Electronic Filing - Recived, Clerk's Office : 04/25/2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

THE PHILLIPS 66 COMPANY, Petitioner,	))	
	)	
v.	)	PCB 12-101
	)	(Permit Appeal – Water)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent	)))	

NOTICE OF FILING

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

Rachel R. Medina
Office of the Attorney General
500 South Second Street
Springfield, IL 62706

Carol Webb
Hearing Officer
Illinois Pollution Control Board
P.O. Box 19274
1021 North Grand Avenue East
Springfield, IL 62794-9274

I filed with the Clerk of the Pollution Control Board of the State of Illinois, James R. Thompson Center, 100 W. Randolph St., Suite 11-500, Chicago, IL 60601, **Petitioner's Motion for Reconsideration**, a copy of wbich is herewith served upon you.

Respectfully submitted,

/s/ David L. Rieser

David L. Rieser
Much Shelist, P.C.
191 North Wacker Drive, Suite 1800
Chicago, Illinois 60606-1615
(312) 521-2000

Electronic Filing - Recived, Clerk's Office : 04/25/2013

CERTIFICATE OF SERVICE

I, David L. Reiser, an attorney, hereby certify that on April 25, 2013, I served the foregoing **Petitioner's Motion for Reconsideration** upon those listed below via the Illinois Pollution Control Board Clerk's Office Online (COOL) electronic filing system and via U.S. mail to:

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

Carol Webb
Hearing Officer
Illinois Pollution Control Board
P.O. Box 19274
1021 North Grand Avenue East
Springfield, IL 62794-9274

Rachel R. Medina
Office of the Attorney General
500 South Second Street
Springfield, IL 62706

/s/ David L. Rieser

Electronic Filing - Recived, Clerk's Office : 04/25/2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

THE PHILLIPS 66 COMPANY, Petitioner,	)	
v.	)	PCB 12-101 (Permit Appeal – Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent	)	

PETITIONER'S MOTION FOR RECONSIDERATION

The Phillips 66 Company (Phillips) by and through its counsel, Much Shelist, LLP now files this motion requesting the Board to reconsider its decision in this matter dated March 21, 2013 rejecting Phillips' challenge to the NPDES permit issued by the IEPA on December 22, 2011. (2011 Permit). Although the Board affirmed the Agency's decision, it did so on grounds either not raised by the Agency in this proceeding or not included in the record before the Agency. Phillips respectfully requests this opportunity to respond to the new grounds raised by the Board.

I. RECONSIDERATION STANDARDS

Pursuant to 35 Ill. Adm. Code 101.902, "[i]n ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the board's decision was in error." 35 Ill. Adm. Code 101.902; see also, *Illinois v. Freeman United Coal Mining Company*, LLC, 2013 WL 577871, *2 (Ill.Pol.Control.Bd.). Similarly, under 35 Ill. Adm. Code 101.904, "the Board may relieve a party from a final order entered in a contested proceeding, for the following: (1) Newly discovered evidence that existed at the time of the hearing and that by due diligence could not have been timely discovered; (2) Fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or (3)

Electronic Filing - Recived, Clerk's Office : 04/25/2013

Void order, such as an order based upon jurisdictional defects." 35 Ill. Adm. Code 101.904; see also, *Illinois v. AET Environmental, Inc., LLC*, 2013 WL 226921, *2 (Ill.Pol.Control.Bd.).

In addition to these standards, fundamental fairness requires the Board to allow a petitioner in a permit denial appeal hearing the opportunity to respond when the Board raises in its order a new legal or factual basis for affirming the Agency's decision that was not raised previously by the Agency. The Board held that Phillips was precluded from challenging the mercury limits in the 2011 Permit based on its decision not to challenge the same condition in an earlier permit, an issue never pursued by the Agency. Illinois law precludes the Agency from defending its decision on grounds not included in its record in order to provide the applicant the opportunity to respond fully before the Board. While the Board may have the opportunity act *sua sponte* in some regards, at the very least the Board should allow a petitioner the opportunity to present contrary evidence or law when it rules on grounds not previously relied on by the Agency.

