

ILLINOIS POLLUTION CONTROL BOARD

August 4, 2005

BOARD OF TRUSTEES OF SOUTHERN)	
ILLINOIS UNIVERSITY GOVERNING)	
SOUTHERN ILLINOIS UNIVERSITY,)	
EDWARDSVILLE,)	
)	
Petitioner,)	
)	
v.)	PCB 02-105
)	(NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by N.J. Melas):

In this May 6, 2002 appeal, Southern Illinois University, Edwardsville (SIUE) requests review of a January 1, 2002 permit issued by the Illinois Environmental Protection Agency (Agency). See 415 ILCS 5/40(a)(1) (2004); 35 Ill. Adm. Code 105.208(a).

The Agency issued a final National Pollutant Discharge Elimination System (NPDES) permit for discharges from SIUE’s heating and cooling facility to Tower Lake at the SIUE campus, Highway 157, Edwardsville, Madison County. SIUE appeals on these grounds: the discharge of its non-contact cooling water does not have to meet the temperature requirements of 35 Ill. Adm. Code 302.211(d) and (e) because Tower Lake is man-made and has no natural temperature; that several of the permit requirements apply to rivers as opposed to lakes and thus are not applicable; that the proposed permit provides no monitoring points in Tower Lake; and that the monitoring requirements for the permit are inconsistent.

This order addresses the parties’ April 26, 2002 cross motions for summary judgment. The primary points of contention are the applicability of Section 302.211(e) to SIUE’s Tower Lake and the proper point of monitoring for compliance with SIUE’s permit.

For the reasons set forth below, the Board grants SIUE’s motion for summary judgment in part and denies it in part. Similarly, the Board grants the Agency’s cross motion for summary judgment in part and denies it in part. Today the Board orders the Agency to strike Special Condition 2.B, containing the language of Section 302.211(e), from SIUE’s January 2, 2002 NPDES permit no. IL 0075311, and affirms the remaining contested conditions of that permit, specifically Special Conditions 2.A and 3.

PROCEDURAL BACKGROUND

After receiving a 90-day extension of the appeal period on February 7, 2002, on May 5, 2002, SIUE timely petitioned the Board for review of several conditions of SIUE's Agency-issued NPDES permit. On May 16, 2002, the Board accepted this matter for hearing and the Agency filed the record on appeal on June 7, 2002. On April 26, 2005, the parties simultaneously filed cross motions for summary judgment. The Agency responded on May 17, 2005, and SIUE responded on May 18, 2005. On June 16, 2005, SIUE replied to the Agency's response, timely pursuant to a May 19, 2005 hearing officer order.

FACTS

Tower Lake

Tower Lake is a man-made lake located on SIUE's campus in Edwardsville Madison County, Illinois. Tower Lake was constructed to provide cooling water for condensers used in SIUE's heating and refrigeration plant, which provides the university's core campus with air conditioning. Rec. at 6, 43. Tower Lake is not a source of drinking water and SIUE allows no recreational boating or swimming in the lake, although shoreline fishing is permitted. Rec. at 6. The plant draws water for condenser cooling purposes during periods of warm weather, passes the water through condensers, and then returns the water to Tower Lake via either a submerged discharge line (Outfall 001) or a flume (Outfall 002). Rec. at 6, 17. The flume is 1750 feet long. Rec. at 17. At the end of the flume is an approximately 150-foot-long "rip-rapped" slope that cools and aerates the water before delivering the discharge water to Tower Lake. Rec. at 6-10. SIUE uses the flume during the summer.

According to SIUE, the temperature of Tower Lake varies widely. Rec. at 6. SIUE states that intake water approaches ninety degrees Fahrenheit in the late summer. Rec. at 6, 17. At the time SIUE applied to the Agency for an NPDES permit, heat gain from the water passing through the condensers varied from 2-10 degrees Fahrenheit. Rec. at 6. At peak demand, the maximum daily flow is 19.5 million gallons per day (MGD). Rec. at 4, 6.

