

RECEIVED
U.S. E.P.A.

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

NOV 19 1 21 PM '03
ENVIR. APPEALS BOARD

IN THE MATTER OF:)
INDECK-BLWOOD LLC)
)
)

APPEAL NUMBER: PSD 03-04
PERMIT NUMBER: 197035AAJ

MEMORANDUM IN SUPPORT OF MOTION TO FILE AMENDED PETITION

Petitioners, American Lung Association of Metropolitan Chicago, Citizens Against Ruining the Environment (Lockport), Clean Air Task Force, Lake County Conservation Alliance and Sierra Club, submit this memorandum in support of their motion respectfully requesting leave to file an amended petition. Both the November 14th petition and the amended petition document U.S. Environmental Protection Agency (US EPA) Region 5's decision to decline the request it received from the U.S. Fish and Wildlife Service (FWS) to consult regarding endangered species concerns in accordance with Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. The amended petition, however, unlike the first petition, urges Board review of this issue.

The FWS requested that Region 5 consult prior to approving Indeck's coal-burning power plant to ensure that its approval "do[es] not jeopardize the continued existence of a federally listed species." Letter from John Rogner, FWS Field Supervisor to Thomas Skinner, US EPA Region 5 Adm'r 1 (Sep. 30, 2003) (Rogner Ltr. attached as Ex. G¹). Region 5 declined to accept the FWS's request on the basis that the agency lacked the "discretionary authority" to protect endangered species.

¹ Exhibits labeled A - O refer to the exhibits attached to the November 14th petition. Exhibits P - R are attached to the amended petition.

Letter from Cheryl Newton, Acting Air & Radiation Div. Dir., Region 5 to John Rogner, FWS, 1 (Oct. 10, 2003) (Newton Ltr. attached as Ex. P).

Petitioners raised Region 5's consultation obligations in their November 14th petition but did not explicitly request Board review. Instead, on December 8, 2003, Petitioner Sierra Club filed a petition for review of Region 5's lack of discretionary authority determination in the U.S. Court of Appeals for the Seventh Circuit.² See *Petition For Review, Sierra Club v. US EPA* (Case # 03-4174) (attached as Ex. Q).

Now, upon further consideration, Petitioners respectfully request that the Board accept their amended petition and address US EPA's ESA obligations within the narrow context of a state-delegated PSD permit program.³ Because no responsive pleadings have yet been filed Petitioners' request should not be rejected as untimely. US EPA's ESA consultation obligations is precisely the type of "important policy consideration" that the Board should in its discretion review. 40 C.F.R. § 124.19(a)(2). Board resolution of this matter may, moreover, address Region 5's decision to decline consultation in light of the approach Region IX employs – a process of regularly consulting with the FWS prior to issuance of state-delegated PSD permits. See *In re Metcalf Energy Center*, PSD Appeal No. 01-7 & 01-8 (EAB, Aug. 10, 2001) (describing how Region IX fulfills its ESA obligations).

² In this same action Sierra Club is also challenging the failure of US EPA to consult prior to issuance of the part of Indeck's construction permit addressing hazardous air pollutants, otherwise known as the case-by-case maximum achievable control technology determination. See 42 U.S.C. § 7412(g).

³ In requesting EAB review Petitioners are not conceding that the Board is the sole venue for challenging US EPA's failure to consult. Petitioners would, however, request a stay of the Court of Appeals proceeding and withhold commencing any further legal action should the Region agree to a remand of the entire construction permit while it consults with the FWS, strengthen Indeck's permit to address FWS' concerns, and provides additional public participation opportunities to consider and comment on any resulting permit changes.

I. FACTS

The record is replete with evidence that Indeck's proposed power plant threatens two endangered species. On June 19, 2003 the US Forest Service Supervisor for the Midewin National Tallgrass Prairie wrote that Indeck's proposed power plant "could cause direct effects to sensitive habitat types at the Midewin" and "[s]ome of the affected habitats are occupied by Federal threatened, endangered, or sensitive species." Letter from Logan Lee, Prairie Supervisor, US Forest Service to Dan Merriman, Hearing Officer, IEPA, 2 (June 19, 2003) (attached as Ex. F).