II. THE BOARD'S DECISION THAT PETITIONER WAIVED ITS CHALLENGE TO THE MERCURY PROVISIONS OF THE 2011 PERMIT IS NOT SUPPORTED BY THE RECORD OR BY LAW

The Board's ruling that Phillips waived its challenge to the mercury limits in the 2011 permit by not appealing those limits in the permit issued on February 5, 2009 (2009 Permit) fails as a matter of fact and law. As a factual matter, the Board states it could "find no support in the record" for Phillips' statement that the Agency agreed to reconsider the special condition for mercury included in the 2009 permit in the context of the 2011 permit. (Order, p. 25) Yet the record is replete with direct evidence of the Agency's consideration of its mixing zone determination in the context of the 2011 permit. Phillips' Environmental Director Michael

Bechtol testified that Phillips originally suggested an adjusted standard approach and met to discuss this with the Agency. He further testified:

> At a meeting on June 29, 2011, the parties realized that it would be difficult to proceed to an adjusted standard without resolving the legal issue of the Agency's refusal to grant a mixing zone for mercury. As a result, the Agency agreed to review its mixing zone determination in the context of the permit renewal process. (T. 33)

Mr. Bechtol also testified that Phillips counsel sent a letter to Sanjay Sofat, Manager of the Agency's Division of Water Pollution Control a letter following up on that meeting but also reflecting the Agency's agreement to review its mixing zone decision. A copy of this letter was introduced as Petitioner's Exhibit 3 but it was already included in the Agency's record as Document 40.

The Agency never challenged this testimony nor could it since its record documents that it, in fact, made a new mixing zone determination in the context of the 2011 permit. As its permitting records reflect (See Agency Exhibit K) the Agency focused almost entirely on whether the technology developed in compliance with the permit requirements constituted the Best Degree of Treatment for the purpose of making its mixing zone decision. This information was obviously not available in 2009. The record further shows that the Agency never considered whether the upstream water quality complied with the human health standard either in the 2009 Permit, due to its general policy against permitting mercury mixing zones. The Agency raised the water quality issue for the first time at the hearing on October 3, 2012.

The Board statement that there is no support for finding that the Agency considered the mixing zone question anew for the 2011 Permit is incorrect. In fact, the record is clear that the Agency evaluated its mixing zone decision in light of additional facts not available in 2009 and

Electronic Filing - Recived, Clerk's Office : 04/25/2013

in light of abandoning its policy against mercury mixing zones on which it based its prior decision.

The Board's decision that Phillips waived this issue is legally unsustainable as well. In none of the cases cited by the Board did the Agency specifically agree to review its prior decision based on additional information submitted by the applicant which was not available at the time of the original decision. Further this issue fits squarely within the parameters of *IEPA v. Jersey Sanitation Corporation*, 784 N.E. 2d 867 (4th Dist. 2003) in that the conditions of the permit discussion changed between the issuance of the 2009 Permit and the 2011 Permit. The 2009 Permit was premised on the requirement that Phillips evaluate the potential for mercury treatment and the 2011 Permit proceeded based on the information produced by that evaluation.

More to the point, the Agency never made an appropriate mixing zone determination for the 2009 permit, because their decision was based not on the record but on an illegal rule and was therefore void from the start. Bob Mosher specifically testified that the Agency denied the mixing zone for mercury in the 2009 permit because of an unwritten Agency policy that it would not grant mixing zones for mercury. In his direct testimony he was asked why he did not recommend a mixing zone in the 2009 permit. He replied, "We have at Illinois EPA never then or up to the present granted a mixing zone for mercury, and through some discussion with my supervisors, I was instructed that Illinois EPA would not be granting any mixing zones for mercury." (T. 89) During cross examination he acknowledged that this policy had never been subject to any notice or comment rulemaking procedure. (T. 113 – 144)

As the Board stated in *City of Quincy v. IEPA*, PCB 08-86, March 4,2010, (Slip Op. p. 20) "[u]nless a rule is promulgated in conformity with the [Administrative Procedure Act], 'it is not valid or effective against any person or party and may not be invoked by an administrative

agency for any purpose.'" The Agency freely acknowledged that the internal mixing zone ban on which it based the 2009 Permit underwent no notice and comment process and thus was an invalid unenforceable rulemaking decision. Although the 2011 Permit contained the same mercury permit condition as in the 2009 Permit, the 2011 permit represented the first and only time that the Agency actually made a mixing zone determination pursuant to the Board's rules with respect to mercury.

For the Board to deny Phillips the opportunity to have that determination reviewed, solely on procedural grounds, would place form significantly over substance. Moreover it would make effective an administrative action which the Board previously held "could not be invoked for any purpose." The Board should reconsider and reverse its determination that Phillips waived any challenge to this condition of its 2011 Permit.

