ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
DIVISION OF LEGAL COUNSEL
1021 NORTH GRAND AVENUE EAST, POST OFFICE BOX 19276
SPRINGFIELD, ILLINOIS 62794-9276
TELEPHONE (217) 782-5544 FACSIMILE (217) 782-9807

RECEIVED
CLERK'S OFFICE
NOV 03 2005 11:36
ENVIR. APPEALS BOARD

DATE: November 3, 2005

FACSIMILE TRANSMITTAL SHEET

PLEASE DELIVER THE FOLLOWING PAGES TO:

PARTY'S NAME: Eunika Durr, Clerk of the EAB

FIRM/COMPANY NAME: Environmental Appeals Board

FACSIMILE NO: 202 - 233 - 0121

TELEPHONE NO: 202 - 233 - 0122

FROM: Robb Layman

RE: Indeck - Elwood, LLC (PSD Appeal No. 03-04)

TOTAL NUMBER OF PAGES (INCLUDING THIS PAGE): 12

HARD COPY WILL X WILL NOT ____ FOLLOW

IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL (217) 782-5544

COMMENTS: Motion and Response to the City of Chicago's prior Motion for Leave to File an Amicus Curiae Brief. If there are any concerns or questions, please call me.

IMPORTANT – THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADRESSED; AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THE MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT READING, DISSEMINATING, DISTRIBUTING, OR COPYING THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S POSTAL SERVICE.

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
PERMIT NUMBER 197035AAJ	)	
	)	

NOTICE

To:

Eurika Durr,
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W. Suite 600
Washington, D.C. 20005

Bertram C. Frey,
Acting Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency,
Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604-3507

Bruce Nilles
Sierra Club
200 N. Michigan Avenue, Suite 505
Chicago, Illinois 60601

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

Keith Harley
Chicago Legal Clinic, Inc.
205 W. Monroe, 4th Floor
Chicago, Illinois 60606

Verena Owen
Lake County Conservation Alliance
421 Ravine Drive
Winthrop Harbor, Illinois 60096

Ann Brewster Weeks
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, Massachusetts 02108

Ronald D. Jolly
City of Chicago
Department of Law
30 North LaSalle Street, Suite 900
Chicago, Illinois 60602-2580

PLEASE TAKE NOTICE that I have today filed with the Clerk of the Environmental Appeals Board an original (1) and five (5) copies of a **MOTION FOR LEAVE TO FILE INSTANTER** and **RESPONSE IN OPPOSITION TO CITY OF CHICAGO'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF** of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, a copy of which is herewith served upon you.

Respectfully submitted by,

Robb H. Layman

Robb H. Layman
Assistant Counsel
Illinois EPA

Dated: November 2, 2005
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217)524-9137

RECEIVED
U.S. E.P.A.

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

2005 NOV 3 AM 11: 36
ENVIR. APPEALS BOARD

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

MOTION FOR LEAVE TO FILE INSTANTER

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorneys, and moves the ENVIRONMENTAL APPEALS BOARD ("Board") for leave to file instanter the accompanying Illinois EPA's Response in Opposition to the CITY OF CHICAGO'S ("City") Motion for Leave to File *Amicus Curiae* Brief in the above-captioned cause. In support thereof, the Illinois EPA states the following:.

1. The City filed its Motion for Leave to File *Amicus Curiae* Brief (hereinafter "Motion") and its accompanying *Amicus Curiae* Brief (hereinafter "Brief") with the Board on or after October 7, 2005.

2. The Illinois EPA was served by mail with a copy of the Motion and the Brief on October 11, 2005.

3. The Board's Practice Manual, 2004 edition, governs general motion practice before the Board. The Manual recognizes that no formal regulatory standards exist for motions in permit proceedings before the Board, however, some basic guidelines are outlined "as a matter of practice." *See,* Practice Manual at Section III (D)(7)(b), pages 37-38 (June 2004 edition). In this instance, one of those basic guidelines provides

that "any response to a motion *should* be filed within 15 days after service of the motion to ensure consideration (emphasis added)." *Id.* at pages 38-39. This provision of the Practice Manual clearly suggests that the 15-day filing date for response motions is directory, not mandatory.

4. Due to press of other legal matters, including the recent filing of the Illinois EPA's Supplemental Brief in this cause and extensive involvement in other recent Title V permitting disputes, the undersigned attorney was unable to consider the City's Motion and Brief until earlier this week. As a result, the Illinois EPA's filing of a formal response to the City's Motion exceeds the Practice Manual's recommended 15-day filing date by approximately a week.

5. At the time of this filing, the undersigned attorney had not been informed that the Board had yet ruled on the City's Motion, thus acceptance of the Illinois EPA's Response in Opposition to the City's Motion will not pose any hardship or prejudice to others.

