

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

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ENVIR. APPEALS BOARD

In re: _____)
Indeck-Elwood, LLC _____)
Permit No. 197035AAJ _____)
_____)

PSD Appeal No. 03-04

BRIEF OF EPA OFFICE OF AIR AND RADIATION

The Office of Air and Radiation of the Environmental Protection Agency (hereinafter EPA) submits this brief in accordance with the Environmental Appeals Board's (EAB or Board) December 1, 2005 and January 27, 2006 orders regarding Endangered Species Act (ESA) issues in the above-captioned matter. As explained in the prior brief submitted by the EPA Office of General Counsel (OGC), the ESA claim raised in this appeal is now moot by virtue of EPA's conclusion of informal consultation with the U.S. Fish and Wildlife Service (FWS). The EAB thus has no need to, and should not, reach any of the ESA questions set forth in its orders in deciding this appeal. However, because the EAB has requested that EPA answer those questions to assist the EAB's consideration of this matter, EPA now submits the following views regarding the ESA issues.

EPA's view is that section 7(a)(2) of the ESA applies to the issuance of a federal Prevention of Significant Deterioration (PSD) permit by EPA or a state¹ delegated to act on EPA's behalf. Accordingly, some form of consultation under the ESA should be

¹ In some situations, EPA has delegated federal PSD permitting to local air pollution control districts rather than to a state. For simplicity, the term state is used throughout this brief to refer to any entity to which an EPA Region has delegated authority to issue federal PSD permits on behalf of EPA.

conducted in cases such as this where a delegated state issues a PSD permit in accordance with the Clean Air Act (CAA) that may affect a species listed under the ESA.

Consultation on such a permit should ordinarily be completed prior to issuance of the final permit. Consultation need not be completed prior to issuance of the draft PSD permit and subject to the public comment requirements of the PSD program. Although the Illinois Environmental Protection Agency (IEPA) issued the permit in this case to Indeck-Elwood, LLC (Indeck) before EPA Region V completed the consultation, Region V has ensured compliance with ESA requirements and IEPA has satisfied related CAA obligations.

I. Background

In 2003, IEPA issued a PSD permit to Indeck to construct a 660-megawatt coal-fired electric generating facility. The Petitioners argued in their Amended Petition for Review that EPA failed to comply with the ESA because it did not consult with the FWS regarding potential impacts of the permit on listed species. While this appeal was pending, Region V initiated an informal ESA consultation with the FWS, analyzed the possible effects of the permit on listed species, and concluded that issuance of the permit was not likely to adversely affect listed species or their designated critical habit. The FWS concurred in writing with this finding, thus concluding the ESA consultation. *See* Status Report (July 17, 2005) and Attachments. IEPA then determined that the ESA consultation process, including the information compiled through that process, did not raise any substantial new questions under the CAA concerning the permit issued to Indeck. IEPA Supplemental Brief at 7. As a result, IEPA declined to supplement the

record for its PSD permit decision or take additional public comment on the permit or information generated in the ESA consultation process.

Nevertheless, the Petitioners requested that the Board remand the Indeck permit to IEPA to supplement the record and provide an additional opportunity for public comment on information developed through the ESA consultation process. Petitioners' Supplemental Response Brief at 7. The Board then requested that OGC address the following questions regarding the interplay between the ESA and the CAA PSD permitting requirements: (1) whether the Board needs to reach the ESA issues to resolve the appeal of the Indeck permit; (2) whether ESA consultation is required in conjunction with the issuance of a PSD permit and, if so, how that process should be conducted; and (3) whether the information typically generated during an ESA consultation would be required to be included in a PSD permit application even if ESA consultation was not required.

OGC responded to the Board's order on January 17, 2005, explaining that the Board did not need to reach the ESA issues to resolve this appeal because these issues became moot when Region V completed consultation with the FWS, thus addressing the claim raised by Petitioners. OGC also pointed out that the ESA consultation process is inherently intra-governmental and does not provide for public comment on that process. Thus, OGC noted that the public comment and record issues raised by Petitioners regarding the information compiled in the ESA consultation arise solely under the CAA and EPA's PSD regulations and do not relate to ESA applicability or compliance. Because there is no need to address the ESA issues to resolve this appeal, OGC did not directly answer the Board's second and third questions. Without resolving whether it

needed to address the ESA issues, the Board reaffirmed its request for a response to those questions. EPA now sets forth below its response to those questions below, but notes that many parts of the Board's questions are difficult to answer in the abstract and might be subject to different answers in specific situations.

