

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

THE PHILLIPS 66 COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 12-101
	)	(Permit Appeal NPDES)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondents.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List


PLEASE TAKE NOTICE that on July 10, 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, RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR STAY PENDING APPEAL, 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  
Assistant Attorney General  
Environmental Bureau

500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
July 10, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR STAY PENDING APPEAL**

Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by its attorney. LISA MADIGAN, Attorney General of the State of Illinois, pursuant to 35 Ill. Adm. Code Section 101.500(d), respectfully responds and objects to the Petitioner's Motion For Stay Pending Appeal ("Motion"), for the following reasons: 1) the status quo poses a threat to the environment and public health; 2) there is no relative hardship to the Petitioner; 3) the fruits of the appeal are not obvious; and, 4) Petitioner does not have a substantial case on the merits that would outweigh the potential harm to the environment.

**I. STANDARDS OF A MOTION FOR STAY**

The Supreme Court of Illinois has not adopted a "ritualistic formula which specifies elements a court may consider in passing on a motion to stay and which limits the court's consideration to those elements." *Stacke v. Bates*, 138 Ill. 2d 295, 308 (1990). Instead, the Court has determined that a balancing process be used. Various factors are proper to consider, including whether a stay is necessary to secure the fruits of the appeal in the event the movant is successful, whether the status quo should be preserved, and whether a hardship on other parties would be imposed. *Id.* at 305-306, 307, 309. The Court, in *Stacke*, suggests that the factors should vary depending on the facts of the case and that 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." *Id.* at 309.

While the Illinois Pollution Control Board (Board) has stayed payment of monetary penalties, the "Board has been reluctant to stay its orders when a stay may result in harm to the public or the environment." *People v. Blue Ridge Construction Corp.*, PCB 02-115 (Dec. 16, 2004). See *Panhandle Eastern Pipeline Co. v. IEPA*, PCB 98-102 (July 8, 1999), *aff'd sub nom Panhandle Eastern Pipeline Co. v. PCB and IEPA*, 314 Ill. App. 3d 296 (4<sup>th</sup> Dist. 2000). For example, in *Panhandle*, the movant asserted it would suffer undue economic hardship if it was compelled to apply for a PSD permit, indicating that the "PSD permit application process is 'arduous, time consuming and expensive.'" *Id.* Similar to *Petitioner's* claims, *Panhandle* was concerned that it "may also be required to undergo costly construction and other activities...." *Id.* The Board found that where the PSD requirements are intended to prevent significant deterioration in air quality, and thereby protect public health and welfare," a delay in implementing such requirements may result in harm to the environment and public health. *Id.*

## **II. THE STATUS QUO POSES A THREAT TO THE ENVIRONMENT AND PUBLIC HEALTH**

Phillips reported to the Illinois EPA, on more than one occasion during the pendency of its permit application, that its effluent exceeds the human health water quality standard (Human Health Standard) for mercury. This fact is not disputed. Next, Phillips fails to adequately dispute the potential impact of its effluent. And, Phillips has failed to demonstrate that they can meet the Human Health Standard for mercury in the receiving stream.

Phillips' own data demonstrates their effluent consistently exceeds the Human Health Standard for mercury. The Human Health Standard for mercury is 12 ng/L, an exceedance of which is to be based on an annual average of at least eight samples. 35 Ill. Adm. Code 302.208. Phillips submitted data to the Illinois EPA for the period August 17, 2007 to November 28, 2007 that demonstrated the average concentration of mercury in Phillips' effluent averaged 12.49286

ng/L. R.<sup>1</sup> at Doc. 83. Phillips also provided the Illinois EPA effluent sample data dated July 9, 2009 to June 21, 2010 that demonstrated the average concentration of mercury in Phillips' effluent averaged 14.8 ng/L. R. at Doc. 35. An additional three samples for November 30, 2010, December 15, 2010, and January 28, 2011, were 28.6 ng/L, 86.7 ng/L, and 16.4 g/L, respectively. R. at Doc. 35.

Phillips attempts to dispute the potential impact of their effluent by referencing irrelevant data. First, Phillips attempts to present Agency testimony in another matter that showed the Human Health Standard for mercury was met in the area of the refinery during a study conducted in 2004. But, Phillips provides no citation or specific quote from the multiple transcripts that exist for that matter demonstrating the specific facts (Proposed New 35 Ill. Adm. Code 225, Control of Emissions from Large Combustion Sources (Mercury), R06-25.). Furthermore, even if the testimony showed that the Human Health Standard for mercury in the area of the refinery was met at that time, that study is now almost 10 years old and not necessarily representative of conditions during the permit application in this matter.

