

ILLINOIS POLLUTION CONTROL BOARD
April 5, 2012

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

ORDER OF THE BOARD (by D. Glosser):

On January 17, 2012, ConocoPhillips Company (ConocoPhillips) timely filed a petition asking the Board to review a December 22, 2011 permit determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2010); 35 Ill. Adm. Code 101.300(b), 105.206. The Agency issued a permit, subject to conditions, under the National Pollutant Discharge Elimination System (NPDES) for the ConocoPhillips' operation of a petroleum refinery owned by WRB Refining LP, known as the Wood River Refinery in Roxana, Madison County. The ConocoPhillips' petition included a request for stay of certain permit conditions. The Agency objected to the stay. For the reasons discussed below the Board grants the motion for stay.

PROCEDURAL BACKGROUND

On January 17, 2012, ConocoPhillips filed its petition for review (Pet.) and request for stay of certain permit conditions (Mot.). The NPDES permit concerns ConocoPhillips' operation of a petroleum refinery. On February 2, 2012, the Board accepted the petition but reserved ruling on the motion for stay.

On February 14, 2012, the hearing officer extended the deadline for the Agency to respond to the motion until February 28, 2012. *See* Hearing Officer Order (Feb. 14, 2012). On February 24, 2012, the Agency timely filed a response to the motion for stay (Resp.).

On March 12, 2012, ConocoPhillips filed a motion for leave to file a reply along with a reply to the Agency's response (Reply). The Board grants the motion for leave to file a reply.

FACTS

ConocoPhillips operates the refinery that is owned by WRB Refining LP. Pet. at 1. The refinery is located at 900 South Central Avenue, Roxana, Madison County. *Id.* The refinery is in the final stages of an expansion that will increase the crude oil throughput from 323,000 to 385,000 barrels per day. Pet. at 2. The expansion also added facilities to process efficiently

heavier crude oils. *Id.* Pollution control equipment in the form of two wet scrubbers was added in response to a consent decree entered into with the United States Environmental Protection Agency (USEPA). *Id.* The cost of the expansion is expected to be \$3.8 billion and will generate an estimated at \$48 million per year for the area. *Id.*

The refinery discharges wastewater to the Mississippi River. The wastewater treatment process at the refinery includes a series of unit operations beginning with two bar screens operated in parallel, followed by two 93,359-gallon pH neutralization tanks. Pet. at 2. “Wastewater then flows through eight oil/water separators followed by two dissolved nitrogen flotation units to reduce oil concentration before biological treatment.” *Id.* Wastewater then flows to a diversion/equalization tank and next to the activated sludge process. The effluent flows through “polishing lagoons” before discharging to the Mississippi River. *Id.*

On April 14, 2004, prior to the expansion, the Agency issued an NPDES permit to the refinery with an expiration date of March 31, 2009. Pet. at 3. On May 12, 2006, ConocoPhillips sought a modification of that permit, which the Agency granted and issued on February 5, 2009. *Id.*

On September 8, 2008, ConocoPhillips filed an application for renewal of the permit and the Agency issued a draft permit on December 21, 2010. Pet. at 3. On December 22, 2011, the Agency issued ConocoPhillips a revised NPDES permit for the refinery. *Id.* ConocoPhillips appealed the Agency’s decision with regard to certain conditions.

Among the conditions imposed, the permit establishes concentration and load limits for mercury based on the Board’s regulations for general use water quality. Pet. at 5. The limit and condition were imposed in the 2009 permit. *Id.* The permit also includes a condition establishing an effluent limit for fecal coliform and requires that discharges to “Smith Lake” be subject to a NPDES permit. Pet. at 8. The permit also includes dissolved oxygen limits. Pet. at 9.

REQUEST FOR STAY

ConocoPhillips requests a stay of Special Condition 21 (which relates to the discharge to Smith Lake), Special Conditions 26 and 28 (relating to fecal coliform discharge), Special Condition 27 (relating to mercury compliance plan), and the effluent limits, for for mercury and dissolved oxygen. Pet. at 4; *see also* Pet. at Exh. A pgs. 13-16. ConocoPhillips relies on Borg-Warner v. Mauzy, 427 N.E.2d 415 (3rd Dist. 1981) and Ameren Energy Generation Company v. IEPA, PCB 06-67 (Feb. 16, 2006) for the proposition that once a permit is appealed to the Board, the entire permit is stayed until the Board renders a decision. Pet. at 4. ConocoPhillips further relies on Ameren for the principle that a petitioner can choose to ask the Board to stay only certain conditions. *Id.* ConocoPhillips states that it “has no objections” to the remaining terms and conditions in the permit and is prepared to operate under those terms and conditions. *Id.*