II. The Endangered Species Act Issues In This Case Are Moot

EPA maintains its position that the ESA issues in this case became moot when Region V completed informal consultation with the FWS. Region V's determination that issuance of the PSD permit to Indeck was not likely to adversely affect listed species, with the written concurrence of the FWS, concluded the informal consultation and fully satisfied the requirements of ESA section 7(a)(2). 50 C.F.R. § 402.13; 50 C.F.R. § 402.14(b). Because Region V completed the very process that Petitioners alleged EPA was required to undertake pursuant to the ESA, their ESA claim is moot, and there is no need for the Board to address any issues regarding ESA applicability. The Board has previously recognized that the issue of applicability of ESA consultation requirements is moot once consultation is completed, even when the consultation is completed after the permitting authority has issued the permit. *See In re: Ash Grove Cement Company*, 7 E.A.D. 387, 429 (EAB 1997) (involving challenge to a RCRA permit).

Furthermore, EPA continues to view the public comment and record issues before the Board to be matters arising solely under the CAA. Although the ESA consultation process generated the documents Petitioners now seek to rely upon to challenge the PSD permit, the questions regarding whether those documents need to be a part of the record for the PSD permit or subject to public comment do not arise under the ESA. These issues are present because new documents that are alleged to have relevance to the PSD

permit proceeding were prepared after IEPA issued the final permit. The same issues would exist regardless of whether the documents were developed as part of an ESA consultation or through some other means. Because consultation under the ESA is inherently intra-governmental and does not require public involvement, Petitioners cannot establish a right to comment on the consultation materials under the ESA. Furthermore, Petitioners have not established any grounds under the CAA and EPA's PSD regulations for remanding the PSD permit to supplement the record or accept additional public comment.

III. Section 7(a)(2) Of The ESA Applies To The Issuance Of PSD Permits By EPA And Delegated States Acting On EPA's Behalf, But Consultation Is Not Always Required

Although the question is moot for purposes of this case, EPA's view is that section 7(a)(2) of the ESA applies to issuance of federal PSD permits under the CAA. Section 7(a)(2) requires federal agencies to insure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of federally-listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat of such species. 16 U.S.C. § 1536(a)(2). Under the ESA implementing regulations, the term "action" is defined to include, among other things, the granting of permits. 50 C.F.R. § 402.02. Consistent with these requirements, EPA interprets issuance of a federal PSD permit to qualify as action authorized, funded, or carried out by EPA.

Federal PSD permits can include permits issued directly by EPA or, as in this case, by a delegated state acting on EPA's behalf. Where EPA delegates administration of the federal PSD program, the delegate state implements the substantive and procedural

aspects of the federal PSD regulations on behalf of EPA pursuant to a negotiated agreement. *See In the Matter of West Suburban Recycling and Energy Center*, 6 E.A.D. 692, 703 (EAB 1996). Thus, in issuing the Indeck permit pursuant to a delegation agreement with EPA, IEPA simply stands in the shoes of EPA, and the permit remains a federal action for ESA purposes. *Id.* at 707.²

EPA notes that under the ESA regulations, section 7(a)(2) applies only to actions where there is discretionary federal involvement or control. 50 C.F.R. § 402.03. In applying this standard, courts have examined whether the relevant federal agency has discretion to implement measures that would inure to the benefit of listed species. Where such discretion is absent, section 7(a)(2) is not applicable because ESA consultation would be a meaningless exercise. *See, e.g., Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995). Although EPA construes the scope of its discretion under the PSD permitting program to be limited by the terms of section 165 of the CAA,³ 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.

Although section 7(a)(2) of the ESA applies, consultation on federal PSD permits is not always required. Under the ESA implementing regulations, consultation (which may be formal or informal) with the ESA Services (the FWS and the National Oceanic and Atmospheric Administration Fisheries Service) is only required where the federal action “may affect” listed species or designated critical habitat. 50 C.F.R. § 402.14(a).