NPDES Permit

The Agency received SIUE's application for a cooling water discharge from its heating and refrigeration plant into Tower Lake on March 8, 2001. Rec. at 1. The application concerned an existing source that came into operation in 1965 to provide cooling water for refrigeration units. *Id.* On July 19, 2001, the Agency sent a draft NPDES permit to SIUE for its review and asked for comments within 15 days. Rec. at 21. The draft permit included thermal limits and set forth the location of the proper point of compliance. SIUE did not submit any comments during the 15-day notice period. Rec. at 30. On August 10, 2001, the Agency published a 30-day notice of the draft permit. Rec. at 39. The Agency received a public comment from SIUE on August 28, 2001, raising several questions about conditions 2.A and 2.B of the permit and the applicability of the thermal limits to Tower Lake. Rec. at 43-44.

On January 2, 2002, the Agency issued the final NPDES permit unchanged from the draft permit language. The Agency addressed SIUE's concerns in the permit cover letter stating that Tower Lake is not an artificial cooling lake, but rather a water of the State as defined in 35 Ill.

Adm. Code 301.440. The letter also clarified that temperature monitoring will be required at a point representative of discharge and prior to entry into Tower Lake. Rec. at 47.

Petition for Review

SIUE's petition for review challenges the following conditions of its NPDES permit no. IL 0075311 (Pet. at 2-3):

SPECIAL CONDITION 2. Discharge of wastewater from this facility must not alone or in combination with other sources cause the receiving stream to violate the following thermal limitations at the edge of the mixing zone which is defined by Section 302.211, Illinois Administration Code, Title 35, Chapter 1, Subtitle C, as amended:

- A. Maximum temperature rise above natural temperature must not exceed 5°F (2.8°C).
- B. Water temperature at representative locations in the main river shall not exceed the maximum limits in the following table during more than one (1) percent of the hours in the 12-month period ending with any month. Moreover, at no time shall the water temperature at such locations exceed the maximum limits in the following table by more than 3°F (1.7°C). (Main river temperatures are temperatures of those portions of the river essentially similar to and following the same thermal regime as the temperatures of the main flow of the river.)

* * *

SPECIAL CONDITION 3. Samples taken in compliance with the effluent monitoring requirements shall be taken at a point representative of the discharge, but prior to entry into the receiving stream.

APPLICABLE STATUTES AND BOARD REGULATIONS

Section 39(a) of the Act provides in part:

When the Board has by regulation required a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, the applicant shall apply to the Agency for such permit and it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of this Act or of regulations hereunder . . . In granting permits, the Agency may impose reasonable conditions specifically related to the applicant's past compliance history with this Act as necessary to correct, detect, or prevent noncompliance. The Agency may impose such other conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder.

Section 40(e) of the Act provides:

[t]he Board shall hear the petition (i) in accordance with the terms of subsection (a) of this Section and its procedural rules governing permit denial appeals and (ii) exclusively on the basis of the record before the Agency. The burden of proof shall be on the petitioner.

Section 302.104 of the Board's water quality standards defines "main river temperatures" as:

[t]emperatures of those portions of a river essentially similar to and following the same thermal regime as the temperatures of the main flow of the river.

Section 301.225 of the Board's regulations defines an "artificial cooling lake" as a:

[m]anmade lake, reservoir or other impoundment, constructed by damming the flow of a stream, which is used to cool the water discharged from the condensers of a steam-electric generating plant for recirculation in substantial part to the condensers. 35 Ill. Adm. Code 301.225

Section 301.440 of the Board's regulations defines "waters" as:

[a]ll accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon the State of Illinois, except that sewers and treatment works are not included except as specially mentioned; provided, that nothing herein contained shall authorize the use of natural or otherwise protected waters as sewers or treatment works except that in-stream aeration under Agency permit is allowable. 35 Ill. Adm. Code 301.440.

Section 302.201 of the Board's regulations describes standards that apply to waters of the State that have no specific designation: "Subpart B contains general use water quality standards which must be met in waters of the State for which there is no specific designation (Section 303.201)." 35 Ill. Adm. Code 302.201.

Section 302.202 of the Board's water regulations sets forth the purpose of the general use water quality standards:

The General Use standards will protect the State's water for aquatic life (except as provided in Section 302.213), wildlife, agricultural use, secondary contact use and most industrial uses and ensure the aesthetic quality of the State's aquatic environment. Primary contact uses are protected for all General Use waters whose physical configuration permits such use.

