

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CONOCOPHILLIPS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 12-101
)	Permit Appeal (NPDES)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**MOTION FOR LEAVE TO FILE A
REPLY IN SUPPORT OF MOTION FOR STAY**

Petitioner, ConocoPhillips Company (“Petitioner”), by its attorneys and pursuant to Ill. Adm. Code 35 § 101.500(e), moves the Board for leave to file a Reply in Support of its Motion for Stay. In support of this Motion, Petitioner states as follows.

1. On January 17, 2012, Petitioner filed its Petition for Review and Motion for Stay. The Motion requested that the Board stay four of the conditions in the December 22, 2011 NPDES Permit (“Permit”) during the pendency of the Petition for Review.

2. On February 2, 2012, the Board reserved ruling on the motion for stay to allow the Illinois Environmental Protection Agency (the “Agency”) time to respond.

3. While not challenging the Board’s authority to grant a discretionary stay of certain permit conditions, the Agency stated its objections to the motion, which Petitioner received on February 27, 2012.

4. In order to prevent material prejudice from the Agency’s Response, Petitioner would like the opportunity to respond to the Agency’s arguments through a Reply Brief.

5. Ill. Adm. Code 35 § 101.500(e) provides that “a motion for leave to file a reply must be filed within 14 days after service of the response.” This Motion is filed within 14 days of receiving the Agency’s Response, and thus, it is timely.

6. Further, at this time, the Board has not yet ruled on the Petitioner’s Motion for Stay, and thus, granting this Motion will not unduly delay this matter.

7. Counsel for Petitioner has spoken with counsel for the Agency to confirm that the Agency has no objection to this Motion.

Therefore, Petitioner respectfully requests leave to file the attached Reply *instanter* in order to address and clarify statements made by the Agency in its Response, and grant all other relief that the Board deems fair and just.

Respectfully submitted,

Dated: March 12, 2012

s/ David L. Rieser
David L. Rieser

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REPLY IN SUPPORT OF MOTION FOR STAY

Petitioner, ConocoPhillips Company (“Petitioner”), for its Reply in Support of Motion for Stay, states as follows.

Procedural Background

On January 17, 2012, Petitioner filed its Petition for Review challenging the December 22, 2011 NPDES Permit (“Permit”) regarding its Roxanna, Illinois facility. At the same time, it submitted a motion requesting that the Board grant a discretionary stay of the following four conditions contained in the Permit: (1) Special Conditions 21 (Smith Lake); (2) 26 and 28 (fecal coliform); (3) the effluent limit and Special Condition 27 (mercury); and (4) the effluent for dissolved oxygen.

The Illinois Environmental Protection Agency (the “Agency”) filed its Response to the Motion to Stay on February 27, 2012, stating that it was not challenging the Board’s authority to grant a discretionary stay of these permit conditions. (Resp. at 3.) Further, the Agency indicated that it did not object to the stay for the effluent for dissolved oxygen recognizing that they did not have the authority to include this condition in this permit in the first place. (*Id.* at 3, 6.) However, the Agency did object to the granting of the discretionary stay for the remaining three conditions.

Accordingly, this Reply will address why the three conditions that remain in dispute should be stayed pending a final decision of the Board.

Discussion

Petitioner should not be required to expend significant costs in complying with the contested conditions of the Permit prior to a Board ruling on the merits of the appeal. The nature of a permit appeal is that Petitioner claims that the Agency acted unlawfully in issuing the permit and it should not have to comply with the requirements until that issue is resolved. The issues the Agency raises in its objection, as discussed more fully below, would require the Board to prejudge the merits of the underlying action in the absence of the Agency's record or the hearing to which Petitioner is entitled. Further, the Agency asks the Board to require immediate compliance with contested permit conditions based on standards (i.e. irreparable harm) that are completely irrelevant to the permit appeal, which contests only the validity of the Agency's decisionmaking. Should the Agency prevail in opposing the Motion for Stay, Petitioner would have to expend substantial sums to comply with requirements which the Board may determine later to be completely unlawful. Petitioner would also have to act before it has had its opportunity for a hearing which is a requirement under both federal and Illinois law. Both of these results would be completely inconsistent with the Act and the permit appeal process.

Citing *Bridgestone/Firestone Off-road Tire Co. v. Illinois EPA*, the Agency argues that Petitioner cannot meet any of the factors that a Board considers in issuing a stay in enforcement. *Bridgestone* stated that the Board "may" consider whether: (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. PCB 02-31 at page 2 (November 1, 2001).

