

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**POST-HEARING COMMENTS OF THE
ILLINOIS ENVIRONMENTAL REGULATORY GROUP**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by and through its attorney, Alec M. Davis, and pursuant to 35 Ill. Admin. Code §101.628 (c), hereby submits the following post-hearing comments in the above-described matter. IERG understands that these comments are being submitted after the deadline established by 35 Ill. Admin. Code §101.628 (c), however, as the transcript for the October 3, 2012, hearing was not available until the afternoon of October 16, and IERG was occupied during an all-day meeting on October 17, it was not possible to finalize the comments in a timely manner. Further, the briefing deadlines (petitioner’s by Nov. 15, respondent’s by Dec. 17, and petitioner’s reply by Dec. 28) are such that IERG asserts that none of the parties will be prejudiced by the one-day late submittal.

IERG consists of 51 member companies operating environmentally regulated facilities throughout the State of Illinois. IERG represents its members in environmental regulatory and legislative development, but also, from time to time, other matters which have the potential to impact its members and by their precedential nature, impact the regulated community as a whole.

The petitioner in this matter, Phillips 66 Company, is an IERG member. IERG views the issues discussed below as relevant and important to a significant number of its members.

IERG encourages the Illinois Pollution Control Board (“Board”) to grant the relief requested by the petitioner in this matter, but in so doing, to be mindful of two very important policy issues that were raised at the October 3, 2012 hearing in this matter that have come to IERG’s attention.

THE ILLINOIS EPA’S “POLICY” TO NOT GRANT MIXING ZONES FOR MERCURY IS CONTRARY TO LAW IN ILLINOIS

At hearing, Mr. Bob Mosher, testifying on behalf of the Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), provided a great deal of background on the Agency’s “policy” regarding granting mixing zones for bio-accumulative chemicals of concern, or BCCs, including mercury. Hearing Transcript, *ConocoPhillips Company v. Illinois EPA*, PCB No. 12-101 at 89 and 112-114 (Ill.Pol.Control.Bd. Oct. 16, 2012) (hereinafter cited as “Transcript”). Mr. Mosher testified that the Agency had a policy wherein it would not grant mixing zones for mercury, but that at some point during a regulatory proposal development, had discontinued its “policy.” Transcript at 111-112 and 114-115. Setting aside for the moment the specific details regarding the discussion and timeline dealing with when the “policy” was or was not in effect, IERG finds the concept in and of itself to be extremely troubling, contrary to obligations imposed by Board regulations, and a circumvention of the demarcation of powers that underlies Illinois’ administrative law.

As the Board is undoubtedly familiar, the Illinois Environmental Protection Act (“the Act”) created both the Agency and the Board, and the powers and duties of both are enumerated therein. *See* 415 ILCS 5/4 and 415 ILCS 5/5. Although the Board is vested with general

rulemaking authority, the Agency's rulemaking authority is limited to specifically identified circumstances. See 415 ILCS 5/27, 5/4(k), 5/4(o), 5/4(u), and others. Particularly relevant to the matter before the Board is Section 4(g), charging the Agency with the "duty to administer, in accord with Title X [Permits] of this Act, such permit and certification systems as may be established by this Act or regulations adopted thereunder," and Section 39 which, among other things, specifies that while the Agency may adopt filing requirements and procedures dealing with permitting, it must issue permits consistent with the Board (and where applicable Federal) regulations. ILCS 5/4(g) and 415 ILCS 5/39 (a) and (b).

The Board's regulations directing the Agency's actions in reviewing an NPDES permit application are contained in 35 Ill. Admin. Code Part 309. Nowhere within those regulations is there an apparent grant of discretion to the Agency to adopt an outright ban on mixing zones for mercury or any other BCC. Notably, the Board has adopted a ban on allowing mixing of new sources of BCCs, such as mercury, but has limited that ban to new dischargers in the Lake Michigan Basin. 35 Ill. Admin. Code §309.141(h). The Board specifically considered, but rejected a request to extend the Lake Michigan ban on mixing zones for BCCs to all waters of the state. Dismissal Order, *In the Matter of: Proposed Amendments to 35 Ill. Adm. Code Subtitle C (Water Toxics and Bioaccumulation)*, R92-8 (Ill.Pol.Control.Bd. April 4, 1996). As a result, the Board's rules cannot be read to support a ban on BCCs outside of the Lake Michigan Basin. If the Board intended the Agency to implement an outright ban of BCCs in the permitting of other sources, it clearly could have done so. Setting aside any arguments regarding the need for or rationale behind such a ban being extended to other waters, the Agency does not have the authority to adopt such a policy on its own and the Board regulations directing the Agency's

action in reviewing an NPDES permit application do not authorize such a ban or grant such discretion or authority to the Agency.