ConocoPhillips wishes the Board to clarify that a stay of Special Condition 27, includes also a stay of the requirement as it was included in the 2009 permit. Pet. at 5. ConocoPhillips argues that the Agency had “agreed to review its legal and factual basis” for Special Condition

27 in the context of this permit renewal. *Id.* ConocoPhillips maintains that Special Condition 27 “should be seen as independent of the prior condition and subject to both appeal and stay.” *Id.* ConocoPhillips asserts that it is at a point where contracting for the design, engineering and construction of the mercury control facility must begin in order for the refinery to be in compliance by February 5, 2014. Pet. at 4. Further expenditures must be made no later than April of 2012. *Id.*

RESPONSE TO REQUEST FOR STAY

The Agency responds in opposition to the request for stay arguing that ConocoPhillips has failed to establish that a stay is appropriate. Resp. at 1. The Agency opines that ConocoPhillips is asking for a discretionary stay, by requesting that only certain conditions be stayed. Resp. at 2. The Agency argues that the Board refers to four factors when deciding whether to grant a discretionary stay. Resp. at 2, citing Bridgestone/Firestone Off-road Tire Company v. IEPA, PCB 02-31, slip op. at 3 (Nov. 1, 2001) and *see also* Community Landfill Company and City of Morris v. IEPA, PCB 01-48 and 01-49 (consol.), slip op. at 5 (Oct. 19, 2000), citing Junkunc v. SJ. Advanced Technology & Mfg., 149 Ill. App. 3d 114, 498 N.E.2d 1170 (1st Dist. 1986).

The Agency maintains that those four factors are:

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. Resp. at 2, citing Bridgestone, slip op. at 3.

The Agency points out that in Community Landfill, the Board states that the “Board is particularly concerned about the likelihood [of] environmental harm if the stay is granted”. Resp. at 2, citing Community Landfill, slip op. at 5.

The Agency argues that ConocoPhillips’ reliance on Ameren is misplaced as the Board did not reach the issue of a discretionary stay in Ameren. Resp. at 2. The Agency acknowledges that the Board has the authority to grant a discretionary stay, but argues that the Board should not do so for these permit conditions. Resp. at 4.

Special Condition 27 (Mercury)

The Agency argues that ConocoPhillips cannot meet the tests for a discretionary stay concerning effluent limits or a mixing zone for mercury as set forth in Special Condition 27 of the permit. Resp. at 3. The Agency notes that ConocoPhillips concedes that the special conditions regulating the discharge of mercury were included in the 2009 permit modification. *Id.* The Agency contends that even if it had agreed to review the conditions in the permit

renewal, the Agency did not relieve ConocoPhillips from complying with the permit conditions. *Id.*

The Agency also argues that ConocoPhillips does not have a legal right to a mixing zone, as a mixing zone is the exception to the requirements of the Act and Board regulations. Resp. at 3. The Agency maintains that ConocoPhillips has not established that all efforts to comply with the standard in Section 304.105 (35 Ill. Adm. Code 304.105) have been made; instead ConocoPhillips contends that the permit condition is arbitrary and capricious. Resp. at 3-4. The Agency asserts that ConocoPhillips relies on the alleged cost of compliance to establish that mercury control is economically unreasonable; however, the cost for mercury control would “be only a third of one percent of the cost” for the expansion project. Resp. at 4. The Agency opines ConocoPhillips is “hard pressed” to establish that such an expenditure is economically unreasonable. *Id.*

The Agency further maintains that ConocoPhillips has not demonstrated that it will likely succeed on the merits of the petition with regard to mercury. Resp. at 4. The Agency points to two factors that weigh against ConocoPhillips prevailing. The first is that the condition is not new to the permit at issue, but rather was first included in the 2009 permit modification. *Id.* Second, ConocoPhillips cannot establish that a mixing zone should be allowed. *Id.*

The Agency argues that even if the Board determines that a discretionary stay is appropriate in this permit appeal, the Board should not stay Special Condition 27 due to the environmental harm that will result. Resp. at 6. The Agency argues that the bioaccumulative nature of mercury results in a heightened concern against any stay of a permit condition relating to mercury. Resp. at 7.

