

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

PCB No. 12-101
(Permit Appeal NPDES)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on May 9, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, RESPONSE TO MOTION FOR RECONSIDERATION, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division


BY: *Rachel R. Medina*

Rachel R. Medina
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May 9, 2013

CERTIFICATE OF SERVICE

I hereby certify that I did on May 9, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and RESPONSE TO MOTION FOR RECONSIDERATION upon the persons listed on the attached Service List.



RACHEL R. MEDINA
Assistant Attorney General

This filing is submitted on recycled paper.

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PROTECTION AGENCY,)	
)	
Respondent.)	

RESPONSE TO MOTION FOR RECONSIDERATION

Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), respectfully responds to the Motion for Reconsideration, filed by the Petitioner pursuant to Section 101.902 of the Board's procedural rules, regarding the Board's March 21, 2013 decision ("Board's Order") in the above permit appeal. Respondent requests the Board deny Petitioner's Motion.

On December 22, 2011, the Illinois EPA issued an NPDES permit pursuant to Petitioner's application for renewal of the permit. The permit was issued with special conditions concerning mercury that were identical to the mercury provisions in the earlier permit issued in 2009. The Petitioner filed a petition for review on January 17, 2012, and a hearing was held on October 3, 2012. The Board's Order affirmed the Illinois EPA's permit decision.

The Board's Order concluded that "Phillips waived arguments regarding the inclusion of a condition regarding mercury in the 2011 permit when Phillips accepted the same condition as a part of a permit modification in 2009." *Board's Order* p. 28. In addition the Board found that "even if the arguments had not been waived, Phillips cannot be granted a mixing zone for mercury because Phillips failed to establish that the human health mercury water quality standard is being met in the receiving stream, for which Phillips is seeking a mixing zone." *Id.*

The Board declined to accept the stipulation regarding the remaining issues on appeal. Finally, the Board remanded the permit to the Illinois EPA to correct the mercury mass limit consistent with Illinois EPA's "concern regarding the calculation of the limit," the details of which were identified in Respondent's Reply Brief. *Id.*

The Petitioner's filed a Motion for Reconsideration on April 25, 2013 ("Motion"). Petitioner argues that the Board's decision concerning the mercury condition and the Board's decision to reject the Stipulations on the remaining issues is not supported by the Record or by law. In addition, the Petitioner argues that the Board did not identify the correct relief as to the mass limit.

The Petitioner acknowledges the Board's standard, Section 101.902, for a Motion for Reconsideration in its Motion, yet fails to apply that standard in each of its arguments. In addition, Petitioner's arguments misconstrue facts and inappropriately look for the burden of proof to be placed on the Illinois EPA or the Board. Thus, the Board should deny the Motion for Reconsideration.

I. Standards for Reconsideration

The Board's rules establish the standard for reconsideration: "In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude the Board's decision was in error." 35 Ill. Adm. Code 101.902. Where a party fails to raise "new evidence or a change in the law," the Board has affirmed its orders and denied motions to reconsider. *See People v. AET Environmental, Inc., and E.O.R. Energy, LLC*, (2013 WL 226921); *See also People v. AET Environmental, Inc. and E.O.R. Energy, LLC*, (2013 WL 1776521).

II. Petitioner Fails to State a Basis for a Motion for Reconsideration

The State will not address every argument in Petitioner's Motion, since Petitioner failed to meet the standard under a Motion to Reconsider. Petitioner's arguments fail to cite any new

evidence or change in law regarding the Board's decision that Petitioner waived its challenge to the mercury provisions of the 2011 permit.

The Petitioner's arguments concerning the waiver issue include:

- a claim that the Board erroneously stated that it could "find no support in the record" for Phillips' claim that the Agency agreed to reconsider the special condition for mercury included in the 2009 permit in the context of the 2011 permit;
- an argument that the Board misapplied the caselaw concerning waivers of appeal; and,
- a rehashing of its complaint that the Illinois EPA had an earlier policy that disfavored mixing zones for mercury.

None of the above arguments include any reference to facts or law which are new since the Board issued the decision.

Next, Petitioners arguments regarding the Board's decision that Petitioner failed to meet its burden in proving that the human health standard for mercury could be met at the edge of the mixing zone raise no new evidentiary or legal issues. Petitioner fails to cite to any new evidence or change in the law that would indicate the Board's decision was in error.