On September 30, 2003 the FWS sent a letter to Region 5 urging the agency to consult before Indeck received its permit. In its letter, the FWS identified two endangered species at risk from Indeck's proposal, the eastern prairie fringed orchid (*Platanthera leucophaea*) and the leafy prairie clover (*Dalea foliosa*), and summarized the Region's ESA obligations regarding these species:

Section 7 of the Act prohibits Federal agencies from making irreversible or irretrievable commitments of resources prior to completion of the consultation process. Therefore, to avoid a possible violation of section 7 of the Act, we recommend that the Federal agencies not undertake or authorize any actions related to this project until this consultation is completed. We recommend that the U.S. Environmental Protection Agency ensure that the Illinois Environmental Protection Agency does not issue permits until after this consultation is completed.

Rogner Ltr., Ex. G at 2.

On October 10, 2003 Region 5 responded, acknowledging that "the eastern prairie fringed orchid and leafy prairie clover are present in the area surrounding the Indeck Elwood site at the Midewin National Tallgrass Prairie," but declined to consult.⁴

⁴ Region 5's letter indicates that the FWS may have gone along with Region 5's determination that US EPA lacks discretionary authority and therefore consultation is unnecessary. The FWS did, however, determine that Indeck's proposal may affect two endangered species. It would be arbitrary and capricious,

Newton Ltr., Ex. P at 1 (“EPA consultation * * * was not appropriate because EPA lacks discretionary authority.”) That same day Indeck received its construction permit.

II. PETITIONERS’ MOTION IS TIMELY

The Board in the matter of *Phelps Dodge* did not reject an ESA claim that was raised eleven months after a petition for review was first filed. *See In re Phelps Dodge Corporation Verde Valley Ranch Development*, NPDES Appeal No. 01-07 (EAB, May 21, 2002), 10 E.A.D. ___. The Board should not reject Petitioners’ ESA claim that comes ten months earlier than in *Phelps Dodge* as untimely either. In *Phelps Dodge*, the petitioner filed its petition for review challenging a stormwater permit with the Board on February 5, 2001. *Id.* at 15. Region IX, the permitting agency, and Phelps Dodge, the permittee, filed responses on April 25, 2001. *Id.* On January 17, 2002, one week before the scheduled oral argument and eleven months after filing its original petition, the petitioner filed a “Notice of Filing Supplemental Authorities,” raising for the first time the claim that Region IX failed to comply with its ESA consultation obligations *Id.* at 86. The Board rejected the argument that the ESA claim was untimely:

While it is true that this issue was reasonably ascertainable at the time the [petitioner] filed its petition and thus could have been concluded therein, we decline to use the lack of timeliness rationale to dispose of the issue at this juncture.

Id. at 87.

Petitioners herein seek Board review of their ESA claim one month after filing their original petition. Unlike in *Phelps Dodge*, Petitioners did raise US EPA’s

therefore, for Region 5 to forgo consultation unless the FWS formally provides Region 5 with a written concurrence of “no adverse effect.” *Natural Res. Defense Council v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998) (“[R]egardless of the NMFS [the FWS’s counterpart for protection of marine species] position that formal consultation is ‘unnecessary,’ the [action agency] had a clear legal duty to at least request a formal consultation. *See* 40 C.F.R. §§ 402.13, 402.14.”).

consultation obligations in the proceedings below, (see SC/ALA Comments, Ex. D at 16: "USEPA must still meet its Section 7 obligations"), and their November 14th petition. See *Petition For Review*, at Sec. B.3 (Nov. 14, 2003). Moreover, unlike in *Phelps Dodge* where briefing was completed by the time the ESA claim was first raised, here no responsive pleadings have yet been filed. Indeed, based on communications with IEPA's counsel that agency is seeking a 45-day extension to file its first responsive pleading, *i.e.* some date beyond February 1, 2004. More important still, Petitioners' ESA claim is directed at Region 5, not IEPA. See *In re Metcalf Energy Center* at 41 ("At the outset, we note that EPA may not delegate its responsibility to ensure that the [permitting agency's] PSD permitting actions comply with the ESA."). The Board has not yet set a briefing schedule for Region 5. For these reasons the Board should not reject Petitioners' ESA claim as untimely.

