

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**NOTICE OF FILING**

TO: See attached Service List

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, **MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT'S OBJECTION TO PHILLIPS' MOTION FOR STAY PENDING APPEAL**, a copy of which is herewith served upon you.

Respectfully submitted,

/s/ David L. Rieser

David L. Rieser  
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**CERTIFICATE OF SERVICE**

I, David L. Reiser, an attorney, hereby certify that on July 18, 2013, I served the foregoing **MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT'S OBJECTION TO PHILLIPS' MOTION FOR STAY PENDING APPEAL** upon those listed below via the Illinois Pollution Control Board Clerk's Office Online (COOL) electronic filing system and via U.S. mail to:

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/s/ David L. Reiser

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	)	
v.	)	PCB 12-101
	)	(Permit Appeal – Water)
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MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT’S OBJECTION TO PHILLIPS’  
MOTION FOR STAY PENDING APPEAL

The Phillips 66 Company, by and through its attorneys, Much Shelist, files this motion for leave to file a Reply to Respondent’s Objection to Phillips’ motion for stay pending appeal. While Board rules do not allow for replies to responses to motions, the Board has the discretion to grant leave to file a reply in order to prevent “material prejudice.” (35 Ill. Adm. Code 101.500(e)) As described in the attached Reply (attached hereto and incorporated herein as Exhibit A), Respondent’s motion makes significant misstatements of fact and law which, if accepted by the Board in its consideration of this motion, would materially prejudice Phillips. The attached Reply seeks solely to correct those misstatements and not to reargue the original motion. In addition, this motion is submitted within three days of the date of service of the Response and so is well within the time requirements set out in 35 Ill. Adm. Code 101.500(e).

WHEREFORE, for the reasons stated in this motion, Phillips respectfully requests leave to file the attached Reply.

THE PHILLIPS 66 COMPANY  
By: /s/ David L. Rieser  
One of Its Attorneys

Date: July 18, 2013  
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# EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

THE PHILLIPS 66 COMPANY'S REPLY TO RESPONDENT'S OBJECTION TO  
PETITIONER'S MOTION FOR STAY PENDING APPEAL

The Phillips 66 Company (Phillips) by and through its counsel, Much Shelist, P.C., files this Reply to Respondent's Objection to Petitioner's Motion for a Stay Pending Appeal filed on July 10, 2013 (Objection). While Phillips believes that the necessary facts and arguments are already stated in its motion, the Objection contains misstatements of law and facts to which Phillips is compelled to respond.

1. Respondent begins its brief with a significant misstatement, stating that "...[Phillips'] effluent exceeds the human health water quality standard (Human Health Standard) for mercury. *This fact is not disputed.*" (Objection, p.2, emphasis added). In reality, this entire dispute is about this very fact. If the Agency had included the mixing zone for mercury to which Phillips is entitled, Phillips' effluent would be in complete compliance with the human health water quality standard (HHS) for mercury. Instead, the Agency arbitrarily refused to grant the mixing zone, first on the basis of an illegal policy, then on the basis of a technical decision without support on the record, which it subsequently defended at the hearing on the basis of claims regarding compliance with the water quality standards which it had never previously raised. Assuming that the Agency was correct in its testimony to the Board in its prior

rulemaking that the Mississippi River water quality complies with the HHS standard, there is no impact to the environment whatsoever associated with the stay of this proceeding.

2. Respondent again ignores the facts before the Board when it asks the Board to dismiss any reliance on the Agency's testimony in the mercury proceedings docketed as R06-25 where it states, "Phillips provided no citation or specific quote from the multiple transcripts that exists for that matter demonstrating the specific facts." (Objection, p. 3). In its Post-Hearing Reply Brief filed on January 14, 2013, Phillips included the specific language from the Agency's Technical Support Document addressing this issue and described in a footnote how the actual study appears not to have been included in the record. In its recitation of the facts in its opinion, the Board acknowledged that it had received this information. (Opinion p. 23). One would assume that the Agency is well aware of its own study or would at least not respond as if it doubted its existence or validity.

3. The assumption that the Agency is aware of its own study may admittedly not be valid since the Agency appears to disavow the quality of its own work relative to mercury. Not only does it claim that reliance on this study is unwarranted, it notes that Phillips' anti-degradation report "fails to use the appropriate testing methods to determine whether the Human Health Standard for mercury can be met in the receiving water." (Objection, p. 4). The statement is completely disingenuous because the data on which Phillips relied, which failed to use the appropriate testing methods, was the Agency's own water quality sampling data. Through all of the iterations of that Anti-Degradation study, the Agency never once criticized the report for the apparent technical sin of using Agency data. It was not until the hearing that the Agency announced that its own data was flawed for numerous quality reasons in addition to not having a sufficiently low detection level.

4. The Agency's argument documents how flawed both permit procedures were and why Phillips should be entitled either to a decision in its favor or to a remand for a fair process. The Board's determination regarding water quality was not based on the record because the Agency never raised the issue prior to the hearing. The Board's decision regarding Phillips' alleged waiver had never been raised previously and the Board allowed Phillips no opportunity to respond. The Board and the Agency acted arbitrarily and capriciously by identifying objections well after the record had closed and after the point where Phillips had an opportunity to meaningfully supplement its information.

5. All of this underscores the Agency's erroneous argument that the fruits of the appeal are not obvious. The Agency argues that Phillips "would like to believe" that the Appellate Court would reverse the Board and order the mixing zone be granted, but that it was just as likely that the entire matter would be remanded for further consideration by the Agency. While Phillips does believe that the Appellate Court would be correct reversing the Board and Agency decisions, Phillips believes that a remand back to the Agency would also be a satisfactory result and so stated in its Motion for Reconsideration.

6. It would certainly be valuable for Phillips to finally and rightfully obtain a fair process where the Agency identifies its perceived issues and data gaps and Phillips can respond to those issues. Phillips believes that that record (just as much as the current record) will clearly show that it is entitled to a mixing zone. So a remand to the Agency would be a fruit of the appeal which would be lost should Phillips be forced to construct an expensive and unnecessary mercury treatment facility in the meantime.

7. The result is that Phillips is entitled to a stay because it has a substantial case on the merits, there will be no environmental harm and Phillips will not be able to obtain the fruits

of its appeal if it is required to construct an unnecessary and expensive treatment facility while the appeal is pending.

WHEREFORE, for the reasons stated in Phillips' Motion and this Reply, Phillips is entitled a stay of the Board's decision pending its appeal.

THE PHILLIPS 66 COMPANY

By: \_\_\_\_\_  
One of Its Attorneys

Date: July 18, 2013

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