WHEREFORE, the Illinois EPA respectfully requests that the Board grant this Motion for Leave to File Instanter, thereby accepting the Illinois EPA's Response in Opposition to the City of Chicago's Motion as timely filed.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Robb H. Layman
Assistant Counsel
Illinois EPA

Dated: November 2, 2005
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217)524-9137

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
PERMIT NUMBER 197035AAJ	)	

RESPONSE IN OPPOSITION TO CITY OF CHICAGO'S
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorneys, and moves the ENVIRONMENTAL APPEALS BOARD ("Board") to deny the Motion for Leave to File *Amicus Curiae* Brief (i.e., "Motion") sought by the CITY OF CHICAGO (hereinafter "City") in the above-captioned proceeding. In support thereof, the Illinois EPA states the following:

1. The City filed its Motion and accompanying *Amicus Curiae* Brief (hereinafter "Brief") with the Board on or after October 7, 2005. The Illinois EPA was served by mail with a copy of the Motion and the Brief on October 11, 2005.

2. In its Motion, the City seeks leave from the Board to file its Brief pursuant to 40 C.F.R. §124.19 and Section III.D.7 of the Board's Practice Manual. *See, Motion* at page 1. Instead of explaining the basis for either purported source of authority, the City cites to a previous Board order, wherein the Board lifted the stay on the proceedings and directed both the Illinois EPA and the Petitioners, *Sierra Club et al.*, ("Sierra Club") to provide supplemental briefs relating to the Endangered Species Act, 16 U.S.C. §1536, and "any other issue" germane to the procedural context of this case. *See, In re: Indeck-Elwood, LLC*, PSD Appeal No. 03-04, Order Lifting Stay and Requiring

Additional Briefing (hereinafter "Order")(EAB, July 21, 2005). In conjunction with that Order, the City states that it "would like to offer its unique perspective [sic] this issue." *See. Motion* at page 1 and 2. The Motion also alleges that the proposed project by INDECK-ELWOOD, LLC, ("Indeck"), is a matter of "major concern" to the City.

3. The City's participation in this proceeding as through an amicus brief is not available as a matter of right. The procedural provision cited by the City does indeed contemplate the participation of a non-party in a permit proceeding, but it does so in an altogether different context. Section 124.19(c) of the Board's procedural regulations provides that the Board shall allow for any "interested person" to file an amicus brief following any grant of a petition for review. *See,* 40 C.F.R. §124.19(c). In this instance, the Board has yet to decide whether to deny or grant review of the pending petition.

4. Nothing in the Part 124 regulations or the Board's Practice Manual[1] authorizes the City's intrusion into this stage of the Board's review, which is focused primarily upon acquiring information from a permitting authority so as to enable the Board to respond to issues raised in the initial petition. This phase of the Board's review is the first stage of the Board's two-part review envisioned by the Part 124 regulations. *See,* Practice Manual at Section III (D)(1), page 30 (June 2004 edition). Even if the Board, in its discretion, would chose to allow *amicus* brief filings prior to its ruling on the merits of a petition, no circumstances would warrant it here. Apart from evincing generalized concerns, the City does not articulate any reason in its Motion as to why the Board should now consider briefings from non-parties to the case.

[1] The latter source of authority is presumably cited because it relates to general motion practice before the Board. The Manual notes that that no regulatory standards exist for motions in permit proceedings, however, some basic guidelines have been recognized by the Board "as a matter of practice." *See.* Practice Manual at Section III (D)(7)(b), pages 37-38 (June 2004 edition). However, the Board's Practice Manual neither expressly nor implicitly supports the City's attempt to be heard in this proceeding at this time.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November 2005, I did send, by facsimile and by express mail for next-day delivery, one (1) original and five (5) copies of the following instrument entitled **MOTION FOR LEAVE TO FILE INSTANTER** and **RESPONSE IN OPPOSITION TO CITY OF CHICAGO'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF** to:

Eurika Durr,
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street N.W. Suite 600
Washington, D.C. 20005

and a true and correct copy of the same foregoing instrument, by First Class Mail with postage thereon fully paid and directed into the possession of the United States Postal Service, to:

Bertram C. Frey,
Acting Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency,
Region 5
Chicago, Illinois 60604-3507

Ann Brewster Weeks
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, Massachusetts 02108

Bruce Nilles
Sierra Club
200 N. Michigan Avenue, Suite 505
Chicago, Illinois 60601

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

Keith Harley
Chicago Legal Clinic, Inc.
205 W. Monroe, 4th Floor
Chicago, Illinois 60606

Verena Owen
Lake County Conservation Alliance
421 Ravine Drive
Winthrop Harbor, Illinois 60096

Ronald D. Jolly
City of Chicago
Department of Law
30 North LaSalle Street, Suite 900
Chicago, Illinois 60602-2580

Robb H. Layman
Assistant Counsel
Illinois EPA