However, the Board in *Bridgestone* made clear that it was not required “to consider each of the previously noted four factors.” *Id.* at 3. In *Bridgestone*, the Board granted the stay after determining that irreparable harm would befall the petitioner in *Bridgestone* if the stay was not granted. The Board concluded that the permit appeal would be rendered moot if the petitioner had to comply with the contested condition during the appeal. As a result, the Board granted the motion for stay – without making a determination on the remaining factors. *Id.* In essence, the Board refused to prejudge the appeal in the context of deciding the stay.

Similar to *Bridgestone*, Petitioner would suffer harm if it is forced to comply with conditions that the Board may later overturn. With regard to the mercury requirement alone, Petitioner would have to begin significant expenditures no later than April 2012 in order to be in compliance by the February 5, 2014 compliance date, rendering the Petition for Review moot if no stay is granted. (*See Mot.* at 4.)

Contrary to the Board’s decision in *Bridgestone*, the Agency spends much of its Response arguing the merits in the Petition for Review and asking the Board to resolve those merits in the absence of the filed record and the required hearing. While Petitioner responds below, Petitioner waives no claim that arguing the merits at this point is inappropriate and premature.

A. Mercury

Petitioner moves to have the mercury conditions set forth in Special Condition 27 stayed during the pendency of the Petition for Review, because it will suffer significant if not irreparable harm if forced to comply with the conditions. Without a stay, Petitioner will be forced to initiate design and engineering studies to construct unprecedented mercury control facilities at a cost of \$13.3 million. While the Agency makes light of the \$13.3 million in costs,

it still must be considered a significant expense which would normally justify a stay of a contested permitted condition. Further, while the Agency claims that Petitioner has no likelihood of success and that there will be environmental harm as a result of the continued minuscule levels of mercury in the discharge, neither claim is remotely true. As Petitioner alleges, the Board's rules expressly allow a mixing zone for these waters and the Agency found that a mixing zone was appropriate for other constituents besides mercury, which obviates any claim of potential environmental harm. Clearly, the Agency cannot identify environmental harm in conditions specifically allowed by Board regulations. In addition, under the permit, the Agency was prepared to accept those same conditions until at least February, 2014.

B. Fecal Coliform

Petitioner moves to have the Fecal Coliform conditions set forth in Special Conditions 21 and 26 stayed during the pendency of the Petition for Review. Petitioner is likely to succeed on the merits in the Petition for Review regarding these conditions, as the inclusion of the fecal coliform limitation is unnecessary and not supported by data or the Board's regulations. Further, Petitioner will have to incur substantial costs to install treatment, absent a stay. Finally, due to the mixing zone and the size of the receiving water, there is no likely impact on water quality specifically and the environment in general.

C. Smith Lake

Petitioner moves to have the Smith Lake conditions set forth in Special Condition 28 stayed during the pendency of the Petition for Review. Petitioner is likely to succeed on the merits in the Petition for Review regarding this condition. The U.S. Army Corps of Engineers determined Smith Lake not to be a "water" pursuant to 40 CFR 122, therefore, the Agency has no authority to include discharges in Smith Lake in the Permit. Also, as Smith Lake has been

present for a number of permit cycles without being included in the permit, the prospect of an environmental harm associated with the stay is remote.

Conclusion

For the reasons stated above, Petitioner respectfully requests that the Board grant Petitioner's Motion for Stay, and grant all other relief that the Board deems fair and just.

Respectfully submitted,

Dated: March 12, 2012

s/ David L. Rieser

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NOTICE OF FILING

TO: See Attached Service List

Please take notice that on March 12, 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., Suite 11-500, Chicago, IL 60601, Petitioner's Motion for Leave to File Reply in Support of Motion for Stay and Reply in Support of Motion for Stay, copies of which are herewith served upon you.

Respectfully submitted,

s/ David L. Rieser

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2012, I caused to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box at 77 W. Wacker, Chicago, IL 60601, true and correct copies of Petitioner's Motion for Leave to File Reply in Support of Motion for Stay and Reply in Support of Motion for Stay, upon the following:

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue
Post Office Box 19276
Springfield, IL 62794-9276

Carol Webb
Hearing Officer
Pollution Control Board
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s/ David L. Rieser
One of the Attorneys for Petitioner

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