² In contrast, permits issued by states or eligible Indian tribes under a PSD program approved by EPA in a state or tribal implementation plan (SIP or TIP) would not be federal actions to which section 7 of the ESA applies. PSD permits issued by SIP-approved states or TIP-approved tribes would be state or tribal actions conducted under state or tribal law.

³ *See* Brief of EPA Office of Air and Radiation and Region V in PSD Permit Appeal No. 05-05 (Prairie State Generation Company).

Thus, where issuance of a federal PSD permit has no effect on listed species or critical habitat, consultation is not required. In this case, EPA Region V determined that, while issuance of the Indeck permit may affect listed species (thus triggering the requirement to consult), it was not likely to adversely affect such species. The FWS concurred in writing with that finding, thus concluding the consultation and satisfying section 7(a)(2) requirements. 50 C.F.R. § 402.13; 50 C.F.R. § 402.14(b).

IV. Where Delegated States Issue PSD Permits, EPA Retains Responsibility For ESA Compliance

Although EPA may, as it did with Illinois, delegate PSD permitting responsibilities to a state, EPA retains the non-delegable responsibility to ensure ultimate ESA compliance. The ESA regulations provide that federal agencies may, upon written notice to the ESA Service(s), designate non-federal representatives (which could be the permit applicant or a delegated PSD state) for certain key purposes, such as preparing relevant assessments and conducting informal consultation. 50 C.F.R. § 402.08.

However, the ESA regulations make clear that “[t]he ultimate responsibility for compliance with section 7 remains with the Federal agency.” 50 C.F.R. § 402.08; *see also*, 51 Fed. Reg. 19926, 19939 (June 3, 1986) (preamble to ESA regulations). In the case of the Indeck permit, EPA Region V fulfilled this responsibility by directly conducting informal consultation with the FWS.

As a practical matter, EPA must retain sufficient control over the PSD permitting process administered by a delegated state to allow time for any required consultation to occur and to ensure that permitting and project activities do not proceed beyond a point that would affect EPA’s ability to comply with the ESA. Several of EPA’s PSD program delegation agreements expressly reserve EPA’s responsibilities for ESA compliance and

prohibit issuance of permits until delegated states are notified that EPA is satisfied ESA obligations have been met. *See In re: Metcalf Energy Center*, PSD Appeal No. 01-07, slip op. at 41 (EAB, Aug. 10, 2001).

V. Although Related To The Same Action, The ESA And PSD Permitting Processes Are Separate Processes That May Proceed In Parallel

Section 7(a)(2) of the ESA imposes distinct requirements on federal PSD permitting actions that neither arise from, nor are specifically referenced in, the CAA or PSD regulations. Significantly, section 7(a)(2) neither authorizes nor requires public involvement in the interagency consultation process. *See* 51 Fed. Reg. 19926, 19928 (June 3, 1986). There is thus no right derived under the ESA for the public to participate in an ESA consultation.⁴ Moreover, nothing in the CAA or PSD regulations requires that information developed to comply with a separate federal requirement such as the ESA be available for public comment during the PSD permitting process. As a result, ESA consultation, whether formal or informal, may, as it did in the case of the Indeck permit, proceed entirely separate from the PSD permitting process.

A. Consultation should ordinarily conclude prior to issuance of a final federal PSD permit, but not necessarily before issuance of the draft permit and public comment period.

Section 7(a)(2) of the ESA and the implementing regulations do not specify the precise time when an ESA consultation must conclude relative to an agency action process. Once the consultation process is initiated, section 7(d) of the ESA prohibits agencies (and permit applicants) from making any irreversible or irretrievable commitments of resources that would have the effect of foreclosing the formulation or

⁴ Under the ESA regulations, permit applicants have certain limited rights to participate in formal consultations on federal permitting actions. 50 C.F.R. § 402.14.

implementation of any reasonable and prudent alternatives that may be needed to avoid violating section 7(a)(2). 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

Consistent with this requirement, EPA believes the most efficient way to ensure compliance with the ESA under the PSD permitting program is generally to complete consultation before the final PSD permit is issued because there are limited opportunities to stay or reopen a PSD permit after this point. In the absence of a timely appeal to the EAB, a federal PSD permit is final agency action. 40 C.F.R. § 124.19(f)(1). However, in some cases, it may be permissible to complete consultation after final issuance of a PSD permit.⁵ Although Region V did not complete consultation on the Indeck permit before IEPA issued it, EPA appropriately completed its ESA compliance during this appeal pending final agency action on the permit. *See*, 40 C.F.R. § 124.19(f); 40 C.F.R. § 124.19(d).

