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ENVIR. APPEALS BOARD

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April 3, 2006

VIA FAX (202-233-0121)
& U.S. MAIL

Ms. Eurika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Ariel Rios Building
Environmental Appeals Board
1200 Pennsylvania Ave, NW
Washington, DC 20460-0001

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 an original (1) and five (5) copies of the PETITIONERS' MOTION FOR LEAVE TO FILE RESPONSE BRIEF.

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, Attorney
Sierra Club

Enc:

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

2006 APR -5 AM 8:33
ENVIR. APPEALS BOARD

IN THE MATTER OF:)	APPEAL NO.: PSD 03-04
INDECK-ELWOOD LLC)	PERMIT NO.: 197035AAJ
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MOTION FOR LEAVE TO FILE RESPONSE BRIEF

Petitioners hereby move for leave to file a brief responding to the Brief of the EPA Office of Air and Radiation, filed in this matter on March 17, 2006 ("OAR Br."). Petitioners request leave to file a response brief by Friday, April 14, 2006. Petitioners have contacted Illinois Environmental Protection Agency counsel Robb Layman about this request and he indicated that the agency does not support this motion.

On February 3, 2004 the Board asked the Office of General Counsel and Region 5 to answer a simple question: Does the ESA apply to the PSD program, and if so, how should it be integrated into the PSD permitting process? EPA delayed answering this question for two years. On March 17, 2006, the Office of Air and Radiation filed a brief stating that the ESA does apply to the PSD program and offered its interpretation for how the Board should require the ESA and the PSD program be integrated.

Petitioners request leave to respond to OAR's brief, for five reasons. First, EPA has now flip-flopped on the applicability of the ESA. For two years EPA has maintained that ESA compliance is not required because the federal PSD program affords the agency no discretion to condition an air permit to protect endangered species. In its recent filing OAR concedes that PSD permits are subject to ESA compliance and that, in fact, "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 Br. 6. Petitioners request a limited period to research its options and to notify the Board how it plans to respond to this significant development, including whether Petitioners will seek to file an amended petition or pursue an alternate course of action.

Second, Petitioners request the opportunity to respond to OAR’s position that there is no public right to review and comment on the hundreds of pages of documents generated during the ESA consultation process. OAR asserts that “[n]othing in the structure or history of the CAA or ESA suggests that Congress intended for the CAA to establish an opportunity for public comment on an ESA consultation that is not provided under the ESA itself.” OAR Br. 10. In a response Petitioners will explain how OAR’s position is, in this case, inconsistent with the purposes of the PSD program. *See e.g.* CAA Section 160(2) & (5). There has never been an adequate procedural opportunity for informed public participation in the Indeck decisionmaking process. CAA Section 160(5). Specifically, the public has never been afforded the opportunity to review and comment on the information EPA generated during the consultation process, including the expected acid rain and nitrogen deposition impacts Indeck’s coal plant may have on the Midewin and the endangered species. *Id.* Moreover, this soil and vegetation information was required to be made available to the public and part of the administrative record for the draft permit. 40 C.F.R. §124.9.

Third, Petitioners will respond to OAR’s views regarding how it proposes the agency will administer the ESA within the PSD program. OAR’s proposal is particularly troubling because it seeks to allow ESA consultation to occur after a final PSD permit is

issued. OAR Br. 9. This approach would effectively eliminate any opportunity for meaningful public involvement in reviewing information that, as in this case, goes to the heart of the PSD permitting decision.

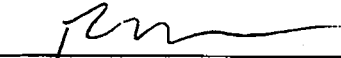
Fourth, Petitioners will respond to OAR's suggestion that under section 165(a)(2) that ESA issues are not "other appropriate considerations" or otherwise covered by Section 165(a)(2). OAR Br. 9. This is a new agency position that Petitioners have never had an opportunity to respond to.

Finally, Petitioners will respond to OAR's statements about the public's responsibility to submit comments on a woefully deficient soils and vegetation analysis. OAR Brief 10-11. OAR's response confuses the obligation of the permitting agency to conduct a complete soils and vegetation analysis in the first instance, which did not occur in this case until the post-permit issuance consultation process, with the public's obligation to raise its concerns about such an analysis during the public comment period. The public cannot be expected to critique a soils and vegetation analysis that lacks basic information about the soils and vegetation adjacent to a proposed source.

For these reasons, Petitioners request leave for a limited period to submit a brief responding to the OAR brief.

Respectfully submitted this 3rd day of April, 2006,

By:



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On behalf of Petitioners

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
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_____)

CERTIFICATE OF SERVICE

On April 3, 2006, I served a copy of PETITIONERS' MOTION FOR LEAVE TO FILE RESPONSE BRIEF on the following parties via United States first class mail, postage pre-paid:

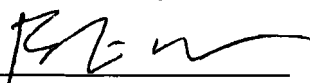
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