Finally, the Board should reconsider this decision because it would discourage negotiated permit resolutions and encourage additional permit appeals. As the record indicates, Phillips accepted the mercury condition in the 2009 Permit reluctantly, but in good faith performed the additional evaluation of mercury treatment required in order to determine whether such treatment was available. Having determined that mercury treatment was not economically reasonable or technical feasible, Phillips discussed different approaches to relief from the permit condition from the Agency and the parties agreed that challenging the underlying mixing zone decision, which had not been previously tested due to the Agency's "policy," would be the most efficient.

Nothing about this process is contrary to the spirit or the letter of the Act. It obviously does not prejudice the Agency, since the Agency agreed to it and does not prejudice the public since the permit issuance proceeded through all of the appropriate public participation requirements. It does not abuse Board resources since only one appeal was filed and it was filed

after a more thorough record regarding the underlying question was developed. On the other hand, should the Board maintain this position it will encourage parties to simply appeal all potentially disputed permit conditions immediately and not to rely on ongoing negotiations or compromise conditions. Phillips respectfully suggests that the Board's approach here does not support the policy of an efficient permit process.

III. THE BOARD'S DETERMINATION THAT PHILLIPS IS NOT ENTITLED TO A MIXING ZONE DUE TO THE WATER QUALITY OF THE MISSISSIPPI RIVER IS NOT SUPPORTED BY THE RECORD OR BY LAW

Despite ruling that Phillips was not entitled to bring this appeal, the Board also affirmed the Agency's permit determination regarding mercury, yet on different grounds than that urged by the Agency. While the Agency claimed that Phillips failed to meet the mixing zone requirements at 35 Ill. Adm. Code 302.102(b)(9) by not documenting the current compliance of the Mississippi River with the Human Health Standard (HHS) for mercury, the Board affirmatively held that information in the record documented that this water quality standard was not being met and that Phillips was therefore not entitled to a mixing zone. The Agency never made this finding. Therefore this is a new issue raised by the Board for the first time in its opinion and should be subject to reconsideration.

This determination is factually unsustainable because it is hased on what the Agency stated was had data. Bob Mosher testified that the IEPA's own mercury sampling data used in Phillips' anti-degradation report was based on a prior methodology which was deficient in numerous respects in addition to an insufficient level of detection (T. 104). He testified that the data was "insufficient for the purpose of trying to evaluate whether the human health water quality standard is being met or not." (T. 105) He further testified that the Agency actually halted water quality testing for mercury due to these issues with the data.

Electronic Filing - Recived, Clerk's Office : 04/25/2013

Despite the Agency's emphatic testimony regarding the unreliability of its data, the Board performed its own mathematical assessment of this same data and determined that it demonstrated that the upstream water quality did not meet the human health standard. Based on the Agency's testimony the Board's determination is inconsistent with the factual record and should be reconsidered.

The Board's water quality determination is also unsustainable because the Agency testified to the Board in another proceeding that it had tested the water quality in this area of the Mississippi using the proper methodology and that the water quality there met the human health standard. While the Board acknowledged this testimony in its factual recitation (Order, P. 23) it ignored it in making its ultimate finding. As a result, the Board made a determination based on data that the Agency testified was unreliable, while ignoring a contradictory determination made by the Agency on this exact issue using appropriate data in another proceeding.

The Board's factual error here points up the legal insufficiency of the water quality issue as a basis for denying the mixing zone because the Agency never raised it in any of its discussions with Phillips or in its decision making records. As the Board repeatedly held, the Agency is limited to its stated justification in the record and its denial letter "frames" the issues on appeal (*Freedom Oil Company v. IEPA*, PCB 10-46, August 9, 2012, p. 14). Phillips argued in its post-hearing response brief that this is a substantive issue which goes to the heart of the fairness of the permitting process. (Petitioner Response Brief, p.2) The only permit hearing to which an applicant is entitled is the one before the Board and fundamental fairness requires that the Agency alert the applicant to its bases for decision. Board rules do not require the Agency to file an answer to a permit denial petition on the assumption that the permit response letter and the record should tell an applicant what it needs to know about the Agency's positions.

The record reflects that the Agency never raised the issue of the compliance with the human health water quality standard. Neither Bob Mosher's initial water quality memo of June 12, 2008 (Respondent's Exhibit A) nor the IEPA's 30 day review notes of November 16, 2011(Respondent's Exhibit K) contain any discussion of the upstream water quality. The only document mentioning water quality was Respondents Exhibit I which Bob Mosher testified he prepared in advance of the hearing and further testified that the information in it had never been shared with Phillips. (T. 107) This exhibit was admitted over the objection of Phillips.

