

ILLINOIS POLLUTION CONTROL BOARD
August 8, 2013

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

ORDER OF THE BOARD¹ (by D. Glosser):

On March 21, 2013, the Board affirmed a decision by the Illinois Environmental Protection Agency (IEPA) imposing certain conditions on Phillips 66 Company's (Phillips) National Pollutant Discharge Elimination System (NPDES) permit (2011 Permit). Phillips is asking that certain terms of the NPDES permit be stayed by the Board pending Phillips' appeal of the Board's decisions. The 2011 Permit was issued by IEPA and concerns Phillips' petroleum refinery located at 900 South Central Avenue, Roxana, Madison County. For the reasons discussed below, the Board denies the motion to stay.

PROCEDURAL HISTORY

On January 17, 2012, Phillips timely filed a petition for review and request for stay of certain permit conditions (Pet.), asking the Board to review a December 22, 2011 IEPA permit determination. IEPA issued a permit to Phillips with conditions. Phillips appealed the permit decision to the Board on the grounds that "certain permit conditions [were] incorrect, economically unreasonable, inapplicable, unnecessary, or [were] required in light of the facility's recent expansion in order to clarify that [Phillips'] activity will not cause a violation of the Act or the regulations promulgated thereunder." ConocoPhillips Co. v. IEPA, PCB 12-101, slip op. at 1 (Feb. 2, 2012). Specifically, Phillips objected to and requested a stay on the effectiveness of the following permit conditions: Special Condition 21 (relating to discharge at Smith Lake), Special Conditions 26 and 28 (relating to fecal coliform discharge), Special Condition 27 (relating to mercury discharge), and the effluent limits for mercury and dissolved oxygen. Pet. at 4.

In its February 2, 2012 order the Board accepted the petition for review, but reserved ruling on the motion to stay to allow the IEPA's response time to run. ConocoPhillips Co., PCB 12-101, slip op. at 1. On April 5, 2012, the Board issued an order granting Phillips' motion for

¹ Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, took no part in the Board's drafting or deliberation of any order or issue in this matter.

stay and staying the contested permit conditions. ConocoPhillips Co. v. IEPA, PCB 12-101 (Apr. 5, 2012). On March 19, 2012, IEPA filed the record in this proceeding, and on April 11, 2012, a supplement was filed.

On March 21, 2013, the Board issued an order in which it affirmed IEPA's imposition of a condition requiring that Phillips meet the human health water quality standard for mercury in its effluent. Phillips 66 Co. v. IEPA, PCB 12-101, slip op. at 1 (Mar. 21, 2013). Further, the Board found that Phillips waived any arguments regarding the inclusion of a condition regarding mercury in the permit by accepting the condition as a part of a permit modification in 2009. *Id.* Finally, the Board found that, had these arguments not been waived, Phillips nonetheless cannot be granted a mixing zone for mercury because it failed to establish that the human health water quality standard for mercury is being met in the receiving stream. *Id.* at 2. Therefore, the Board affirmed IEPA's refusal to grant a mixing zone for mercury and affirmed IEPA's issuance of a mass limit for mercury in the 2011 Permit (Special Condition 27). *Id.* at 29.

On April 25, 2013, Phillips filed a motion for reconsideration, requesting that the Board reconsider its March 21, 2013 decision. On May 9, 2013, IEPA filed a response to Phillips' motion for reconsideration. In its May 16, 2013 order the Board denied Phillips' motion to reconsider, finding that Phillips had provided no new evidence or change in law that would indicate that the Board's previous decision was in error. Phillips Co. v. IEPA, PCB 12-101, slip op. at 2 (May 16, 2013).

On June 21, 2013, Phillips filed a motion for stay pending appeal (Mot.), which is the subject of this order. On July 10, 2013, IEPA filed an objection to Phillips' motion for stay pending appeal (Resp. Br.). Finally, on July 18, 2013, Phillips filed a reply (Pet. Br.) to IEPA's objection to Phillips' motion for stay pending appeal and a motion for leave to file such reply.