A PSD permitting authority may issue a draft permit and complete the PSD public comment process prior to completion of an ESA consultation because these steps in the PSD process do not amount to an irreversible or irretrievable commitment of resources. The permit applicant may not begin construction prior to issuance of the final PSD permit, 40 C.F.R. § 52.21(a)(2)(iii), and the permitting authority still has the opportunity to establish conditions in the PSD permit or request action by the permit applicant to address impacts on listed species.

Furthermore, neither the CAA nor EPA's PSD permitting regulations require completion of an ESA consultation prior to the issuance of a draft PSD permit or the completion of the public comment period on the PSD permit. EPA does not construe the ESA consultation process to be an "appropriate consideration" for public comment under

⁵ For instance, in some cases additional EPA approvals may be necessary before a project may proceed.

the language in section 165(a)(2) of the CAA. *See* 42 U.S.C. § 7475(a)(2). Nothing 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. The applicable EPA permitting regulations do not require that documents from an ESA consultation be made available during public review and comment on a PSD permit. *See* 40 C.F.R. § 124.9.

A PSD permitting authority has the discretion to reopen the public comment process on the PSD permit if information that comes to light during the public comment process or an appeal of the permit raises substantial new questions concerning the permit under the CAA and PSD regulations. *See* 40 C.F.R. § 124.14(b); 40 C.F.R. § 124.19(d). However, these circumstance do not exist in this case with respect to the Indeck permit. Informal ESA consultation concluded with a finding that the Indeck permit is not likely to adversely affect listed species without any need to modify the permit or the proposed source. Based on this finding, IEPA concluded that the consultation did not raise any substantial new questions with respect to the PSD permit. Furthermore, an additional opportunity for comment is not required in this case because IEPA did not seek to bolster its permitting action with additional information compiled in the consultation process. *See In re: Hawaii Electric Light Co.*, 8 E.A.D. 66, 102-103 (EAB 1998).

Petitioners allege that they have been denied an opportunity to comment on the soils and vegetation impacts of the proposed facility as they relate to the additional impact analysis requirement of EPA's PSD regulations (40 C.F.R. § 52.21(o)), but this is not the case. One commenter said there was "significant evidence" suggesting that the facility would have a significant effect on soils and vegetation, but this commenter

apparently did not provide IEPA with the documents or references that comprised this evidence. IEPA Responsiveness Summary at Comment 56; Petitioners Supplemental Response Brief at 10. Under the federal PSD program, interested persons “must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period.” 40 C.F.R. § 124.13. Because all such issues and argument on a PSD permit should be raised by this time, there is generally no opportunity to comment on the comments of other parties (or by analogy the contents of a parallel ESA consultation) unless this information raises substantial new issues, which was not the case here.

B. A record must be maintained on the PSD permitting action to demonstrate compliance with the CAA and, where consultation is required, the ESA.

The documents generated in an ESA consultation do not necessarily need to be included as part of the record for public comment on the PSD permit or for purposes of determining compliance with the CAA and EPA’s PSD regulations. To comply with the CAA and EPA regulations, the record must contain all information necessary to demonstrate that the requirements of section 165 of the CAA and section 52.21 of EPA’s regulations are satisfied. IEPA concluded that the information generated during Region V’s informal consultation did not need to be part of its file to show that its final permit decision complied with the CAA and PSD regulations. Although the ESA consultation focused on listed plant species, and thus arguably bears some relation to the additional impacts analysis conducted as part of a PSD application, the conclusion that issuance of the permit would have no likely adverse effects supports IEPA’s determination that the consultation raised no substantial new questions regarding the permit. Thus, IEPA’s

record demonstrating compliance with the CAA and PSD requirements was complete notwithstanding the absence of the ESA documents.