Section 302.205 of the Board's water quality standards applies specifically to reservoirs and lakes:

Phosphorus (STORET number 00665): After December 31, 1983, Phosphorus as P shall not exceed 0.05 mg/l in any reservoir or lake with a surface area of 8.1 hectares (20 acres) or more, or in any stream at the point where it enters any such reservoir or lake. For the purposes of this Section, the term "reservoir or lake" shall not include low level pools constructed in free flowing streams or any body of water which is an integral part of an operation which includes the application of sludge on land. Point source discharges which comply with Section 304.123 shall be in compliance with this Section for purposes of application of Section 304.105.

Section 302.211 of the Board's water quality standards sets thermal standards for general use waters of the State:

* * *

- d) The maximum temperature rise above natural temperatures shall not exceed 2.8° C (5° F).
- e) In addition, the water temperature at representative locations in the main river shall not exceed the maximum limits in the following table during more than one percent of the hours in the 12-month period ending with any month. Moreover, at no time shall the water temperature at such locations exceed the maximum limits in the following table by more than 1.7° C (3° F).

	° C	° F		° C	° F
JAN.	16	60	JUL.	32	90
FEB.	16	60	AUG.	32	90
MAR.	16	60	SEPT.	32	90
APR.	32	90	OCT.	32	90
MAY	32	90	NOV.	32	90
JUNE	32	90	DEC.	16	60

* * *

- j) All effluents to an artificial cooling lake must comply with the applicable provisions of the thermal water quality standards as set forth in this Section and 35 Ill. Adm. Code 303, except when all of the following requirements are met:
 - 1) All discharges from the artificial cooling lake to other waters of the State comply with the applicable provisions of subsections (b) through (e).
 - 2) The heated effluent discharged to the artificial cooling lake complies with all other applicable provisions of this Chapter, except subsections (b) through (e).

- 3) At an adjudicative hearing the discharger shall satisfactorily demonstrate to the Board that the artificial cooling lake receiving the heated effluent will be environmentally acceptable, and within the intent of the Act, including, but not limited to:
 - A) provision of conditions capable of supporting shellfish, fish and wildlife, and recreational uses consistent with good management practices, and
 - B) control of the thermal component of the discharger's effluent by a technologically feasible and economically reasonable method.
- 4) The required showing in subsection (j)(3) may take the form of an acceptable final environmental impact statement or pertinent provisions of environmental assessments used in the preparation of the final environmental impact statement, or may take the form of showing pursuant to Section 316(a) of the Clean Water Act (CWA) (33 U.S.C. 1251 et seq.), which addresses the requirements of subsection (j)(3).
- 5) If an adequate showing as provided in subsection (j)(3) is found, the Board shall promulgate specific thermal standards to be applied to the discharge to that artificial cooling Lake.

Section 309.102 (a) requires dischargers into a water of the State to have an NPDES permit:

Except as in compliance with the provisions of the Act, Board regulations, and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful.

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore should be granted only when the movant’s right to the relief “is clear and free from doubt.” *Id.*; citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986).

On appeal, the Board is limited to the record before the Agency when it made the decision. 415 ILCS 5/40(e) (2004).

BURDEN OF PROOF IN PERMIT APPEALS

Related to the burden of proof issue is the standard of review. Section 39(a) requires the Agency to issue permits that will not cause a violation of the Act or Board regulations. 415 ILCS 5/39(a) (2004). Further, the Act allows the Agency, when granting permits, to “impose reasonable conditions specifically related to the applicant’s past compliance history with this Act as necessary to correct, detect, or prevent noncompliance. The Agency may impose such other conditions as may be necessary to accomplish the purposes of this Act, and are not inconsistent with the regulations promulgated by the Board hereunder.” 415 ILCS 5/39(a) (2004).

Accordingly, when appealing conditions imposed in a permit, it is the petitioner’s burden to prove that the conditions in the Agency-issued permit are not necessary to accomplish the purposes of the Act and Board regulations, and therefore, must be deleted from the permit. Noveon v. IEPA, PCB 91-17 (Sept. 16, 2004); citing City of Rock Island v. IEPA, PCB 00-73, slip op. at 2 (July 13, 2000); Browning-Ferris, 179 Ill. App. 3d 598; Jersey Sanitation Corp. v. IEPA, PCB 00-82 (June 21, 2001); *aff’d* IEPA v. Jersey Sanitation Corp. v. PCB, 336 Ill. App. 3d 582, 784 N.E.2d 867 (4th Dist. 2003).