Special Conditions 26 and 28 (Fecal Coliform)

Likewise, the Agency contends that a stay for Special Conditions 26 and 28 regarding fecal coliform limits should not be granted. Resp. at 4. The Agency argues that if ConocoPhillips is correct that fecal coliform levels are generally low to nonexistent, then the operation of the refinery will not be affected by a fecal coliform discharge level. Resp. 5. The Agency asserts that ConocoPhillips cannot therefore establish irreparable harm. *Id.* However, the Agency argues that ConocoPhillips has also acknowledged that fecal coliform is “*not always*” below the standard place in the permit. *Id.* The Agency further argues that because fecal coliform could exceed the limit, ConocoPhillips “has very little chance” of succeeding on the petition, and there is a potential environmental harm if a stay is granted. *Id.*

Special Condition 21 (Smith Lake)

The Agency is also opposed to granting a stay for Special Condition 21 as ConocoPhillips has not indicated what if any irreparable harm will occur absent a stay. Resp. at 5. The Agency has allowed ConocoPhillips 180 days to submit information incorporating Smith Lake into ConocoPhillips treatment works. *Id.* The Agency argues that it is not clear what relief a stay of Special Condition 21 will provide ConocoPhillips. *Id.*

Dissolved Oxygen

Regarding dissolved oxygen, the Agency concedes that ConocoPhillips was not given proper notice with regard to the effluent limit for dissolved oxygen. Resp. at 6. The Agency does not agree that the inclusion of the effluent limit was arbitrary and capricious, or that a mixing zone would be appropriate. *Id.* The Agency “may agree to the removal of the effluent limit for dissolved oxygen from the NPDES Permit upon settlement of this matter.” *Id.* The Agency does not object to granting a stay of this condition. Resp. at 3.

REPLY

ConocoPhillips argues that it should not have to expend significant resources to comply with contested conditions of the permit. Reply at 2. ConocoPhillips asserts that the issues raised by the Agency in opposition to the stay, would require the Board to prejudge the merits of the case. *Id.* ConocoPhillips opines that the nature of a permit appeal is that a petitioner challenges the Agency’s decision as being “unlawful”. *Id.* ConocoPhillips further opines that the Agency is asking the Board to make its decision based on standards that are irrelevant to a permit appeal, where the Agency’s decision-making is challenged. *Id.*

ConocoPhillips argues that the Agency’s reliance on Bridgestone is misplaced. Reply at 2-3. ConocoPhillips argues that the Board did not apply the four-part test advocated by the Agency; rather, the Board noted that irreparable harm would result if stay were not granted. Reply at 3, citing Bridgestone slip op. at 3. ConocoPhillips notes that the Board went on to conclude that the permit appeal would be rendered moot, absent a stay, as the petitioner would already be complying with the contested conditions. *Id.*

ConocoPhillips asserts it will suffer harm if forced to comply with contested conditions that the Board may ultimately find are not necessary to meet the requirements of the Act or Board regulations. Reply at 3. Further, ConocoPhillips maintains that the Agency’s response to the request for stay argues the merits of the permit appeal in large part. *Id.*

Special Condition 27 (Mercury)

ConocoPhillips asserts that absent a stay of Special Condition 27, it will suffer “significant, if not irreparable harm”. Reply at 3. ConocoPhillips maintains that it will be forced to initiate design and engineering studies to construct mercury control facilities, if a stay is not granted. *Id.* ConocoPhillips opines that \$13.3 million in costs is a significant expense and would normally justify a stay. Reply at 3-4. ConocoPhillips takes issue with the Agency claim that ConocoPhillips is not likely to prevail and that environmental harm will result if a stay is issued. Reply at 4. ConocoPhillips argues that a mixing zone should have been allowed. *Id.*

Special Conditions 26 and 28 (Fecal Coliform)

ConocoPhillips argues that it is likely to prevail on the issue of effluent limits for fecal coliform. Reply at 4. ConocoPhillips maintains that absent a stay, it will incur substantial costs. *Id.*

Special Condition 21 (Smith Lake)

ConocoPhillips argues that it is likely to prevail on the issue of Smith Lake. Reply at 4. ConocoPhillips maintains that the U.S. Army Corps of Engineers determined that Smith Lake is not a “water” pursuant to 40 C.F.R. 122 and therefore the Agency has no authority over discharges to Smith Lake. *Id.* Further, ConocoPhillips argues that Smith Lake has been present during prior permit cycles and the Agency did not previously include Smith Lake. Reply at 4-5.

DISCUSSION

ConocoPhillips has requested a stay of certain new conditions in its permit as well as a condition that was included in the 2009 permit. The Agency is opposed to the granting of the stay. After reviewing the arguments, the Board finds that a stay of contested conditions set forth in ConocoPhillips’ renewal permit is appropriate. The Board stays the contested conditions, as follows: Special Condition 21 (which relates to the discharge to Smith Lake), Special Conditions 26 and 28 (relating to fecal coliform discharge), Special Condition 27 and the effluent limit for mercury, and the effluent limit for dissolved oxygen. .

IT IS SO ORDERED.

Board Member J. A. Burke abstains.

Chairman T. A. Holbrook abstains.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 5, 2012, by a vote of 3-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board