Second, Phillips attempts to argue that removing a significant percentage of mercury from the effluent indicates that there will be no environmental harm. Irrespective of what percentage Phillips is removing, the fact remains that their effluent data show that it exceeds the Human Health Standard for mercury. Contrary to Petitioner's assertion that Phillips may be removing 98% of the mercury from the waste stream, the data provided to the Agency in this regard indicates that the data relates only to the pilot study results, and not their existing system. *See Respondent's Hearing Exhibit D.* In addition, Ron Green testified that Phillips has not been regularly testing the influent and effluent of the wastewater treatment plant for mercury since late 2008 – so it is unclear whether Phillips even has current data relevant to their existing system upon which they could base such a claim. T. 23-24.

---

<sup>1</sup> References are made to the Record as R. \_\_\_, and to the Transcript for the Public Hearing held on October 3, 1012, as T. \_\_\_.

Finally, Phillips has failed to complete an accurate analysis of the water quality. Phillips' own antidegradation report failed to demonstrate whether the Human Health Standard for mercury could be met in the receiving water. R. at Doc. 100, page 69-70. In fact, Phillips never conducted its own sampling of the receiving stream in order to conduct its analysis.

It is completely arbitrary for Phillips to claim that there will be no environmental impact whatsoever, especially in light of the effluent data Phillips submitted to the Illinois EPA. Once more, it is absurd to suggest that a study almost a decade old is adequate to support the contention that there are no water quality issues with respect to mercury, when Phillips more current data suggests that at least their effluent exceeds the Human Health Standard and their own antidegradation report fails to use the appropriate testing methods to determine whether the Human Health Standard for mercury can be met in the receiving water. There is no question that Phillips' effluent poses a threat to public health and the environment.

The remaining conditions protect against obvious environmental concerns. Specifically, the relevant segment of the Mississippi River (J-05) is listed on the Illinois' Integrated Water Quality Report and Section 303(d) List for 2008 as impaired for Primary Contact Recreation due to Fecal Coliform. See <http://www.epa.state.il.us/water/water-quality/>. The Integrated Water Quality Reports submitted in 2010 and 2012, and the draft 2014 report continue to list segment J-05 of the Mississippi River as impaired for the same reason. Thus, limiting Phillips' effluent for fecal coliform is judicious in order to alleviate any additional load to the receiving water which is already burdened.

### **III. THERE IS NO RELATIVE HARDSHIP TO THE PETITIONER**

The proposed expenditures to treat for mercury are a mere fraction of the cost of the wastewater treatment plant upgrades Phillips estimated for the Coker and Refinery expansion (CORE) project and the CORE project overall. In addition, it is possible that Phillips will gain cost efficiencies by using the same system for fecal coliform and could further reduce their costs by treating less of the effluent.

Phillips claims they will be required to expend more than \$14 million in capital costs in order to comply with Special Condition 28 of the 2011 Permit. The Record established that the Coker and Refinery expansion (CORE) project would result in an overall upgrade cost to the wastewater treatment plant of approximately \$100 million, and operating and maintenance costs of \$6.7 million per year. R. at Docs. 58 and 100. Thus, the capital cost of mercury compliance only represents approximately 12% of the capital upgrades to the treatment plant. In addition, the compliance cost for mercury is only a fraction of a percent of the multi-billion dollar budget for the entire CORE project.

The cost is further reduced by the potential benefit of using the granular media filtration system for fecal coliform compliance, an option proposed early on by Phillips. R. at Doc. 37. Finally, the system designed by Phillips is possibly over-designed and could be reduced in scale, which would further reduce costs. R. at Doc. 48; T. at 94 and 165.

There would be no hardship to Phillips to implement treatment for fecal coliform inasmuch as they use the granular media filtration system to comply, as noted above. As for stormwater to Smith Lake, the appealed condition provides two potential alternatives for characterizing and handling the discharges to Smith Lake. These options coupled with Phillips' existing obligations to manage stormwater at the site pursuant to their Stormwater Pollution Prevention Plan, render any hardship nominal.