While Phillips obviously has an obligation to document compliance with the mixing zone requirements in its submissions and to prove its case before the Board, the Agency has an obligation to advise Phillips of deficiencies which it perceives. Typically, the Agency is not shy about this. As the record here documents, the Agency requested additional mercury testing and several rewrites of Phillips' anti-degradation report, all of which Phillips did. The Agency noted the issue regarding the mussel bed below Phillips' outfall with respect to the general mixing zone and Phillips relocated the mussel bed and extended its outfall at a substantial cost. After discussing mercury issues with the Agency from 2008 through 2011, and never once hearing that the Agency could not grant a mixing zone due to non-compliance with upstream water quality, Phillips was entitled to believe that the Agency was satisfied that this was not an issue.

As also noted in Phillips' post-hearing briefs, the Agency has never made a Section 303(d) determination with respect to compliance with the mercury human health standard based on water quality. While the Agency did determine that this area of the Mississippi was impaired with respect to fish consumption, it acknowledged that this determination is based on an evaluation of fish tissue and is not related to compliance with the water quality standard.

Electronic Filing - Recived, Clerk's Office : 04/25/2013

Phillips understands that the Board cannot make a determination that that would allow the Agency to issue a permit inconsistent with the Act. Phillips believes that the Agency's testimony to the Board in its prior proceeding, its determination not to identify the Mississippi as impaired for this water quality standard in the Section 303(d) process and its failure to raise this issue at any point in the record below all present a sufficient record for the Board to determine that this condition of the mixing zone requirements has been met. The Board has more than enough information before it to require that the Agency issue the permit with a mixing zone for mercury. To the extent that the Board believes this data insufficient, the appropriate determination here would be to remand this to the Agency for further evaluation of this issue and additional data collection if necessary. Phillips respectfully submits that a remand would be more consistent with the record than upholding the Agency decision based a water quality determination the Agency never made on the record and on data which the Agency testified was unreliable.

IV. THE BOARD'S DECISION REMANDING THE MASS LIMIT TO THE AGENCY DID NOT IDENTIFY THE CORRECT RELIEF

The Board remanded the mercury mass limit to the Agency to correct in light of the Agency's acknowledged failure to use the correct flow amounts in setting the limit. Yet this remand does not completely identify the areas where the Agency failed to correctly set this limit. First, to the extent that the Board either reverses its decision or remands the entire permit for review of the mercury mixing zone, a mass limit may not even be necessary. If the Agency agrees to a mixing zone, a mass limit may not be necessary since there would be no reasonable potential to violate the water quality standard. That determination would be consistent with the other constituents in the permit for which a mixing zone has been determined. If the Agency does not agree the Board should expand its remand to ensure that the Agency determines that its mixing zone basis is representative of actual conditions. This

Electronic Filing - Recived, Clerk's Office : 04/25/2013

would require not only adjusting the flow value but also the amount of mercury to be consistent with the Agency's practice of applying USEPA uncertainty factors. Phillips requested this relief, but the Board did not address it in its ruling.

V. THE BOARD'S DECISION TO REJECT THE STIPULATION AND AFIIRM THOSE CONDITIONS OF THE PERMIT WAS ALSO WITHOUT LEGAL OR FACTUAL SUPPORT

In a good faith effort to narrow the issues before the Board and reduce the time and scope of the hearing, Phillips and the Agency negotiated a resolution to three of the four issues on which Phillips appealed. In order to advise the Board and any members of the public who might be reviewing the record or participating in the hearing, Phillips and the Agency announced the terms of this settlement at the hearing and presented the terms to the hearing officer in the form of a document entitled Amended Agreed Motions and Stipulations. The document reflected the exact language of the permit to which the parties agreed which amended two of the three conditions and deleted the third. In its order the Board rejected this stipulation and affirmed the Agency's original permit language. As this was also an issue not previously raised, the Board should entertain Phillips' motion to reconsider.

The Board based its decision on three separate grounds, two of which are legally unsupportable and one of which appears to require the Board to allow the issuance of an illegal permit. There is an extraordinary disconnect between the Board's rejection of stipulations while at the same time being advised during nearly every permit appeal that petitioners continue to negotiate their permits with the Agency. Based on a review of the Clerk's web site, of the 114 permit appeals currently pending before the Board, fully 96 report their status as negotiating with the Agency. The Board routinely accepts voluntary dismissals on the grounds that the parties have resolved their dispute based on the Agency's agreement to modify the permit. (See e.g.