Petitioner's arguments concerning the water quality issue include:

- a misinterpretation of the Board's holding in this case;
- a repeated and factually unsupported argument that the water quality issue was never raised in "decision making records" (Pet. Mtn. p. 7); and,
- a legally unsupported argument that the Agency has an obligation to advise Phillips of deficiencies.

Largely, the Petitioner attempts to re-argue its case, and provides no new factual or legal basis upon which a Motion for Reconsideration can be granted. This is also true for their argument concerning the mass limit and the stipulations.

III: Petitioners Arguments Misconstrue Facts and Inappropriately Look for the Burden of Proof to be Placed on the Illinois EPA or the Board.

The Board might note that the Petitioner often misconstrues the facts in their Motion for Reconsideration and has consistently failed to meet their burden in proving their case. Petitioner failed to initially provide the additional information requested by the Illinois EPA in the permit renewal process. The Petitioner now attempts to claim they have the right to respond to arguments that were not raised as issues by the Agency, shirking their own responsibility to adequately address all available legal arguments in their own appeal. And, their Motion for Reconsideration mischaracterizes facts and lacks legal support. A few examples would suffice to make these points.

For instance, Petitioners claimed that the Board erroneously stated that it could “find no support in the record” for Phillips’ claim that the Agency agreed to reconsider the special condition for mercury included in the 2009 permit in the context of the 2011 permit. *Pet. Mtn* p. 2. This claim is erroneous in itself and the Petitioner does a poor job supporting the argument. First, it would be appropriate to note that the Board has held that “neither the Act nor case law requires that the Board discuss every argument raised before the Board” and therefore the Board does not err where it “[fails] to acknowledge, consider, and discuss all arguments raised.” *Mineral Solutions, Inc. v IEPA* (2003 WL 1891825). Petitioner claims that the record is “replete with direct evidence” of the Agency’s consideration of its mixing zone determination. *Pet. Mtn*. p. 2. Petitioner cites to two self-serving pieces of documentation to support its assertion – testimony from Phillips’ environmental director (T.33) and counsel’s own letter, dated July 20, 2011 (Pet. Exh. 3). Far from being “direct,” the testimony and the letter only suggests from the Petitioner’s perspective that the IEPA should consider a mixing zone.

The above pieces of documentation, and the Agency’s review of the technology pursuant to the compliance schedule requirements in the Special Condition concerning mercury, are certainly not conclusive, nor direct evidence of the proposition that the Illinois EPA “agreed

to review its legal and factual basis." *Board's Order* at 25. That the Board did not go into a lengthy discussion of these documents does not indicate that they were ignored. The Board merely found that the Record does not support Phillips' contention.

Secondly, they argue that the subject of whether "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" was "an issue never pursued by the Agency," as if the Agency was required to remind Petitioner of the legal arguments available to them. *Pet. Mtn.* p. 2. The rule in permit denials is clear. In the case of a permit denial, the IEPA's denial letter frames the issue. *ESG Watts, Inc. v. PCB*, 286 Ill. App. 3d 325 (3rd Dist. 1997). However, where a permit is actually issued with conditions, the Board "must determine that as a matter of law the application as submitted to the IEPA demonstrates that no violations of the Act or Board rules will occur if the requested permit is issued." *Des Plaines River Watershed Alliance, et al. v. IEPA, et al.* (2007 WL 1266926) (citing *Jersey Sanitation v. IEPA*, PCB 00-82 (June 21, 2002) *aff'd IEPA v. Jersey Sanitation and PCB*, 336 Ill. App. 3d 582 (4th Dist. 2003)). The Petitioner is responsible for making its case in the appeal and the Board found that they failed to make their case.

Finally, the Petitioner claims that the Board made an error concerning the water quality issue, when, in fact, the Board articulated the logical conclusion of the water quality pursuant to Petitioner's own anti-degradation report. However, the Board went on to recognize that "questions have been raised regarding the validity of the mercury data," yet concluded that it is Petitioner's burden of proof. The Board specifically found that based on the Record, Petitioner failed to establish that the human health water quality standard for mercury is being met and thus failed to establish that allowing a mixing zone would not violate the Act or Board rules.

CONCLUSION

The Petitioners failed to meet their burden in the permit appeal and this Motion. Thus, the Respondents respectfully request that this Motion be denied.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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