permit increased air pollution in any area to which this section applies is made only *after* careful consideration of all the consequences of such a decision and *after* adequate procedural opportunities for informed public participation in the decisionmaking process." 42 U.S.C. § 7470(5) (emphasis added). Section 165(a)(2) builds on the section 160(5) public participation and disclosure requirements by requiring that a permitting authority provide the public with a public hearing at which it can offer testimony on a wide range of matters:

> No major emitting facility . . . may be constructed in any area to which this part applies unless—... (2) ... a public hearing has been held with opportunity for interested persons ... to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations ....

42 U.S.C. § 7475(a)(2). Read together these statutory provisions require that before a public hearing is held for a proposed PSD source that a permitting agency make available to the public a reasonable degree of information about the impacts associated with a proposed PSD project, including any significant environmental issues.

The PSD regulations governing the administrative record requirements for draft and final permits offers even stronger evidence that an ESA consultation must be completed before issuance of a PSD permit. For example, 40 C.F.R. § 124.8 requires that a permitting authority prepare a "fact sheet" for "every draft permit which the Director finds is the subject of wide-spread public interest or raises major issues." Such a fact

sheet "shall briefly set forth the principal facts and the significant factual, legal methodological and policy questions considered in preparing the draft permit." *Id.* A draft permit must be based on the administrative record and the administrative record must include a fact sheet and all documents cited in the fact sheet. 40 C.F.R. § 124.9(b)(3-4). Accordingly, for each controversial source a permitting agency must prepare a fact sheet that describes the major factual, policy and legal issues associated with the proposed PSD permit and include that fact sheet in the record prior to issuing a draft permit. *Id.* Consequently, when a proposed PSD permitting decision triggers ESA issues, it can readily be handled in the same manner as any other "significant factual, legal, methodological and policy" issue is routinely handled. *Id.* OAR does not offer a counter view or explain why it would be offensive to the requirements of either the ESA or the PSD requirements to accommodate both programs in such a manner. In short, when the PSD regulations governing the requirements for fact sheets and the contents of administrative records are considered together with the requirements of sections 160(5) and 165(a)(2), it becomes clear that an ESA consultation for a PSD permit must be completed prior to the issuance of a draft permit for public comment.

IEPA did prepare a fact sheet for the Indeck permit prior to issuing the draft permit. *See Amended Petition*, Ex. C. The fact sheet did not set forth, however, "the principal facts" and the "significant factual, legal methodological and policy questions" that should have been considered in preparing the draft permit. § 124.8. IEPA's fact sheet did not mention the 19,000-acre Midewin National Tallgrass Prairie or any endangered species. The fact sheet did not mention that the ESA applied to the Indeck permit or even that there might be some controversy about the application of the ESA in

this proceeding. In fact, in the *Indeck* proceeding neither IEPA nor Region V provided *any* public information about the presence of the adjacent Midewin or any of the four endangered species at risk from Indeck's proposed emissions until it responded to the smattering of comments it received on these issues in its response to comments that was issued the same day as the final permit. No information about these resources could be located in the permit application, the draft permit, the fact sheet, the testimony of the IEPA officials at the public hearing and the hearing notice. *See Amended Petition* 12.

Before IEPA closed the comment period, therefore, the public lacked the basic information necessary to submit comprehensive written or oral testimony regarding the protection of the endangered species, the threat posed by Indeck's pollution, alternatives thereto, control technology requirements and other appropriate considerations because basic information about the surrounding land use and the presence of endangered species was absent from the public record. Section 165(a)(2). It was not until *after* the permit was issued, that information came to light about the number and identify of the endangered species that may be impacted and the types of air pollution posing the greatest risk to nearby endangered species. It is axiomatic that there can be no "informed public participation" if information about the potential impacts of a proposed project is not generated and made available until after the close the public comment period. *See Amicus Brief of Openlands* 5 (Nov. 9, 2005) ("[T]he agency failed to provide an opportunity for informed public participation in the decision making process."). For all these reasons the Indeck ESA materials must be made available for public review and comment at the same time the permit is remanded.

C. ESA consultation materials must be included in the administrative record for a PSD permit.

Based on Petitioners' argument *supra*, all material resulting from an ESA consultation, regardless of how detailed, must be included in a PSD permit record. OAR has offered no rationale that would override the public's interest in having the ESA material readily accessible in the PSD permit administrative record.

