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

CIVIL APPEALS BOARD

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

**BRIEF OF OPENLANDS AS AMICUS CURIAE**  
**IN SUPPORT OF PETITIONERS**

This matter involves a petition for review of the Prevention of Significant Deterioration ("PSD") Permit Number 197035AAJ filed by the American Lung Association of Metropolitan Chicago, Citizens Against Ruining the Environment, the Clean Air Task Force, Lake County Conservation Alliance and the Sierra Club ("Petitioners"). The petition for review challenges the decision by the Illinois Environmental Protection Agency ("IEPA") to issue a PSD permit to Indeck-Elwood, LLC ("Indeck") for the construction of a 660-megawatt coal-burning power plant in Elwood, Illinois, immediately adjacent to the 19,000 acre Midewin National Tallgrass Prairie.

The primary issue currently before the Environmental Appeals Board ("Board") is whether the IEPA is required to take any additional action to incorporate the volumes of new information that were generated during the year-long, multi-agency, Endangered Species Act ("ESA") consultation process that was conducted for the Indeck PSD permit.<sup>1</sup> As *amicus curiae*, Openlands (formerly Openlands Project) supports the

<sup>1</sup> See *Order Lifting Stay and Requiring Additional Briefing*, issued July 21, 2005. The other issues in this matter that are currently before the Board are whether the Petitioners may amend the petition for review in

Petitioners' position that federal law requires IEPA to reopen the Indeck PSD permit proceeding to allow the public to comment on all the new information that has come to light as part of the ESA consultation process. In particular, the ESA consultation process has revealed new information pertaining to potentially irreparable environmental impacts that Indeck's proposed project will have on the Midewin National Tallgrass Prairie. This information was not considered by IEPA before it issued the Indeck PSD permit.

**I. The History and Background of the Midewin National Tallgrass Prairie.**

As a primary partner in the establishment of the Midewin National Tallgrass Prairie, Openlands is deeply concerned that the proposed Indeck facility will adversely impact this unique area of national significance. The following is a brief explanation of how the Midewin was created and why it so important to protect.

The Midewin National Tallgrass Prairie<sup>2</sup> is located on 19,000 acres in Will County, Illinois, approximately 40 miles southwest of Chicago. In 1940, the Joliet Army Ammunition Plant (also known as the Joliet Arsenal) was authorized and the U.S. Army bought land that is now the Midewin from local farmers. The plant produced ammunition for World War II, the Korean War and the Vietnam War. Due to the inherent danger of storing large amounts of ammunition, the facility was surrounded by thousands of acres of buffer land made up of farmland, prairie remnants, woods and streams. Although the production of TNT at the Joliet Arsenal ceased in 1976, the government did not declare the property as surplus until 1992.

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light of the ESA consultation proceeding and whether there are any other issues that are essential to the Board's determination of the appropriate procedural course for this case.

<sup>2</sup> Midewin is a word that comes from the Potawatomi Indian nation and means "healing society," the process of mending, soothing and making whole again.

Shortly thereafter, Openlands became a founding member of the Joliet Arsenal Prairie Parkland Alliance and was appointed by U.S. Congressman George Sangmeister to serve on the Joliet Arsenal Citizens Planning Commission. The Commission recognized that the site offered an extraordinary opportunity to create the largest protected open space in northeastern Illinois and the first national tallgrass prairie park in the United States. In 1996, the Commission successfully convinced the U.S. Congress to pass and President Bill Clinton to sign into law the Illinois Land Conservation Act, P.L. 104-106 (1996). The Act authorized the transfer of land from the U.S. Army to the U.S. Forest Service and created the Midewin National Tallgrass Prairie.

