

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

CONOCOPHILLIPS COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 12-101
	)	(Permit Appeal NPDES)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondents.	)	

**NOTICE OF ELECTRONIC FILING**

To: See Attached Service List

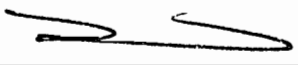
PLEASE TAKE NOTICE that on February 24, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, the AGENCY'S RESPONSE TO MOTION TO STAY, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

LISA MADIGAN,  
Attorney General of the  
State of Illinois

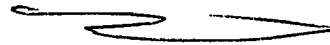
MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
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BY:   
THOMAS DAVIS, Chief  
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Dated: February 24, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that I did on February 24, 2012, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and AGENCY'S RESPONSE TO MOTION TO STAY upon the persons listed on the Service List.



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THOMAS DAVIS, Chief  
Assistant Attorney General

This filing is submitted on recycled paper.

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>CONOCOPHILLIPS COMPANY,</b>	)	
<b>a Delaware corporation,</b>	)	
	)	
	)	
	)	
<b>Petitioner,</b>	)	
<b>v.</b>	)	<b>PCB No. 12-101</b>
	)	<b>(NPDES Permit Appeal)</b>
<b>ILLINOIS ENVIRONMENTAL</b>	)	
<b>PROTECTION AGENCY,</b>	)	
	)	
	)	
<b>Respondent.</b>	)	

**AGENCY’S RESPONSE TO MOTION TO STAY**

Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, for its Response to the Motion to Stay provides as follows:

**Procedural Background**

On January 17, 2012 Petitioner filed its Petition for Review and Motion for Stay (“Petition”) with the Board seeking review of Illinois EPA’s issuance of National Pollutant Discharge Elimination System Permit No. IL0000205 (“NPDES Permit”) on December 22, 2011. In the Motion for Stay portion of the Petition, Petitioner asks the Board to grant a discretionary stay of the permit conditions challenged in the Petition.

On January 31, 2012, the Respondent filed a Motion for Extension of Time to Respond to Petitioner’s Motion for Stay. By order dated February 14, 2012, the Board granted Respondent’s motion for an extension of time, and ordered Respondent to file its response to the Motion for Stay on or before February 28, 2012.

**Discussion**

**I. Petitioner has failed to show the Board why a discretionary stay is appropriate in this case.**

By requesting that only the permit provisions challenged by the Petition be stayed, Petitioner requests that the Board grant a discretionary stay, rather than a blanket stay of the NPDES Permit. "In determining whether a discretionary stay is appropriate, the Board may refer to four factors," according to the Board's opinion in Bridgestone/Firestone Off-road Tire Company v. Illinois EPA, PCB 02-31 at page 3 (November 1, 2001). *See also*, Community Landfill Company and City of Morris v. IEPA, PCB 01-48 and 01-49 (consolidated), slip op. at 5 (October 19, 2000), citing Junkunc v. S.J. Advanced Technology & Mfg., 149 Ill. App. 3d 114, 498 N.E.2d 1170 (1st Dist. 1986). Those four factors include: "1) a certain and clearly ascertainable right needs protection; 2) irreparable injury will occur without the stay; 3) no adequate remedy at law exists; and 4) there is a probability of success on the merits." Bridgestone at 3. Notably, the Board goes on in Community Landfill to state, "the Board is particularly concerned about the likelihood [of] environmental harm if the stay is granted." Community Landfill at 5.

Petitioner cited to Ameren Energy Generating Company v. Illinois EPA, PCB No. 06-67 (February 16, 2006), to support the Board's authority to grant a discretionary stay. Petition at 4. However, the Board did not reach the issue of a discretionary stay in the Ameren case, instead granting a blanket stay pursuant to the Administrative Procedures Act to the applicable permit in that case and stating "it is unnecessary for the Board to reach the issue of whether to exercise discretion to enter a stay in this particular case." *Id.* at 7. After citing to Ameren, Petitioner goes on to request that the Board review only a few of the many conditions of its NDPEs Permit, stating that "Petitioner has no objection to and is prepared to operate under the balance of the permit except for the four issues," raised in the Petition. Petition at 4.