CROSS MOTIONS FOR SUMMARY JUDGMENT

SIUE requests that the Board grant summary judgment in its favor and strike all requirements that SIUE comply with Section 302.211(e) from its NPDES permit (Special Condition 2.B). Alternatively, should the Board find Section 302.211(e) applicable, SIUE requests that the Board strike the requirement that SIUE monitor for compliance with Section 302.211(e) at the point of discharge (Special Condition 3). SIUE Mot. at 21.

SIUE concedes that an NPDES permit is required for SIUE’s discharge of non-contact cooling water into Tower Lake. SIUE Reply at 1. However, SIUE disputes that Section 302.211(e) is applicable to the discharge. Rather, SIUE contends the Board should grant summary judgment in its favor because Section 302.211(e) of the Board’s rules is not applicable to SIUE’s discharge into Tower Lake. In the alternative, SIUE argues that the Board should direct the Agency to modify SIUE’s NPDES permit to allow monitoring for compliance in Tower Lake, rather than at a point prior to the discharge’s entry into Tower Lake. SIUE Mot. at 1.

According to SIUE, it has made improvements since applying for the permit that are expected to reduce the total heat input to Tower Lake by 50 percent. SIUE Mot. at 4; citing Rec. at 43. SIUE contends, however, that even with these plant improvements, SIUE cannot guarantee it will meet conditions 2.B and 3, which require monitoring for compliance with Section 302.211(e) at the point of discharge. If SIUE is prevented from using Tower Lake to cool water from August through November, it claims it will be forced to close because the buildings will be too warm to inhabit. SIUE Mot. at 4.

SIUE sets forth two primary arguments in support of its motion for summary judgment. First, SIUE claims that Section 302.211(e) of the Board’s regulations applies only to rivers, and rather than all waters of the State. SIUE Mot. at 4. Second, SIUE contends that even if Section

302.211(e) applied to lakes such as Tower Lake, Section 302.211(e) states that the proper monitoring point is in Tower Lake itself, not at the point of discharge. SIUE Mot. at 8.

In its motion for summary judgment, the Agency requests that the Board affirm the Agency's decision to grant NPDES permit no. IL 0075311 to SIUE, and deny SIUE's petition for review. Regarding SIUE's motion for summary judgment, the Agency states that "SIUE's argument is based on semantics" and demonstrates a "fundamental misunderstanding" of the applicability of the Board's water quality standards. Ag. Resp. at 6, 8. The Agency emphasizes the purpose of the Board's regulations by citing the Board's policy reasons for promulgating water quality standards, which include: "to prescribe the water quality standards required to sustain the designated uses for which the various waters of the state must be maintained and protected." Ag. Resp. at 6; citing 35 Ill. Adm. Code 301.102. The Agency states that Section 302.211(e) is applicable and that SIUE's NPDES permit was properly issued. Each of the parties' arguments, and corresponding responses to the arguments, are discussed below.

Before analyzing the parties' arguments, the Board notes that for the purposes of this opinion and order, the Board finds that Tower Lake is not an "artificial cooling lake." In a public comment submitted during the required public notice period prior to the Agency issuing SIUE's permit, SIUE argued that Tower Lake is an artificial cooling lake, regulated by Section 302.211(j), rather than a water of the State. However, SIUE did not raise the issue in its motion for summary judgment or in any response that Tower Lake is an artificial cooling lake. The Agency contends that Tower Lake does not meet the Board's definition of an artificial cooling lake because it was not constructed by damming the flow of a stream as required by Section 301.225 of the Board's rules. The record supports the Agency's argument and the Board finds that Tower Lake is not an artificial cooling lake.

As to Special Condition 2.A, though SIUE contests the condition in its petition for review, SIUE does not further discuss the applicability of Section 302.211(d) in the motion for summary judgment. For this reason, the Board finds that the Agency properly included condition 2.A in SIUE's NPDES permit.

Applicability of Section 302.211(e) to Tower Lake

SIUE's Arguments

SIUE reviews and compares various Board regulations, including definitions and general water quality standards. SIUE concludes that the plain language of the Board's rules dictates that Section 302.211(e) is specifically applicable to rivers, not lakes.

