

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

THE PHILLIPS 66 COMPANY,)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent)

RECEIVED
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JUN 21 2013
STATE OF ILLINOIS
Pollution Control Board
PCB 12-101
(Permit Appeal - Water)

 ORIGINAL

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

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Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Ste 11-500
Chicago, IL 60601

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 Stay Pending Appeal**, a copy of which is herewith served upon you.

Respectfully submitted,

By _____

David L. Rieser
Much Shelist, P.C.
191 North Wacker Drive, Suite 1800
Chicago, Illinois 60606-1615
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CERTIFICATE OF SERVICE

I, David L. Reiser, an attorney, hereby certify that on June 21, 2013, I served the foregoing **Petitioner's Motion for Stay Pending Appeal** upon those listed below via U.S. mail at 191 North Wacker Drive, Suite 1800, Chicago, Illinois, to:

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
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ILLINOIS ENVIRONMENTAL)
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PETITIONER'S MOTION FOR STAY PENDING APPEAL

The Phillips 66 Company (Phillips) by and through its counsel, Much Shelist, P.C., files this motion requesting the Board to stay enforcement of the terms of the NPDES permit ("2011 Permit") challenged in the above permit proceeding, pending its appeal of the Board's decisions. Although Phillips has already filed its Petition for Review with the Fifth District Appellate Court, (docketed as *The Phillips 66 Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency*, No.: 5-13-0283) Supreme Court Rule 335(g) requires motions for stay to be filed "in the first instance" to the agency issuing the decision subject to challenge

I. STANDARDS OF A MOTION FOR STAY

The decision to grant or deny a motion for a stay is vested in the sound discretion of the Board. *People v. Blue Ridge Construction Corp.*, PCB 02-115 (2004). The factors to be considered in ruling on a motion for stay pending appeal are: (1) whether a stay is necessary to secure the fruits of the appeal in the event that the movant is successful; (2) whether the *status quo* should be preserved; (3) the respective rights of the litigants; (4) whether hardship on other parties would be imposed; and (5) whether there is a substantial case on the merits. *People v. Community Landfill Co., Inc.*, PCB 97-193 (2009), citing *Stacke v. Bates*, 138 Ill. 2d 295, 304-306 (1990). Although not required to show a probability of success on the merits, a movant must

present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay. *Stacke*, 138 Ill. 2d at 309.

III. ARGUMENT

A. *A Stay Is Necessary To Secure The Fruits of Phillips' Appeal*

The key issue in this appeal is the Board's rejection of Phillips' challenge to the refusal of the Illinois Environmental Protection Agency ("Agency") to grant a mixing zone for mercury discharges from Phillips' refinery. Although stayed during the pendency of Phillips' appeal before the Board, Special Condition 28 of the 2011 Permit required the submission of additional progress reports and compliance with the 2011 Permit's mercury standard by February 5, 2014. Absent a stay of this condition, Phillips will be required to expend more than \$14 million in capital costs in order to comply with the permit. Since there are only seven months remaining until the compliance date, Phillips would need immediately to begin engineering and construction of the proposed compliance system as well as seeking and obtaining a construction and operating permits from the IEPA. (See affidavit of Ron Green attached hereto and incorporated herein as Exhibit A)

Phillips has long been aware of this looming deadline and began discussions with the Agency in early 2011 to modify the permit to either remove or extend the deadline or seek site specific relief. As a result, it has not been dilatory in seeking to resolve this matter. If Phillips prevails in this appeal, the Agency will be required to either approve the mixing zone determination or reconsider its decision in light of all of the available information. In those circumstances, Phillips would not be required to achieve immediate compliance with the permit. Yet if the Board refuses to stay the deadline now, Phillips will be forced to incur costs to design and construct a system that would be completely unnecessary should the Appellate Court

overrule the Board. Since the “fruit” of Phillips’ appeal is the determination that construction of this system is not necessary, a refusal to issue a stay would clearly deny Phillips the fruit of its appeal.

Similarly, with respect to the other issues under appeal relating to fecal coliform, Smith Lake and dissolved oxygen, Phillips will be required to take substantial steps to comply immediately with those elements of the permit. These steps would be especially pointless since the Agency already agreed to modify the permit on these issues. Requiring immediate compliance with these conditions would also deny Phillips of the benefit of its appeal.

B. There Would Be No Harm In Preserving the Status Quo

There would be no impact to human health or the environment associated with this stay. With respect to mercury, the Agency testified in another proceeding (Proposed New 35 Ill. Adm. Code 225, Control of Emissions from Large Combustion Sources (Mercury), R06-25) that it performed a water quality study in 2004 which showed that the human health water quality standard for mercury was met in almost all of the samples taken from rivers and streams, including one taken from a location which appears to be in the vicinity of the Wood River Refinery. While Agency witness Bob Mosher discussed the potential for impacts associated with mercury, the Agency has never found that the Mississippi River is impaired for mercury based on water quality, but only based on limited fish sampling. Further, the Agency determined that it would no longer test statewide for mercury water quality. As Phillips stated in its Post-Hearing Brief, the existing system already removes more than 98% of the mercury from the waste stream leaving only 3.2 ounces per year uncontrolled. As a result there will be no environmental impact associated with a stay while the Appellate Court considers this matter.