STATUTORY PROVISIONS

Section 101.906(c) of the Board's Rules (35 Ill. Adm. Code 101.906(c)) provides that stays pending appeal are governed by the Illinois Supreme Court Rule 335. Rule 335(g) states that a stay pending appeal shall ordinarily be sought in the first instance from the administrative agency. The decision to grant a motion for a stay is discretionary. Illinois Supreme Court Rule 335(g) provides in its entirety:

Application for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency. A motion for stay may be made to the Appellate Court or to a judge thereof, but the motion shall show that application has been made to the agency and denied; with reasons, if any, given by it for denial, or that the application to the agency for the relief sought was not practicable. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavit. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the Appellate Court. The court

may condition relief under this rule upon the filing of a bond or other appropriate surety. Illinois Supreme Court Rule 335(g) (134 Ill. 2d R. 335(g)).

In deciding whether to grant a discretionary stay, the Board may consider various factors, such as the avoidance of irreparable harm to the petitioner, as well as “the likelihood of environmental harm if a stay is granted.” Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, PCB 01-49 (cons.), slip op. at 4, citing Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

MOTION TO STAY

On June 21, 2013, Phillips filed a motion, pursuant to Illinois Supreme Court Rule 335(g) and the Board’s procedural rule at 35 Ill. Adm. Code 101.906(c), requesting the Board to stay enforcement of the terms of the 2011 Permit. Specifically, Phillips requests that the Board stay the enforcement of the 2011 Permit condition requiring that Phillips meet the human health water quality standard for mercury in its effluent. Mot.

Phillips makes five arguments in its motion to support its request for a stay here. First, Phillips argues that a stay is necessary to secure the fruits of its appeal. Phillips maintains that “[a]bsent a stay of this condition, [it] will be required to expend more than \$14 million in capital costs to comply with the permit.” *Id.* at 2. Further, Phillips claims that these expenditures and construction projects will be unnecessary should the Appellate Court rule in favor of Phillips. *Id.* Therefore, Phillips states that “the ‘fruit’ of [its] appeal is the determination that construction of this system is not necessary,” and thus “a refusal to issue a stay would ... deny Phillips the fruit of its appeal.” *Id.* at 3.

Second, Phillips argues that there would be no harm in preserving the status quo here if the stay is granted. Phillips claims that “[t]here would be no impact to human health or the environment associated with this stay.” *Id.* In support of this argument, Phillips reiterates its statement from 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.” *Id.* Finally, Phillips claims that all other permit requirements at issue are new requirements that have not previously been imposed on Phillips’ facility, and thus a delay in the imposition of these requirements will have no environmental impact. *Id.*

Third, Phillips maintains that it will incur great hardship if the stay is not granted, and that IEPA will suffer little to no harm. *Id.* at 4. Phillips argues that, as expressed above, it will be forced to incur substantial expenditures to comply with the 2011 Permit’s requirements if the stay is not granted, whereas IEPA, the Board, nor the environment of the State will suffer any harm if the stay is granted. *Id.*

Fourth, Phillips argues that it has a substantial case on the merits. *Id.* Phillips maintains that it “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.” *Id.* Further, Phillips maintains that the Board’s determination that Phillips waived its right to appeal

the Agency's denial of the mixing zone in the 2011 Permit was legally and factually baseless, contending that changed circumstances preclude any waiver here. *Id.* Phillips also argues that the Board's determination that the Mississippi River was not in compliance with the human health water quality standard for mercury was similarly baseless. *Id.*

Fifth, Phillips argues that consideration of the equitable factors favors granting the stay here. *Id.* at 6. Specifically, Phillips contends that if the stay is not granted it will be forced to expend a significant sum in capital costs to comply with the permit, that a stay will not cause harm to the Board, IEPA, or the environment, and that it has a substantial case on the merits.

IEPA'S OBJECTION TO STAY

On July 10, 2013, the IEPA filed its objection to Phillips' motion for stay pending appeal. The IEPA contends that the Board should not grant Phillips' motion for stay, and gives four principal arguments in support of its objection to the motion. Resp. Br.

First, IEPA argues that a stay should not be granted here because the status quo poses a threat to the environment and public health. *Id.* at 2. IEPA maintains this is true because Phillips has reported effluent levels exceeding the human health water quality standard for mercury. *Id.* Furthermore, IEPA states that Phillips has failed to adequately dispute the potential impact of its effluent and has failed to demonstrate that it can meet the human health water quality standard for mercury in the receiving stream. *Id.*

Second, IEPA contends that, contrary to Phillips' argument, there is no relative hardship to Phillips here if the stay is not granted. *Id.* at 4. IEPA disputes Phillips' claim that it will incur hardship by being forced to expend more than \$14 million to comply with the 2011 Permit by noting that these compliance costs represent only a small portion of the capital upgrades to the facility and the total budget for the facility's improvements. *Id.* at 5.