Congress established the Midewin for four purposes, primary among them, "[t]o manage the [Midewin's] land and water resources to conserve and enhance native wildlife, fish and plant populations and habitat." See P.L. 104-106, Sec. 2914(c). Among the unique natural resources that Congress sought to protect are the park's dolomite prairies, one of the rarest ecosystems in North America, as well as grasslands, savanna, wetlands, seeps, upland forests and high-quality streams. Over one hundred bird species nest and breed at the Midewin and an additional 68 bird species utilize habitat at the Midewin during migration or as winter range. The Midewin is also home to rare flora and fauna including: 27 mammal species; 15 reptile species; 8 amphibian species; 53 fish species and over 600 species of plants. While the Indeck facility has the potential to harm all of the Midewin's natural resources, of particular importance are the Midewin's federally-listed threatened and endangered species: the Leafy Prairie Clover (*Dalea foliosa*); Eastern Prairie Fringed Orchid (*Platanthera leucophaea*); Lakeside

Daisy (*Hymenoxys herbacea*); and the Hine's Emerald Dragonfly (*Somatochlora hineana*).

**II. IEPA Violated the Clean Air Act's Procedural Requirements by Issuing the Indeck PSD Permit Without Considering Critical Information and by Not Allowing an Opportunity for Informed Public Participation in the Decision Making Process.**

As a designated State PSD permit administrator, IEPA is required to follow the procedural requirements of the Clean Air Act and its accompanying regulations. See 42 U.S.C. § 7475(a). The Clean Air Act requires IEPA to consider and protect natural areas such as the Midewin when making PSD permitting determinations. One of the purposes of the PSD program is "to preserve, protect, and enhance the air quality in...areas of special national or regional natural, recreational, scenic, or historical value." 42 U.S.C. § 7470(2). The Clean Air Act further requires IEPA "to assure that any decision to permit increased air pollution...is made only *after* careful evaluation 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).

IEPA violated these provisions by issuing the Indeck PSD permit before evaluating an analysis of how the proposed facility would impact the Midewin and before allowing an opportunity for the public to provide informed comments on all the relevant information regarding the permit. Specifically, on June 28, 2003, IEPA closed the public comment period for the Indeck PSD permit. Thereafter, on October 10, 2003, IEPA issued the PSD permit allowing Indeck to construct the proposed facility adjacent to the Midewin. However, the ESA consultation process that evaluated the impacts to the Midewin's endangered species was not completed until nearly 2 years after IEPA issued the permit. Furthermore, IEPA issued the permit without first reviewing an analysis of

the impairment to the Midewin's visibility, soils and vegetation as required by 40 C.F.R. § 52.21(o).<sup>3</sup> IEPA did not consider, and the public had no opportunity to comment on, any of this critical information that should have been made part of the administrative record and subject to a thorough analysis before the permit was issued.

This Board has recognized that the failure to follow the Clean Air Act's procedural requirements is neither harmless nor inconsequential. Recently, the Board vacated a PSD permit issued by IEPA because the Agency failed to comply with "the requirement to give adequate and timely consideration to public comments at the time of issuing the final permit decision." In re Prairie State Generation Station, PSD Appeal No. 05-02, slip op. at 6 (EAB, March 25, 2005). Similarly here, the Board should reopen the Indeck PSD permit because IEPA violated the Clean Air Act's procedural requirements in this matter. The Agency failed to consider information that was critical to an evaluation of the consequences of its decision and failed to provide an opportunity for informed public participation in the decision making process.

**III. New Information Regarding the Facility's Adverse Impacts to the Midewin Warrants the Reopening of the Public Comment Period for the Indeck PSD Permit.**

The Clean Air Act authorizes the reopening of a PSD permit's public comment period, "if any data information or arguments submitted during the public comment period...appear to raise substantial new questions" concerning the permit. See 40 C.F.R. § 124.14(b). A logical extension of this provision is that the public comment period should be reopened if new information is submitted during a comment period, the permit

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<sup>3</sup> This Section requires that, "The owner or operator shall provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial and other growth associated with the source or modification."

is subsequently issued, but only later does the permitting agency investigate and verify that the new information raises substantial questions concerning the permit.

In this case, IEPA was notified during the initial public comment period that acid rain deposition from the proposed Indeck facility could seriously threaten the Midewin.<sup>4</sup> At the time, there was only limited scientific data to validate these concerns. IEPA, however, waited until after the permit was issued to conduct an analysis to determine the impacts on the Midewin's endangered species. This post-permit analysis verified the concerns raised during the initial public comment period and warrants a reopening of the Indeck PSD permit. This Board has allowed a limited reopening of a public comment period under 40 C.F.R. § 124.14(b) in circumstances like these when new information will adequately protect the environment. In re Ash Grove Cement Co., 7 E.A.D. 387, 431 (EAB 1997).