MWRD v. IEPA, PCB 08-47 April 3, 2008; *City of Geneva v. IEPA*, PCB 07-39, March 15, 2007). So the issue here is not that the parties resolved their differences, but that they filed the Amended Motion as a means of documenting that resolution.

For its first ground, the Board conflates two separate and conflicting bases by relying on its traditional language regarding its "difficulty in dealing with settlements in permit appeals" and then segueing to its finding that this issue is controlled by the prohibition against Agency reconsideration contained in *Reichhold v. IEPA*, 561 N.E. 2d 1343 (3rd Dist. 1990). These holdings are not legally supportable individually and contradict each other when put together. With respect to the Board's "difficulty," the Board should understand that the underlying decision, *Caterpillar v. IEPA*, PCB 79-180 June 2, 1983, never referred to any difficulty but instead held that the Board would accept a stipulation so long as it included sufficient information to allow the Board to make a decision. The Board held,

> Should the parties wish to have a permit appeal resolved by a Board order that a particular negotiated permit issue, a stipulation and proposal should be presented at hearing setting out sufficient technical facts and legal assertions to allow the Board to exercise its independent judgment and to make proper findings of fact and conclusions of law. (Slip Op. 1-2)

Over time this language has ossified into an absolute prohibition, (See e.g. *General Electric Company v. IEPA*, PCB 90-65, September 12, 1991; *Meyer Steel Drum v. IEPA*, 92-76 August 13, 1992) even though the original opinion contemplated the parties being able to stipulate not only to permit language but also to a legal and factual bases in support. Indeed in *Caterpillar Tractor Company v. IEPA*, PCB 83-58, the Board accepted a stipulation remanding the permit back to the Agency after asking the parties to address certain legal and factual issues. The Board's blanket prohibition on stipulations has no real basis in the Act or the Board's prior decisions.

The Board's position is further undermined by its reliance on *Reichhold*. Contrary to the Board's ruling, *Reichhold* does not preclude Agency reevaluation of permits but does preclude that reevaluation from affecting the applicant's rights or responsibilities until the new permit is issued. In *Reichhold* the Agency sought the dismissal of a permit appeal filed after the applicant had asked the Agency to reconsider its permit decision. The Board granted that dismissal over the objections of the petitioner, but the Appellate Court reversed the Board's dismissal, holding the filed permit appeal remained valid.

It would have been shocking had the Appellate Court actually held that the Agency has no authority to reevaluate and revise its permit decisions. The Agency plainly has broad authority to modify permits (See e.g. 40 CFR 124.5) and numerous Board opinions recognize this authority (See e.g. *Wesley Brazas, Jr. v. Jeff Magnussen and IEPA*, PCB 06-131, July 6, 2006.). Instead, the point of *Reichhold* is that, without statutory authority, the Agency's reconsideration has no legal import and, unlike a Board reconsideration, the Agency's reconsideration cannot automatically stay the finality of its underlying decision. The First District Appellate Court emphasized this point in *Waste Management of Illinois, Inc. v. IPCB*, 595 N.E.2d 1171 (1st. Dist. 1992) when it overturned a Board regulation purporting to delay the finality of an Agency permit decision if the applicant asked for a reconsideration. The Agency can reevaluate or reconsider a permit whenever it wants but that reconsideration cannot provide any rights or protections to the applicant outside of the regulated permit process.

The Board's failure to distinguish between reconsideration as a quasi-judicial act staying effectiveness and reconsideration as reevaluation leading to a new permit has led to awkward results. For example in *Ameren Energy Generating Company, Coffeen Power Station v. IEPA*, PCB 06-64 (September 20, 2012), the Board approved a stipulation lifting the automatic stay as

to certain conditions in the appealed permit. The Board acknowledged its issue with respect to *Reichhold*, but held that the General Assembly provided specific authority for the Agency to modify Title V air permits and that it therefore had the authority to "reconsider" its decisions. Yet that authority is not meaningfully different from the authority exercised by the Agency and acknowledged by the Board with respect to an NPDES or any other permit. In short, to the extent it relies on its past cases and on *Reichhold,* the Board's determination is flawed and should be reconsidered.

The Board also should reconsider its holding that a stipulation is precluded because it could potentially affect the rights of third parties who may wish to challenge the permit. Yet the Board has indicated that the permit the Agency issues after remand can be appealed by the permittee in a separate proceeding (See e.g., Illinois Power Company v. IEPA, PCB 79-243, (February 17, 1982)) whicb suggests that a third party could appeal the permit as well. For a third party following this issue, it would not only have full appeal rights, it would also bave knowledge of these potential changes since the stipulation was presented during the hearing and filed with the Board. The stipulation has no impact on a third party's public participation or its right to appeal.