Third, IEPA responds to Phillips' argument that a stay is necessary to secure the fruits of its appeal by arguing that the potential fruits of Phillips' appeal are not obvious or definite. *Id.* IEPA notes that, "even if the Board were reversed, it is likely not automatic, nor certain, that Phillips would be exempted from employing some level of mercury treatment." *Id.* at 6.

Finally, IEPA argues that Phillips does not have a substantial case on the merits that would outweigh the potential harm to the environment. *Id.* IEPA repeats that Phillips' effluent exceeds the human health water quality standard for mercury and that Phillips has failed to demonstrate that it could meet that standard in the receiving stream. *Id.* at 7. For these reasons IEPA maintains that Phillips does not have a substantial case on the merits and that IEPA was not arbitrary in imposing the mercury limit. *Id.*

PHILLIPS' REPLY

On July 18, 2013, Phillips filed a reply h stating that IEPA's objection "contains misstatements of law and facts to which Phillips is compelled to respond." Pet. Br. at 1. In its reply, Phillips refutes IEPA's arguments expressed in its objection and reiterates its arguments

from its motion for stay, maintaining that it has a substantial case on the merits, that there will be no environmental harm from granting the stay, and that a stay is necessary to preserve the fruits of its appeal. *Id.* at 3-4.

Phillips emphasizes its belief that there is a dispute on whether its effluent exceeds the human health water quality standard. *Id.* at 1. Phillips contends that “[t]he Board’s determination regarding water quality was not based on the record because the IEPA never raised the issue prior to the hearing.” *Id.* at 3. With respect to the fruits of the appeal, Phillips states that it feels that a remand to IEPA would be a satisfactory result, in addition to a reversal of the Board and IEPA decisions by the Appellate Court, and that this fruit will be lost if the stay is not granted. *Id.*

DISCUSSION

Although the Appellate Court acquired jurisdiction over this case once Phillips filed a notice of appeal with the Court, the Board retains jurisdiction to determine “matters collateral or incidental to the judgment. A stay of judgment is a matter that is collateral to the judgment because it neither affects nor alters issues on appeal.” Sears Holdings Corp. v. Maria Pappas, 391 Ill. App. 3d 147, 158-59, 908 N.E. 2d 556, 567 (1st Dist. 2009) (citations omitted). In deciding whether to grant a discretionary stay, the Board may consider various factors, such as the avoidance of irreparable harm to the petitioner, as well as “the likelihood of environmental harm if a stay is granted.” Community Landfill, PCB 01-48, PCB 01-49 (cons.), slip op. at 4, citing Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

The Illinois Supreme Court has addressed factors that should be considered in ruling on a motion for stay pending appeal. Stacke v. Bates, 138 Ill. 2d 295, 304-05, 562 N.E.2d 192, 196 (1990). One consideration is “whether a stay is necessary to secure the fruits of the appeal in the event that the movant is successful.” Stacke, 138 Ill. 2d at 305, 562 N.E.2d at 196. Other equitable factors should be balanced, including: 1) whether the status quo should be preserved, 2) the respective rights of the litigants, and 3) whether hardship on other parties would be imposed. Stacke, 138 Ill. 2d at 305-06, 309, 562 N.E.2d at 196, 198. Another consideration is whether there is a “substantial case on the merits”, but this should not be the sole factor. Stacke, 138 Ill. 2d at 309, 562 N.E.2d at 198.

The court in Stacke further explained the factors to be considered in ruling on a motion for stay pending appeal and how they should be evaluated:

The granting of a stay pending appeal is preventative or protective and seeks to maintain the status quo pending appeal. *We believe that in all cases, the movant, although not required to show a probability of success on the merits, must, nonetheless, present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay.* If the balance of the equitable factors does not strongly favor movant, then there must be a more substantial showing of a likelihood of success on the merits. Thus a strong showing of the likelihood of success on the merits may offset other equitable

factors favoring the other party. Stacke, 138 Ill. 2d at 309, 562 N.E.2d at 198 (emphasis added).