In this case, the Board should use the standards it has previously applied to determine whether the record for showing compliance with the CAA and PSD regulations should be supplemented with documents that were not available at the time a final PSD permit was issued. The Board has indicated that it may be appropriate to supplement the record when there is an unusual delay between the close of the public comment period and the date of permit issuance or other extraordinary circumstances are present. *See In the Matter of Columbia Gulf Transmission Co.*, PSD Appeal No. 88-11, Order on Motion for Stay at 3 n. 3 (Adm'r, July 3, 1990). Furthermore, the Board has denied requests to supplement the record when the information was reasonably ascertainable during the comment period. *See In re: Sumas Energy 2 Generation Facility*, PSD Appeal No. 05-03, slip op. at 19 n. 18 (EAB, May 27, 2005); *In re: General Motors Corporation, Inland Fisher Guide Division*, 5 E.A.D. 400, 404-5 (EAB 1994) (involving a RCRA permit).

Based on these standards, in this case involving Indeck, the Board need not supplement the record for demonstrating compliance with the CAA with the documents from the ESA consultation or remand for IEPA to do so. Extraordinary circumstances are not present because, despite the delay between the close of comment period and the completion of the ESA consultation, the consultation led to a conclusion (with concurrence of the expert ESA Service) that the project was not likely to adversely affect listed species, and no changes to the permit were needed. In addition, the effects of the proposed source on soils and vegetation (the PSD issue Petitioners argue is affected by the documents developed in the ESA consultation) was reasonably ascertainable during

the comment period. One commenter stated that there was significant evidence that the proposed source would significantly affect soils and vegetation. IEPA Responsiveness Summary at Comment 56.

Documents demonstrating EPA's compliance with ESA section 7(a)(2) consultation requirements, and rendering Petitioners' ESA claim moot, are presently before the Board. *See* Status Report (July 17, 2005) and Attachments. Because the Board may take official notice of these documents, there is no need for the Board to remand the permit to IEPA on ESA-related grounds. *See, e.g., In re: Indianapolis Power and Light Co.*, 6 E.A.D. 23, 29 n. 12 (EAB 1995). EPA is not taking a position here on whether the Board has jurisdiction to address alleged ESA violations in connection with issuance of federal PSD permits. EPA notes that unlike certain other federal environmental permitting programs, the PSD regulations do not reference potentially applicable ESA requirements, thus raising an issue regarding the Board's jurisdiction to address alleged violations of those requirements. *See, Metcalf Energy Center*, PSD Appeal No. 01-07, slip op. at 42 n. 20; *compare*, 40 C.F.R. § 52.21; 40 C.F.R. § 122.49; 40 C.F.R. § 144.4; 40 C.F.R. § 270.3.

C. ESA consultation may require information beyond what would normally be required in a PSD permit application and the review of such an application.

The information required for both PSD permit applications and ESA consultations varies depending on the nature of the proposed source, the location of the source, and the species in the area. As a result, generalizations about the information required in a PSD permit application and an ESA consultation are difficult. However, in EPA's experience, the ESA consultation process has typically required a compilation of additional information that is not required under section 52.21 of EPA's PSD regulations.

ESA consultation on a PSD permit typically involves development of biological information evaluating the potential effects of the action on listed species and their designated critical habitat. Such an evaluation would, for instance, take into account the status of the listed species and the environmental baseline in the area, the manner in which the particular effects of the action may impact such species, the cumulative effects of future state or private activities that are reasonably certain to occur in the area, as well as the effects of other interrelated or interdependent actions. *See, e.g.*, 50 C.F.R. § 402.02 (defining “effects of the action”); 50 C.F.R. § 402.14. In developing this information and fulfilling their roles in the consultation, EPA and the ESA Services are required to rely on the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

Under section 52.21(n) of EPA’s regulations, a PSD permit applicant must “submit all information necessary to perform any analysis or make any determination required under this section.” 40 C.F.R. § 52.21(n). The following four analyses and determinations are the primary requirements of section 52.21 of EPA’s regulations and section 165 of the CAA: (1) a demonstration that the proposed source will not cause or contribute to air quality concentrations that exceed the NAAQS or PSD increment (40 C.F.R. § 52.21(k); 42 U.S.C. § 7475(a)(3)); (2) a top-down analysis of pollution control techniques to demonstrate that the facility will apply Best Available Control Technology (40 C.F.R. § 52.21(j); 42 U.S.C. § 7475(a)(4)); (3) an analysis of additional impacts on soils, vegetation, and visibility (40 C.F.R. § 52.21(o); 42 U.S.C. § 7475(e)(3); 42 U.S.C. § 7475(a)(6)); and (4) in cases where a source may affect a class I area, an analysis of impacts on visibility and any other Air Quality Related Values that may be of interest to

the Federal Land Manager (40 C.F.R. § 52.21(p); 42 U.S.C. § 7475(d)). To satisfy these requirements, an applicant is not ordinarily required to supply specific information on the potential impacts of the proposed facility on listed species or designated critical habitat.