The Board regulations and court precedent describing when and how mixing zones are to be established are clear and unambiguous in stating that mixing is a right (subject to limiting factors) to which a discharger is entitled. Assuming a proposed mixing zone meets the enumerated regulatory requirements, “the Agency *shall*, pursuant to Section 39(b) of the Act, include within the NPDES permit a condition defining the mixing zone.” 35 Ill. Admin. Code §302.102(d) (emphasis added). The Supreme Court of Illinois has considered the Board’s mixing regulations contained in Section 302.102, and, among numerous notable statements affirming the Agency’s duty to implement the Board’s mixing regulations, stated:

The Agency, as permit issuer and enforcer of the Board’s regulations, has authority to make mixing determinations where the Board has provided for alternative methods of compliance. [Internal citation omitted]. The regulations provide directives to the Agency in making these determinations and limit its discretion in that, if a discharger can prove that the proposed mixing zone or ZID [zone of initial dilution] conform to the general mixing regulations, the Agency *must* grant the permit condition.

Granite City Division of National Steel Company, et al. v. The Illinois Pollution Control Board, 155 Ill. 2d 149 at 179 (emphasis added). The “policy” described in Mr. Mosher’s testimony is clearly not in line with either the Board’s regulations or Illinois Supreme Court interpretation of the Agency’s duty, and cannot be condoned by the Board.

Equally troubling to the lack of Agency authority for such a ban is the confusion within the regulated community that has resulted from the Agency’s shifting position regarding its “policy.” At the October 3, 2012, hearing in this matter, Mr. Mosher testified that the “policy” had been in effect at some point around the time the Agency requested Phillips 66 to begin testing for mercury in 2007, but had been discontinued as a result of a stakeholder review

process reviewing a draft Agency rulemaking proposal that included, among other amendments to the Board's rules, a prohibition on mixing for mercury. Transcript at 89 and 111-115. IERG was involved in that stakeholder review process, and, in fact, met with Mr. Mosher and other senior management of the Illinois EPA's Bureau of Water on multiple occasions to discuss the various aspects of its draft proposal, including the mercury mixing ban. As Mr. Mosher testified, the Agency ultimately decided to proceed with its rulemaking proposal, leaving out the mercury mixing prohibition language that was problematic to stakeholders, including IERG. *See* email from Bob Mosher to Boron/Fluoride/Manganese Water Quality Standards Rulemaking Stakeholders, dated March 8, 2010, attached to these comments as Attachment A. Notably, the statement in the email that "[the Agency] will continue the existing policy regarding mercury..." is ambiguous, particularly absent any information regarding the substance of that policy and IERG's lack of knowledge about the "policy" at the time. Further complicating the situation, IERG is aware of meetings that have been held as recently as October and November of 2011, where senior Bureau of Water managers (although apparently not Mr. Mosher) have continued to state that the Agency would not allow the mixing of mercury.

Just as the Agency has no authority under the Act to adopt a ban on mixing zones for BCCs, it also has no authority to adopt a rule without being in compliance with the notice and comment requirements of the Administrative Procedure Act. The dangers of that failure are readily apparent here in that the Agency's policy is not only secret but uncertain. The regulated community should not have to guess at the rules for obtaining NPDES permits. The Agency's "policy" regarding mercury is contrary to Illinois law, yet is still being relied upon by senior managers in the Bureau of Water. IERG encourages the Board to speak to the issue and resolve the matter, to disabuse the Agency of the idea that it has the authority to unilaterally disregard

the Board's rules, and relieve the regulated community of the uncertainty that has become pervasive.

AFFORDABLE IS NOT EQUIVALENT TO ECONOMICALLY REASONABLE

A properly conducted mixing zone analysis requires a permit applicant to demonstrate a number of limiting factors have been satisfied before the Agency must grant a mixing zone. One such requirement is that the discharger has "made every effort to comply with the requirements of 35 Ill. Adm. Code 304.102." 35 Ill. Admin. Code §302.102. Section 304.102, dealing with dilution of effluent, requires a discharger to provide the "best degree of treatment" ("BDT") of wastewater "consistent with technological feasibility, economic reasonableness and sound engineering judgment." 35 Ill. Admin. Code §304.102.

At hearing, witnesses for the Agency testified at length regarding what information was provided by the petitioner regarding the economic reasonableness element, and how the Agency determined that it was not providing for BDT. Transcript at 93-94, and 108-110. Again setting aside whether the Agency's determination in this particular case was appropriate, IERG is concerned by a recurring element in the Agency's economic reasonableness analysis; specifically, that it appeared that the Agency has equated "affordability" with "economic reasonableness." Transcript at 96, 108-110, and 117-118. While the concept of "affordability" is similar to "economic reasonableness" in that they both deal with comparison of sums of money, they are distinctly and importantly different, and the Board should make clear that the standard that the Agency should be relying upon is the "economic reasonableness" standard contained in the Board's rules.