Phillips and IEPA both make arguments relative to the Stacke factors. A review of those factors convinces the Board that a stay should not be granted. For the following reasons, the Board finds that Phillips does not have a “substantial case on the merits.”

While Phillips maintains as part of its arguments that there is a dispute on whether its effluent exceeds the human health water quality standard for mercury, the Board disagrees. As the Board expressed in its March 21, 2013 order in this case, the Board’s review of an IEPA permit determination is limited to the record.

If IEPA denies a permit or grants one with conditions, the permit applicant may appeal IEPA’s determination to the Board. 415 ILCS 5/4, 5, 39, 40(a)(1) (2010); 35 Ill. Adm. Code 105, 301, 304, 309. The petitioner has the burden of proof on appeal. 415 ILCS 5/40(a)(1) (2010); 35 Ill. Adm. Code 105.112(a). Board hearings are based exclusively on the record before IEPA at the time IEPA issued its permit determination. 35 Ill. Adm. Code 105.214(a). Accordingly, though the Board hearing affords a permit applicant the opportunity to challenge IEPA’s reasons for denying or conditionally granting the permit, information developed after IEPA’s determination typically is not admitted at hearing or considered by the Board. Phillips 66 Co. v. IEPA, PCB 12-101, slip op. at 8 (Mar. 21, 2013) (citations omitted).

Accordingly, the Board’s review here is limited to the record before IEPA at the time IEPA made its permit determination and the Board’s factual determinations. In its March 21, 2013 order, the Board found that, “based on the record, Phillips failed to establish that in this instance, the human health mercury water quality standard is being met in the receiving stream for which Phillips is seeking a mixing zone.” Phillips 66 Co. v. IEPA, PCB 12-101, slip op. at 27 (Mar. 21, 2013). Therefore, contrary to Phillips’ contentions, the Board has found that the facts establish that Phillips’ effluent exceeds the human health water quality standard for mercury.

Furthermore, the Board’s rules on mixing zones state that “[n]o mixing is allowed where the water quality standard for the constituent in question is already violated in the receiving water.” 35 Ill. Adm. Code 302.102(b)(9). As stated above, the Board found that Phillips’ effluent exceeds the human health water quality standard for mercury in the receiving water. Therefore, a mixing zone for mercury is prohibited here 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. This conclusion is independent of whether or not Phillips waived arguments regarding this condition by accepting the condition as part of a 2009 permit modification. Accordingly, the Board finds that Phillips does not have a “substantial case on the merits.”

As stated above, when requesting a stay pending appeal, “the 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, 562 N.E.2d at 198. Here, the Board finds that

Phillips has not presented a substantial case on the merits. Furthermore, the Board is not persuaded that the remaining Stacke factors warrant granting the stay or outweigh the lack of a substantial case on the merits.

First, the Board agrees with IEPA that the status quo poses a threat to the environment and public health here. Phillips' effluent exceeds the human health water quality standard for mercury. It is irrelevant that Phillips' "existing system already removes more than 98% of the mercury from the waste stream," because the effluent nonetheless exceeds the human health water quality standard. Therefore, staying the enforcement of Phillips' permit would allow Phillips to continue exceeding this standard with its effluent, causing harm to the environment and the public health.

Second, the Board is not persuaded that a stay is necessary to secure the fruits of Phillips' appeal here. The fruits of Phillips' appeal are not obvious or certain because, should Phillips prevail in its appeal, IEPA may be required to reconsider its previous decision. Therefore, Phillips may not be exempted from employing some type of mercury treatment even if the Board's decision were reversed.

The Board finds that Phillips in this case has not presented a substantial case on the merits and has failed to persuade the Board that "the balance of the [Stacke] equitable factors weighs in favor of granting the stay." People of the State of Illinois v. Community Landfill Co., Inc. and City of Morris, PCB 97-193, PCB 04-207 (cons.) slip op. at 3 (Dec. 17, 2009). The Board therefore denies the request for stay. Phillips may apply to the Appellate Court if it continues to believe a stay is warranted.

IT IS SO ORDERED
Member Burke Abstained

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the board adopted the above order on August 8, 2013, by a vote of 3-0.



John T. Therriault, Clerk
Illinois Pollution Control Board