#### **IV. THE FRUITS OF THE APPEAL ARE NOT OBVIOUS**

The Board's March 21, 2013 opinion, affirmed the Illinois EPA's permit decision. The Board 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." 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." 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," which was identified in Respondent's Reply Brief. The Petitioner's filed a Motion for Reconsideration on April 25, 2013 which was denied.

The potential fruits of the appeal are not clear. The Petitioner would like to believe that the mixing zone for mercury would simply be granted for mercury if the Appellate Court disagrees with the Board and they would automatically be exempted from having to implement treatment for mercury. Even if on appeal the Court were to determine that Phillips could appeal the renewal permit and had performed best degree of treatment, the case would arguably have to be remanded to Illinois EPA to complete a mixing zone analysis under Section 302.102 of the Board's Water Pollution Regulations, 35 Ill. Adm. Code 302.102. It is not obvious now how that analysis would come out.

The Court could also determine that Illinois EPA is entitled to all the information it requested in order to make the appropriate determination as to whether best degree of treatment was being performed. So, even if the Board were reversed, it is likely not automatic, nor certain, that the Petitioners would be exempted from employing some level of mercury treatment.

As for the remaining conditions concerning fecal coliform, dissolved oxygen, and Smith Lake, Phillips claims they would be required to take "substantial steps" in order to comply with those conditions. But, Phillips' provides no detail describing how compliance with any of these would cause a hardship or unreasonable burden.

**V. PETITIONER DOES NOT HAVE A SUBSTANTIAL CASE ON THE MERITS THAT WOULD OUTWEIGH THE POTENTIAL HARM TO THE ENVIRONMENT.**

Phillips case is not substantial. It is rather simple. First, Phillips has failed to avail itself of the appropriate legal vehicles for contesting the mercury condition. Phillips did not appeal the condition regarding mercury when it first appeared in its permit and Phillips did not use the

adjusted standard vehicle which was provided as an option in the condition itself. Secondly, Phillips' own testing demonstrates that their effluent exceeds the Human Health Standard for mercury. Next, the Illinois EPA's analysis demonstrated there is a reasonable potential to exceed that standard. Once more, Phillips own antidegradation assessment fails to demonstrate that the Human Health Standard for mercury could be met in the receiving stream, and Phillips failed to provide the Illinois EPA with requested economic data to complete their best degree of treatment analysis. R. at 100 and 37; T. at 35 and 157. The Illinois EPA was not at all arbitrary when it imposed the mercury limit.

## **VI. CONCLUSION**

The Petitioner's effluent is above the Human Health Standard for mercury and the Petitioner has not shown that they can meet the Human Health Standard in the receiving water even with a mixing zone. The receiving water is already impacted for fish consumption due to mercury. Any further addition of mercury to the receiving stream, which is bioaccumulative, poses a threat to fish and biota. The Petitioner's capital expenditures are minute in comparison to the expenditures of their expansion project and in light of the potential cost efficiencies in using the same system to treat fecal coliform which the permit also requires.

Next, it is not clear that the Petitioner would be exempt from treating mercury even if they won the appeal. Multiple underlying issues would likely still need to be decided by the Board on remand, which may still ultimately result in a requirement to treat for mercury. Finally, the merits of Petitioner's case are not substantial and none of the other factors outweigh the threat to the environment and public health.

The case on the merits and the relative cost of implementing mercury treatment as compared to the benefit of ensuring that Phillips' effluent will not impact the receiving water for the Human Health Standard for mercury is extremely small.



WHEREFORE, the Respondents request that the appealed conditions not be stayed pending the decision by the Appellate Court.

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,  
Assistant Attorney General  
Environmental Bureau

Attorney No. 6297171  
500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
Dated: July 10, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I did on July 10, 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 RESPONDENT'S OBJECTION TO PETITIONER'S MOTION FOR STAY PENDING APPEAL upon the persons listed on the attached Service List.



RACHEL R. MEDINA  
Assistant Attorney General

This filing is submitted on recycled paper.

**SERVICE LIST**

David L. Rieser  
Much Shelist, P.C.  
191 North Wacker Drive, Suite 1800  
Chicago, IL 606-1615

Carol Webb  
Hearing Officer  
Pollution Control Board  
1021 North Grand Avenue East  
Springfield, IL 62794-9276