Although a PSD application may need to include some biological information as part of the additional impacts analysis or to evaluate (where required) potential impairment to AQRVs in a class I area, these analyses would generally not be as comprehensive as an ESA biological evaluation, nor would the information necessarily focus on federally-listed species (if they address such species at all). Thus, while there may, in certain cases, be some overlap in information requirements between the two statutes, the CAA and PSD regulations do not specifically require applicants to include the level of biological information called for in an ESA consultation.

VI. Conclusion

The submissions before the Board demonstrate that Region V and IEPA have satisfied each of the ESA and PSD requirements described above. When the FWS concurred with EPA's determination that the Indeck PSD permit was not likely to adversely affect listed species, this concluded informal consultation and satisfied EPA's obligations under section 7(a)(2) of the ESA. Petitioners' claim on this issue is thus moot. In addition, in accordance with the PSD provisions of the CAA, IEPA provided a full opportunity for interested persons to comment on the potential impacts of the proposed source. IEPA has also considered whether the information developed through ESA consultation raised any substantial new questions with respect to the PSD permit under the PSD requirements. In light of the outcome of the ESA consultation, IEPA concluded that the consultation did not raise substantial new questions under the PSD

regulations and elected not to supplement the PSD permitting record or accept additional comment from the public. Because Region V and IEPA properly addressed the ESA-related issues raised by the Petitioners in this manner, there is no cause for the Board to remand this matter on ESA-related grounds.

Dated: March 17, 2006.

Respectfully submitted,

ANN R. KLEE

General Counsel

RICHARD B. OSSIAS

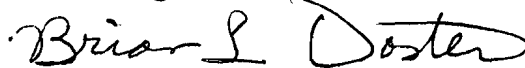
Associate General Counsel

Air and Radiation Law Office

TONY GUADAGNO

Acting Associate General Counsel

Cross-Cutting Issues Law Office



BRIAN L. DOSTER

Air and Radiation Law Office

TOD E. SIEGAL

Cross-Cutting Issues Law Office

1200 Pennsylvania Ave. N.W.

Washington, DC 20460

Telephone: (202) 564-7606

Facsimile: (202) 564-5603

CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief of EPA Office of Air and Radiation were served on the following persons in the manner indicated below:

By Facsimile and First Class U.S. Mail

Bruce Nilles, Esq.
Sierra Club
214 North Henry Street
Madison, WI 60601
Telephone: (608) 257-4994
Facsimile: (608) 257-3513

James Schneider
Indeck-Elwood, L.L.C.
600 N. Buffalo Grove Rd.
Buffalo Grove, IL 60089
Telephone: (847) 520-3212
Facsimile: (847) 520-9883

Robb H. Layman, Esq.
Assistant Counsel, Illinois EPA
1021 N. Grand Ave. East
P.O. Box 19276
Springfield, IL 62794-9276
Telephone: (217) 524-9137
Facsimile: (217) 782-9807

By EPA Pouch Mail

Bertram Frey, Acting Regional Counsel
Susan Tennenbaum
Environmental Protection Agency
Office of Regional Counsel, Region 5 (OC-14J)
77 West Jackson Blvd.
Chicago, IL 60604-3507
Telephone: (312) 886-1308
Facsimile: (312) 886-0747

By First Class U.S. Mail

Ann Brewster Weeks
Clean Air Task Force
18 Tremont St., Suite 530
Boston, MA 02108

Keith Harley
Chicago Legal Clinic, Inc.
205 West Monroe, 4th Floor
Chicago, IL 60606

Verena Owen
Lake County Conservation Alliance
421 Ravine Dr.
Winthrop Harbor, IL 60096

Jeremy R. Hojnicky
Openlands
25 East Washington, Suite 1650
Chicago, IL 60602



Brian L. Doster