III. THE BOARD SHOULD REVIEW THE REGION'S CONSULTATION OBLIGATIONS EVEN IF IT FINDS PETITIONERS' MOTION UNTIMELY

Even if the Board rejects Petitioners' amended petition as untimely, the Board should still review issue Region 5's ESA obligations because "the duty of consultation is an affirmative obligation under federal law, and it is not the obligation of local citizens * * * to point out this statutory mandate to the EPA." *Phelps Dodge* at 89 (internal citations omitted). The Ninth Circuit has explained what the "affirmative obligation" of consultation means to a federal agency such as US EPA:

Before initiating any agency action in an area that contains threatened or endangered species or a critical habitat, the agency must (1) make an independent determination of whether its action "may affect" a protected species or habitat, or (2) initiate a formal consultation with the agency that has jurisdiction over the species. * * * If an agency determines that an action "may affect" critical species or habitats, formal consultation is mandated. 50 C.F.R. § 402.14(a).

Formal consultation is excused only where (1) an agency determines that its action is unlikely to adversely affect the protected species or habitat, and (2) the [FWS] concurs with that determination. 50 C.F.R. § 402.14(b).

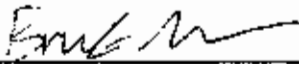
Natural Res. Defense Council v. Houston, 146 F.3d 1118, 1126 (9th Cir. 1998) (emphasis in original.). "Agency action" includes the issuance of "permits." 50 C.F.R. § 402.02

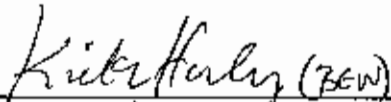
Based on the evidence put into the record by the FWS, the US Forest Service, IDNR and Petitioners, Indeck's proposed power plant most certainly is located in an area that contains endangered species and the issuance of Indeck's permit "may affect" such protected species. 50 C.F.R. § 402.14(a). "Thus, all the prerequisites for [i]nitiation of consultation are in place." *Phelps Dodge* at 88.

CONCLUSION

Region IX is demonstrating how the agency can meet its ESA obligations within the context of a delegated PSD permitting program. The Board has described how Region IX consults with the FWS and if the proposed action potentially jeopardizes an endangered species Region IX works with the delegated permitting agency to include in the final permit conditions that protect the endangered species. *Metcalf* at 7 & 41 n.19. We urge the Board to grant Petitioners' motion for leave to file their amended petition, to remand Indeck's PSD permit, and to require Region 5 to follow Region IX's lead.

Respectfully submitted, this 18th day of December, 2003


Bruce Nilles, Sierra Club
200 N. Michigan Ave, Suite 505
Chicago, IL 60601
312-251-1511
312-251-1780 (fax)


Keith Harley⁵, Chicago Legal Clinic, Inc.
205 W. Monroe, 4th Fl.
Chicago, IL 60606
312-726-2938
312-726-5206 (fax)

⁵ Attorney for CARE/Lockport and American Lung Association of Metropolitan Chicago.

Verena Owen (SEN)

Verena Owen
Lake County Conservation Alliance
421 Ravine Drive
Winthrop Harbor, IL 60096
847-872-1707
847-872-1759 (fax)

Ann B. Weeks (SEN)

Ann Brewster Weeks
Clean Air Task Force
88 Summer Street, 8th Flr.
Boston, MA 02110
617-292-0234
617-292-4933 (fax)