"Afford" is defined by *Webster's II New College Dictionary* as "1. To have the financial means for" or "2. To be able to spare or give up." Houghton Mifflin Co., 1995. By its

very nature, it is dependent on an assessment of how much a party is in possession of, and requires a degree of subjectivity in drawing a conclusion. Economic reasonableness, on the other hand, is a term that is widely-used throughout the Act and the Board's regulations, and while not explicitly defined, requires a more objective balancing of various costs and benefits in reaching a determination. *See* 415 ILCS 5/17.10(c)(1), 22.6(c), 22.51(f)(1), 27(a), and 39(h). *See also* 35 Ill. Admin. Code §215.261(c). While party-specific factors may weigh into the economic reasonableness analysis, it should not depend entirely on a single factor that can vary significantly from year-to-year such as how much money a party happens to be in possession of at any given time. The Agency's insistence that the petitioner perform an affordability analysis and its apparent reliance on the absence of any affordability information should not satisfy the Board in its evaluation of economic reasonableness. IERG encourages the Board to provide the Agency with direction in that regard and provide future permit applicants with a degree of certainty, knowing how the Board expects the Agency to be performing its permitting duties.

The responsibility placed upon the regulator to make an economic reasonableness determination is a very important one. Whereas in the private "free market" the question of economic reasonableness is decided by whether or not a prospective buyer decides to spend its money, in the regulatory realm, the regulator is put in the position of making the reasonableness decision and forcing that decision upon the regulated community. A regulator that makes such decisions based on questionable bases, or result in determinations that are far out of line with what one might expect given past determinations, calls into question the trust that the public has placed in that regulator. Equating economic reasonableness to affordability, without providing any notice or rationale for doing, raises these questions.

CONCLUSION

The two issues identified by IERG in these comments are of significant concern to the regulated community as a whole, in that the positions taken by the Agency place NPDES permit applicants state-wide in a position of uncertainty. The Board's rules dealing with issuance of NPDES permits and mixing are intended to provide guidelines to the Agency as well as a degree of certainty to permit applicants that the delegation of authority to the Board and Agency by the Illinois General Assembly is appropriately executed. Based on the testimony at the October 3, 2012, hearing in this matter, IERG is concerned that this is not, in fact, the case. IERG encourages the Board to take up these two very important issues in this matter, and address them directly and provide firm direction to the Agency and assurance to others similarly situated to the petitioners that the Board intends its regulations to be implemented as adopted and interpreted by the courts of Illinois.

IERG thanks the Board for its consideration of these comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: October 18, 2012

By: /s/ Alec M. Davis
Alec M. Davis

Alec M. Davis
General Counsel
ILLINOIS ENVIRONMENTAL
REGULATORY GROUP
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Springfield, Illinois 62701
(217) 522-5512