Important new information that verifies the concerns raised during the initial public comment period includes an analysis by U.S. EPA of the potential for acid rain from the proposed Indeck facility to directly injure the Midewin's resident endangered species.<sup>5</sup> U.S. EPA noted that under a projected worst-case scenario, acid rain from the Indeck facility would have a pH of 2.6 with a more likely pH of 3.1. U.S. EPA's analysis concluded, "[t]hus, in some cases, wet acid deposition with a pH of 2.6 to 3.1 could be

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<sup>4</sup> Comments submitted to IEPA included, "The Illinois EPA should fully consider environmental impacts of the proposed plant on the Midewin Prairie. Based on the limited information available, I must conclude that the emissions from the proposed plant would adversely impact the Midewin, undermining the goals of ecosystem restoration and outdoor recreation." See also, "The emissions of pollutants that are precursors to acid rain from the proposed plant upwind and in close proximity to the Midewin Prairie are a serious concern, as they would pose a threat to sensitive habitat areas in the Midewin Prairie. Acid deposition can affect soil chemistry, with direct effects on sensitive habitats. Species listed as threatened, endangered or sensitive are present in some of the affected habitats at the Midewin Prairie." *Responsiveness Summary for Public Questions and Comments on the Construction Permit Application from Indeck-Elwood LLC* (October 2003) (pp. 20-21).

<sup>5</sup> Letter from Pamela Blakely, U.S. EPA to John Rogner, US Fish and Wildlife Service dated June 7, 2005, (pp. 6-7).

associated with injury to vegetation after a relatively short term exposure.”<sup>6</sup> This worst-case scenario of damage to the Midewin will occur if the Indeck facility operates at 100% capacity during a fog event. Given the Midewin’s importance, the public should be afforded an opportunity to submit comments to IEPA regarding conditions that should be attached to the Indeck PSD permit to prevent scenarios like these from ever happening.

Furthermore, new information from the U.S. Fish and Wildlife Service also validates the potential harm to the Midewin from the proposed facility. In a letter dated June 9, 2005, the Field Supervisor for the U.S. Fish and Wildlife Service, Chicago Ecological Services Field Office, noted the following,

“Based on data compiled by Cambridge Consultants and Epsilon [Indeck’s environmental consultants], levels of nitrogen that currently exist as background have been shown in the scientific literature to cause deleterious impacts to plant communities. Suding et. al. (2005) evaluated the results of many studies to determine which species are more likely to be extirpated from communities receiving nitrogen deposition. This study concluded that rare species, nitrogen fixers, and short species are more likely to disappear from communities than other species. Because the leafy prairie clover is a short, rare, nitrogen fixer, it is reasonable to assume that it is vulnerable to the effects of increased nitrogen deposition. The proposed action is anticipated to increase nitrogen deposition by 1 percent. Given that existing levels may already be harmful, even small increases could have incremental adverse effects.”<sup>7</sup>

The U.S. Fish and Wildlife Service also stated that, “under ideal circumstances, the [ESA consultation] process would have been more deliberative, information exchange more complete, and options for further ensuring that adverse effects are avoided may have been considered.”<sup>8</sup> These are precisely the reasons that the Clean Air Act’s PSD program

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<sup>6</sup> Id.

<sup>7</sup> Letter from John Rogner, U.S. Fish and Wildlife Service to Pamela Blakely, U.S. EPA, June 9, 2005, (p. 2).

<sup>8</sup> Id.

allows for supplemental public comments and why this Board should order the reopening of the Indeck PSD permit.

#### **IV. Conclusion**

For the foregoing reasons, Openlands requests that the Board reopen the Indeck PSD permit and provide the public with an opportunity to submit comments on the new information regarding the Indeck facility's potential adverse impacts to the Midewin National Tallgrass Prairie and its resident endangered species.

Respectfully submitted by,



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Dated: November 9, 2005  
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