Further with respect to the other issues in the appeal, all of these represent new requirements which the Agency never previously placed on the refinery despite the fact that it has been a permitted facility since the time the Agency started issuing permits. Delaying the initiation of these requirements until a final appellate order would have no environmental impact.

C. *Phillips Will Incur Great Hardship If The Stay Is Not Effectuated and the IEPA Will Suffer Little To No Harm*

As expressed above, if enforcement of the 2011 Permit is not stayed, Phillips will be forced to expend millions of dollars on a treatment system which might not be necessary should the Appellate Court rule for Phillips. It would also need to expend funds to address issues which the Agency has already agreed should be handled differently. Neither the IEPA nor the Board nor, as discussed above, the environment of the state will suffer any harm associated with the stay.

D. *Phillips Has A Substantial Case on The Merits*

Phillips has a meritorious case and fully expects to prevail before the Appellate Court because the Board's decision was clearly arbitrary and capricious and not based on the record before it. The Board's determination that Phillips had waived its right to appeal the IEPA's denial of its mixing zone in the 2011 permit was legally and factually baseless. Nothing in the Illinois Environmental Protection Act precludes the Board from hearing such actions and the few appellate court decisions on the issue recognize that changed circumstances such as here specifically preclude any waiver. Factually, the Board ignored the record which clearly and unequivocally established that the Agency agreed to review its denial of the missing zone in the 2009 permit and did so in order to review information regarding the potential for mercury treatment. This information had been generated in compliance with the investigation requirements of the 2009 permit and was not available to be considered by the Agency at that

time. The record also established that the Agency's decision in 2009 was based on an unwritten and illegal rule which under Board and appellate court precedent could not be enforced.

Similarly, the Board's finding that Phillips was not entitled to a mixing zone because the Board determined that the Mississippi River was not in compliance with the mercury human health standard also had no legal or factual basis. While Board and appellate court precedent require the permit appeal to be based on the record before the Agency and the Agency's denial letter, at no time during its consideration of the 2009 or 2011 permits did the Agency raise the issue of compliance with the water quality standard, let alone conclude that the water quality did not meet the standard. Until the hearing on this matter on October 3, 2011 the Agency never once identified the potential lack of compliance with the water quality standard as a basis for its denial either in its communications with Phillips or in its internal communications. Even at that hearing the Agency affirmatively testified that quality issues with existing data precluded any determination from being made based on that data. Further, as stated above, the Agency testified to the Board in a separate proceeding that its own study showed that the Mississippi River in the area of the refinery complied with the mercury water quality standard.

Finally, the Board's determination that the agency could not agree to review the 2009 permit or agree to certain permit revisions because it lacked authority to "reconsider" its own decisions also has no basis in the Act or in prior appellate court decisions. In short, Phillips has a substantial case because the Board clearly ignored both the law and the facts in reaching its decision which was not based on the record and was arbitrary and capricious.

E. Equitable Factors Favor Granting the Stay

The above discussion documents that consideration of equitable factors favors granting this stay. If the stay is not granted, Phillips will suffer considerable economic harm in having to begin to construct and operate a \$14 million mercury treatment facility which will be rendered completely unnecessary should the Appellate Court rule in its favor. It would also expend capital costs to comply with other conditions which the Agency has already determined should be modified. Neither the Board nor the Agency nor the environment will suffer any harm during the pendency of the stay as the Agency testified that its own study showed that the water quality complied with the human health standards in the area of Phillips discharge. In addition Phillips' current waste water treatment system already removes more than 98% of the mercury leaving only minute quantities to be discharged. Finally, Phillips has a substantial case on the merits and is indeed likely to prevail before the appellate court.

WHEREFORE, for the reasons stated in this motion, Phillips respectfully requests that the Board stay the effectiveness of the challenged provisions of the 2011 Permit until such time as the appellate courts render a final decision on this appeal.

THE PHILLIPS 66 COMPANY

By: 

One of Its Attorneys

Date: June 21, 2013

David L. Rieser
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Exhibit A

STATE OF ILLINOIS)
)
COUNTY OF MADISON)

AFFIDAVIT

I, Ron Green, being duly sworn on oath, do state and aver as follows:

1. I am an environmental engineer with the Phillips 66 Company working at the Wood River Refinery. My responsibilities include wastewater control and the operation of the existing wastewater treatment plant.

2. My responsibilities include planning and oversight of the project to construct an additional facility within the wastewater treatment plant for the control of mercury from the refinery discharge.

3. As part of those responsibilities I have prepared for my management outlines of the steps needed to complete the project and the time necessary for these steps. These steps and time frame are based on my experience and the experience of others in the company responsible for the construction of capital projects.

4. The following steps still need to be performed to complete the facilities necessary to provide mercury treatment:

- a. Preliminary engineering sufficient to estimate costs for materials and construction;
- b. Advanced procurement of designed equipment;
- c. Obtain Illinois construction permits;
- d. Final engineering to prepare design specifications;
- e. Construction;
- f. Shake out, optimize operations; and
- g. Operation.

5. I estimate that the duration for these steps would be up to 30 months.

FURTHER AFFIANT SAYETH NAUGHT.



Ron Green

Subscribed and Sworn to before me
this 17 day of June, 2013.



Notary Public