Attachment A

Brenda Carter

From: Mosher, Bob [Bob.Mosher@Illinois.gov]
Sent: Monday, March 08, 2010 3:10 PM
To: AEttinger@ELPC.org; alanning@bnwr.org; awithers@cmtengr.com; barry.klepp@earthtech.com; bart.jones@strand.com; bcarter@bnwr.org; bcarter@ierg.org; Bill.gradle@il.usda.gov; bmui@jolietcity.org; bob.heitzman@epa.state.oh.us; bpostel@citgo.com; Branham, Michael; Catherine.O'Connor@mwr.org; ccarter@deuchler.com; ccrites@cmtengr.com; Christine Zeman; Cindy.skrukrud@sierraclub.org; cmitche@uiuc.edu; Connie Dou; Corcoran, Sue; Crislip, Larry; Cross, Joel; david.zenz@cte.aecom.com; dblodgett@TNC.ORG; dennis.streicher@elmhurst.org; dkhirner@ierg.org; dnewman@growmark.com; Don.pitts@il.usda.gov; d-soucek@inhs.illinois.edu; dunmire@ilrwa.org; dwesley@keyaginc.com; ekrug@uiuc.edu; Eric Lecuyer; Erickson, Nancy; Fry, Eric; gbuchner@foxmetro.dst.il.us; gcollins@prairierivers.org; gfc@uiuc.edu; Giordano, Patrick; gniemeyerfarms@juno.com; Good, Gregg; Grady, Alyson; Gregg Humphrey; gregsi@boltonmenk.com; Hammer.Edward@epa.gov; HEATONS@michigan.gov; hudson@cmap.illinois.gov; Holst.Linda@epamail.epa.gov; iergstaff@ierg.org; illinois@tnc.org; ipolls@comcast.net; iwyoeder@farmland.com; J Huchel; jasmith@decaturnet.org; jdaugherty@thorncreekbasin.org; jeanp@ifca.com; jeffrey.p.smith@abbott.com; jeggen@jolietcity.org; jennifer.wasik@mwr.org; jfoster@cfindustries.com; jhuff@huffnhuff.com; jorobinson@northshoresanitary.org; JR Schilling; jrussell@frwr.com; jtippy@mchsi.com; jtolen@peabodyenergy.com; Julia Wozniak; Kay Anderson; Keith Alexander; Keller, Al; kirk.thompson@us.rhodia.com; kknowles@prairierivers.org; Koch, Brian; laurie@isawwa.org; lehmann.sarah@epamail.epa.gov; lfrede@cicil.net; machesky@uiuc.edu; mazur.barbara@epa.gov; mbdavid@uiuc.edu; McKenna, Dennis; mehnert@isgs.uiuc.edu; mfbollinger@ameren.com; michael_coffey@fws.gov; mJohnson@foth.com; mjsmallwood@ameren.com; Mosher, Bob; MPfister@co.lake.il.us; mwhiles@zoology.siu.edu; nmanninga@dgsd.org; pberrini@cochran-wilken.com; phajda@baxwood.com; philgonet@springnet1.com; Rjhudson@uiuc.edu; rmanner@frwr.com; rmonzing@eaest.com; robert.s.elvert@exxonmobil.com; roflood@northshoresanitary.org; roy@isgs.uiuc.edu; samuel.dennison@mwr.org; dst.il.us; Selburg, Roger; Short, Matt; slow@uiuc.edu; Sofat, Sanjay; sselvara@idem.in.gov; staff@frwr.com; steve.arant@aecom.com; Steven.Heiskary@state.mn.us; Studer, Dean; Susan Franzetti; syfarms@juno.com; tbachman@u-csd.com; tbarkley@prairierivers.org; Terrio, Paul; Thomas.Granato@mwr.org; Thompson.Brian@epamail.epa.gov; timk@sdd.dst.il.us; tloftus@cmap.illinois.gov; tmuth@foxmetro.dst.il.us; toby.frevert@gmail.com; Tonsor, Connie L.; troyer@indiana.edu; Twait, Scott; Walkenbach, Amy; Willhite, Marcia; Williams, Deborah; wlperry@ilstu.edu; wrhill@uiuc.edu; Yurdin, Bruce
Subject: B/F/Mn Water Quality Standards Update

Dear Boron/fluoride/manganese Water Quality Standards rulemaking Stakeholders:

IEPA missed its self-imposed deadline for filing the rulemaking in late fall 2009. Right now we are looking at late April or May. The reasons for the delay are that we were overly optimistic in our predicted completion date and, late last year we lost one of our Standards Unit staff to another State agency, which causes the remaining workers to divert time away from this rulemaking to cover other duties.

There are two notable changes to the rulemaking as presented at the October 19, 2009 Stakeholders meeting.

1. Several additional toxicity tests for boron, fluoride and manganese have now been completed or will be completed in a few weeks by Dr. Soucek at the Illinois Natural History Survey. Before we file with the IPCB, we will incorporate the results of these studies into the derivation formula and update the proposed IL water quality standards presented at the October meeting accordingly. With the availability of these new studies, a change in the proposed standards may result because the chronic derivation methodology changes when more species have been tested for chronic sensitivity. More data means a more robust chronic standard derivation is

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therefore possible, which means that the proposed chronic standards may be raised (because of less safety factoring in the method) if the studies show equal or less toxic effect than the previous studies.

2. IEPA will not propose rules changes that will prohibit mixing zones for mercury at this time. We will continue the existing policy regarding mercury and we will study this issue until we are prepared to propose to prohibit mixing zones for this substance in another rulemaking.

Please give me a call if you have questions about any of the above. Hopefully the next update I send to the Stakeholders will be a rulemaking petition ready to file, including any recalculated proposed standards.

Bob Mosher
Water Quality Standards Unit, Division of Water Pollution Control
Illinois EPA
1021 North Grand Ave. E.
P.O. Box 19276
Springfield, IL 62794-9276
217/558-2012
217/782-5549 (Fax)

CERTIFICATE OF SERVICE

I, Alec M. Davis, the undersigned, hereby certify that I have served the attached

Post-Hearing Comments of the Illinois Environmental Regulatory Group upon:

Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

via electronic mail on October 18, 2012; and upon:

Carol Webb
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100 W. Randolph Street
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Rachel R. Medina
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David Rieser
Much Shelist Freed Denenberg
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Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

by depositing said documents in the United States Mail, postage prepaid, in Springfield,
Illinois on October 18, 2012.

/s/ Alec M. Davis
Alec M. Davis