In this case, the stipulation was essentially an advance notice of the Agency's agreement to modify the permit in certain respects. It will still have to issue the permit according to the regulations and its decision will be challengeable as a final agency action. Had these three issues been the only matters before the Board, the parties would have announced their resolution, the Agency would have issued a permit with the revised language and then Phillips would have dismissed the appeal, to which the Board would have had no objection. But because there was another issue which required a hearing, this path was not available. The stipulation was intended

Electronic Filing - Recived, Clerk's Office : 04/25/2013

to be the functional equivalent of a dismissal of these claims and the Board should reconsider its decision to reject it.

The Board's last issue that there is no factual support for the stipulation is also not borne out by the record. For example, with respect to the dissolved oxygen limit the Agency admitted (in its Response to Motion to Stay, February 24, 2012, p. 6) that "petitioner was not afforded the proper notice" of the limit, which indicates that the Agency lacked the authority to include the condition in the permit. The changes to the fecal coliform limit only modified the scope and timing of the compliance plan. The changes regarding Smith Lake expanded the scope of the Storm Water Pollution Prevention Plan but deleted the requirement to apply to expand the permit to cover discharges to Smith Lake. As Phillips alleged and as is reflected in the record from the Agency, the U.S. Army Corps of Engineers determined that Smith Lake was not a water of the United States which required an NPDES permit.

To the extent that the Board deemed the stipulation inadequate by not providing the Board with a basis for its decision, that issue could be addressed by requiring parties to supply necessary information. Instead, the Board's decision to deny the appeal based on the stipulation is without basis and is almost punitive. To the extent the Agency stipulates that the permit language it issued should be modified in some way, by simply denying the appeal and allowing the initial permit to issue, the Board may be allowing the issuance of a permit inconsistent with the Act. That would certainly be the case here where the Agency acknowledged that its inclusion of a dissolved oxygen effluent limit in the final permit was inappropriate when it had not afforded Phillips proper notice of the limit.

Further, there is no cognizable difference between the Agency's statement that it wanted to revise the mercury mass limit, which the Board accommodated by remanding the issue to the

Agency and the Agency's statement that it had agreed to revise the permit in certain respects after discussions with Phillips. Both involve Agency acknowledgement that the permit should be revised and both involve relatively meager records. The Board does not explain why the Agency's request regarding the mercury mass limit represents a permissible change which it accommodates with a remand but the stipulation is impermissible but still provides a sufficient record for the Board to allow the permit to he issued without the agreed changes.

VI. CONCLUSION

In the end, the Board should review this decision because it unaccountably focuses on procedure and loses sight of the genuine issue between parties. Having made an illegal permit decision in 2009, the Agency agreed to review the basis for its denial of the mixing zone based on the actual facts before it and not on an indefensible unwritten policy. Phillips sought to evaluate potential mercury treatment alternatives as required in its permit and determined that none of the technologies were technically feasible or economically reasonable. The parties met numerous times to discuss these issues without success and Phillips used the Board's permit appeal process to resolve the issues. At the same time it continued to discuss the issues with the Agency and succeeded in resolving three out of the four permit appeal claims. The parties then proceeded to a hearing on the merits of the one disputed issue.

In response, the Board essentially avoids the issues properly raised by the parties. While it affirms the Agency, it does so on grounds that contradict the Agency's actual determinations, leaving both sides and the regulated community at large with little guidance as to how these underlying issues should be addressed. The Board's grounds for decision were not unavoidable or jurisdictional but represented a choice that placed the Board outside of the dispute instead of in the forefront of its resolution.

Electronic Filing - Recived, Clerk's Office : 04/25/2013

WHEREFORE, for the reasons stated herein, Phillips respectfully requests the Board to reconsider it March 21, 2013 decision and remand the permit to the Agency to either:

1. Reissue it with Phillips' proposed changes regarding mercury and stipulated changes regarding the other matters; or
2. Direct the Agency to further develop its record regarding mercury water quality in that area of the Mississippi and to make a clear determination regarding the requested mercury mixing zone based on that record.

THE PHILLIPS 66 COMPANY

By: /s/ David L. Rieser
One of Its Attorneys

Date: April 25, 2013

David L. Rieser
Much Shelist, P. C.
191 North Wacker Drive, Suite 1800
Chicago, Illinois 60606
312-521-2717
drieser@muchshelist.com