In this Response, the State does not challenge the Board's authority to grant a discretionary stay of certain permit conditions. However, the Illinois EPA argues below why the Board should not use its authority to grant a discretionary stay for the specific permit conditions being challenged by Petitioner. The NPDES Permit condition setting an effluent limit for Dissolved Oxygen is the exception. On this permit condition, the Illinois EPA concedes to Petitioner's argument.

a. The Effluent Limit and Special Condition 27 pertaining to Mercury

Petitioner cannot meet any of the tests set out by the Board for a discretionary stay with regard to the mercury effluent limit or a mixing zone for Mercury. First, Petitioner concedes that the Special Conditions regulating the discharge of mercury by Petitioner have been present in Petitioner's NPDES Permit since the permit modification in 2009. Petition at 5. Even if the Board were to take Petitioner's argument for granted that, Illinois EPA "agreed to review its legal and factual basis for this condition in the context of this permit renewal," Illinois EPA did not, in any way, relieve Petitioner from compliance with the Special Conditions relating to mercury upon Illinois EPA including them in the renewed NPDES Permit. Petition at 5.

Petitioner cannot successfully argue that it has a legal right to a mixing zone for mercury. Allowance of a mixing zone is not the standard, but rather an exception to the Act and Board regulations protecting waters of the State. Section 302.102 of Title 35 provides, "an opportunity shall be allowed for compliance with 35 Ill. Adm. Code 304.105 by mixture of an effluent with its receiving waters, provided the discharger has made every effort to comply with the requirements of 35 Ill. Adm. 304.102." 35 Ill. Admin. Code 302.102(a). The Petition does not argue that Petitioner "has made every effort to comply," but instead focuses on mercury permit

conditions being "arbitrary and capricious." No clearly ascertainable right exists for Petitioner to discharge mercury into the Mississippi River.

Petitioner reveals in its Petition that it is in the middle of a \$3.8 billion expansion. Petition at 2. Later in the Petition, Petitioner argues that treatment to bring mercury into compliance would cost \$13.3 million. Petitioner relies on these figures to show that mercury treatment is economically unreasonable, thus allowing Petitioner to seek Board relief pursuant to Special Condition 27. Simple math shows that the cost of mercury treatment would be only a third of one percent of the cost of the entire expansion project currently being carried out by Petitioner at the Wood River facility. Therefore, Petitioner is hard-pressed to show that the additional expenditures for mercury treatment are economically unreasonable. The irreparable injury that would occur if a stay were granted will be in the form of environmental harm due to the bioaccumulative effects of mercury, rather than any harm to Petitioner.

Finally, as explored above, Petitioner has failed to show that it will have success on the merits of its Petition with regard to mercury. Especially damning to Petitioner in this light are the facts that it: i) the Special Conditions relating to mercury are not new to the December 2011 NPDES Permit, but have been included in Petitioner's NPDES Permit since 2009; and ii) Petitioner is unable to show that it should be allowed an opportunity for mixing because Petitioner has failed to make every effort to comply with Board Regulations. Given these problems with Petitioner's Motion for Stay, the Board should not use its discretion to grant Petitioner a stay of the permit conditions subject of the Petition.

**b. Fecal Coliform and Special Conditions 26 and 28**

Petitioner concedes, with regard to Special Conditions 26 and 28, that since a fecal

coliform limit was removed from its NPDES permit in 1983, “fecal coliform levels continue to be very low, and are nearly always below the imposed standard,” and that previous NPDES Permits for the Wood River facility did not include a fecal coliform limit due to “the virtual absence of coliform in the effluent.” Petition at 8. If Petitioner’s statement is accurate, the operation of the Wood River facility would not be affected by a discretionary stay of the conditions pertaining to fecal coliform. Therefore, it seems unlikely that Petitioner will suffer irreparable injury without a discretionary stay of Special Conditions 26 and 28.