VI. The ESA Materials Must Be Added To The Permit Record Once The Permit is Remanded[6]

The remedy to address the clearly erroneous legal and factual errors in the Indeck record is not, as OAR avers, for the Board to take notice of select documents generated during the ESA analysis. *OAR Brief* 13. EPA cannot supplement the administrative record with select ESA consultation materials after the issuance of the final permit in an attempt to defeat Petitioners' section 7(a)(2) claim. The regulations expressly provide for supplementation of the administrative record with new material *before* a final permit is issued. Citing to § 124.17(b) and § 124.18(b)(4) the Board has approved the inclusion of information into the administrative record after the public comment period closed, but before a final permit is issued. *See e.g.*, *American Soda, LLP*, 9 E.A.D. at 299 (it was not error for the Region to include in the administrative record a report it used, in part, to respond to comments it received). This narrow window for supplementing a record should not prejudice a prospective petitioner because "the appeals process afford[s] [a] petitioner the opportunity to question the validity of the document included after the comment period closed." *Id.* And, while evidence of consultation activity may be used to determine whether the relief Petitioners seek has been obtained (*i.e.*, the claim mooted), such materials cannot be used to determine whether EPA originally violated

[6] Section VI has no parallel provisions in OAR's brief.

section 7(a)(2) when the Indeck permit was issued. *Southern Utah*, 110 F.3d at 729; *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153, 1166-67 (4th Cir. 1977) (considering documents filed after the district court order for purposes of determining mootness, but not for purposes of ascertaining the merits). The only permissible method for including the ESA materials into the Indeck record is first remanding the permit and then reopening the record. The same remedy is necessary to ensure the soils and vegetation information generated during the ESA process is included in the record.

The Board has previously rejected a permitting agency's request to add new information into the record after the issuance of the permit as a way to rehabilitate a procedural error when the response to comments was also inadequate. *In re Hawaii Elec. Light Co.*, 8 E.A.D. 66, 102 (EAB 1998) (rejecting the agency's request to take notice of new monitoring data that had not been subject to public review and scrutiny in order to confirm its earlier submission). "[W]e believe that it would be especially inappropriate for us to rely on new data under these circumstances where we have already determined that DOH's responses to comments were not adequate." *Id.* IEPA's Indeck's response to comments suffers from an even greater inadequacy—the responses asserting no ESA applicability and no impacts on endangered species--are flatly wrong. Here too, it would be "especially inappropriate" for the Board to take notice of select ESA materials absent a permit remand and a new public comment process. *Id.*.

VII. Conclusion

Petitioners urge the Board to remand the permit, order the ESA materials and the soils and vegetation information be included in the PSD permit record, and afford the public the opportunity to review and comment on a complete record, including the ESA materials and potential mitigation measures. Should the Board not remand the permit, Petitioners request leave to file an amended petition within thirty days of the Board's order to add additional claims arising from the new information and new developments. These claims would likely include the adequacy of the "voluntary" consultation process conducted to date, Region V's compliance with ESA section 7(d), the obligation of IEPA to include the new ESA consultation materials in the administrative record, and the public's role in reviewing and commenting on the new ESA consultation materials.

Respectfully submitted,

Bruce Nilles

Bruce Nilles
On behalf of Petitioners,
Sierra Club
214 N. Henry Street, Suite 203
Madison, WI 53703
608.257.4994
608.257.3513
Bruce.nilles@sierraclub.org

Dated this 13th day of April 2006

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

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

CERTIFICATE OF SERVICE

On April 13, 2006, I served a copy of PETITIONERS' BRIEF RESPONDING TO EPA OFFICE OF AIR AND RADIATION BRIEF AND REQUEST FOR LEAVE TO FILE AMENDED PETITION SHOULD THE BOARD NOT REMAND THE PERMIT on the following parties via United States first class mail, postage pre-paid:

Bertram C. Frey, Acting Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region V
77 West Jackson Boulevard
Chicago, IL 60604-3507

Steve Rothblatt, Director
Air and Radiation Division
U.S. Environmental Protection Agency, Region V
77 West Jackson Boulevard
Chicago, IL 60604-3507

Brian L. Dostar
Air and Radiation Law Office
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington DC 20460

Robb Layman, Attorney
Illinois Environmental Protection Agency
1021 Grand Avenue, East
PO Box 19276
Springfield, IL 62794

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

Bruce Nilles
Attorney for Sierra Club