Furthermore, Petitioner’s acknowledgment that fecal coliform has *not always* been below the imposed standard indicates that: i) a fecal coliform effluent limit is necessary in the NPDES Permit; ii) Petitioner has very little chance of success on the merits of the fecal coliform issue; and iii) environmental harm, in the form of excessive fecal coliform colonies in the receiving water, will result if a stay of these conditions is granted and Petitioner is allowed to exceed its fecal coliform effluent limit until a final decision is reached on the Petition. Therefore, the Board should not grant a discretionary stay of the applicable conditions of the NPDES Permit.

c. Smith Lake and Special Condition 21

While Petitioner objects to the inclusion of Smith Lake as a water of the State in Special Condition 21 of the NPDES Permit, it fails to indicate what, if any, harm Petitioner will suffer under Special Condition 21. Illinois EPA has also included a 180-day period in the NPDES Permit for Petitioner to submit information to the Illinois EPA incorporating Smith Lake into the NPDES Permit as a “treatment works”. Therefore, not only is there no ascertainable right or irreparable harm associated with Special Condition 21, but it is also unclear what relief a stay for Special Condition 21 would provide for Petitioner making the third consideration of granting a



discretionary stay—the stay would not provide any remedy to Petitioner for the first 180 days of the permit term. Further, it is clear that delineating Smith Lake as a water of the State, as the permit proposes, or as a treatment works, if the Petitioner should choose to do so, would protect the environment by setting out specific protections for Smith Lake under one or the other categories.

d. The Effluent Limit for Dissolved Oxygen

The Illinois EPA concedes that Petitioner was not afforded the proper notice accorded it pursuant to the Environmental Protection Act and Title 35 of the Illinois Administrative Code with regard to the effluent limit for dissolved oxygen included in the NPDES Permit. Illinois EPA cannot agree with Petitioner's claim that the inclusion of an effluent limit for dissolved oxygen was arbitrary and capricious nor that a mixing zone would be applicable to the dissolved oxygen parameter. However, Illinois EPA may agree to the removal of the effluent limit for dissolved oxygen from the NPDES Permit upon settlement of this matter.

**II. The Mercury limit set out in Petitioner's NPDES Permit should not be stayed despite the Board's ruling on Petitioner's Motion for Stay.**

As stated above, Respondent does not challenge the Board's authority to grant a discretionary stay applicable to specific provisions of the NPDES Permit. Respondent argues above that the Board should not use its discretion to grant a stay of any permit condition challenged by Petitioner. Alternatively, Respondent argues that if the Board is inclined to use its discretion to grant a stay of certain permit provisions for Petitioner, the Board should withhold its discretion to stay the Special Conditions relating to mercury due to the environmental harm that may result from such stay.

The State is particularly concerned about environmental harm that may result from a stay, if granted, as cited above. Respondent argues that the bioaccumulative nature of mercury triggers a heightened concern for any permit condition staying controls on mercury in effluent entering the Mississippi River, or any other water of the State. As it accumulates in aquatic life living in the water, mercury has the potential to harm not only that aquatic life, but the consumers that fish for aquatic life on and around the Mississippi River. This danger motivates not only Respondent's strict interpretation of the law with regard to mercury, but also Respondent's fervent argument for Petitioner's compliance with the Special Conditions relating to mercury in its NPDES Permit.

**Conclusion**

For the reasons explained above, the Illinois EPA requests that the Board deny Petitioner's Motion for Stay, except with respect to the effluent limit for dissolved oxygen. In the alternative, Illinois EPA requests that the Board refuse to stay the mercury limit previously contained in Petitioner's last two NPDES Permits.

WHEREFORE, the Illinois EPA objects to any stay of these proceedings.

Respectfully submitted,

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Dated: February 23, 2012

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