Section 302.211(e) Applies to Rivers Only. First, SIUE states that Part 302 of the Board's rules ". . . contains schedules of water quality standards which are applicable throughout the State as designated in 35 Ill. Adm. Code 303." SIUE Mot. at 4; citing 35 Ill. Adm. Code 302.101(a). Second, SIUE asserts that Part 303 states that all waters of the State must meet the general use standard of Subpart B of Part 302, except where otherwise specifically provided. SIUE Mot. at 4-5. Section 302.211, within Subpart B of Part 302, sets temperature limits for the

different months of the year referring to the limits as “monthly maxima,” explains SIUE. SIUE Mot. at 5; citing 35 Ill. Adm. Code 302.211(a)-(e).

SIUE claims that Section 302.211(e) is not a general use water quality standard, but rather specifically directed toward rivers. SIUE Mot. at 6. Because of this specific provision, SIUE states that Section 302.211(e) is inapplicable to all other waters of the State. *Id.*

SIUE argues that a Board regulation focusing on one type of water body is not unique. SIUE Mot. at 6. For example, SIUE states that Section 302.205 applies phosphorus standards only to “any reservoir or lake” of specified surface area and streams at the point where they enter the specified reservoirs or lakes. 35 Ill. Adm. Code 302.205. Further, SIUE contends that Section 302.211(j) applies only to artificial cooling lakes. SIUE Mot. at 6.

The Term “River” Does Not Include Tower Lake. SIUE continues that the Board did not use the term “waters of the State” as in other water quality regulations. SIUE Mot at 7; citing 35 Ill. Adm. Code 302.210. In the absence of a specific definition in the law in question, argues SIUE, words are given their ordinary and popularly understood meaning. SIUE Mot. at 7; citing *People v. Dednam*, 55 Ill. 2d 565 (1973). According to SIUE, the ordinary meaning of “river” does not include lakes. Citing Webster’s Dictionary, SIUE asserts that a “river” is popularly understood to be “a natural stream of water of considerable volume.” *Webster’s Seventh New Collegiate Dictionary*, 743 (1972).

Permit Condition 2.B is not Necessary to Accomplish the Purposes of the Act. SIUE concludes that Section 302.211(e) applies only to rivers, not all waters of the State and, therefore, not Tower Lake. SIUE states that condition 2.B of SIUE’s NPDES permit, requiring compliance with Section 302.211(e), is not necessary to accomplish the purposes of the Act. Rather the Agency’s inclusion of the condition in its permit was arbitrary and unnecessary. SIUE moves the Board for summary judgment in its favor and moves the Board to strike all portions of the NPDES permit requiring SIUE’s discharge to comply with Section 302.211(e). SIUE Mot. at 8.

Agency Arguments

The Agency contends that Tower Lake is a general use water of the State. The Agency further argues that the use of the term “river” does not exclude Tower Lake and that Board precedent supports this conclusion. According to the Agency, “concluding that Section 302.211(e) applies only to rivers is an absurd reading of the regulations and must be rejected.” Ag. Resp. at 8. As a result, the general use water quality standards found in Subpart B of Part 302 apply to Tower Lake.

SIUE’s Discharge Requires an NPDES Permit. The Agency states that pursuant to Section 309.102, any person discharging a *pollutant* from a *point source* into the *waters of the state* must have an NPDES permit to do so. Ag. Mot. at 5; citing 35 Ill. Adm. Code 309.102(a). According to the Agency, SIUE’s discharge of heat from the heating and refrigeration plant falls within the definition of a “pollutant” as that term is defined in Section 301.340. Ag. Mot. at 5; citing 35 Ill. Adm. Code 301.340. Additionally, the Agency states that the discharge of non-

contact water by a submerged discharge line or by a flume is a discharge of a pollutant from a point source. *Id.* The Agency argues that because Tower Lake is not exempt from the definition of waters of the State, the discharge of non-contact cooling water from the SIUE's heating and cooling plant requires an NPDES permit. Ag. Mot. at 6.

Conditions 2.A and 2.B are Required by the Act and Board Regulations. The Agency states that under Section 39(a) of the Act, it has a duty to issue permits that "will not cause a violation of this Act or regulations thereunder." Ag. Mot. at 6; citing 415 ILCS 5/39(a)(2004). According to Section 304.105 of the Board regulations, argues the Agency, "no effluent shall alone or in combination with other sources, cause a violation of any applicable water quality standard." 35 Ill. Adm. Code 304.105. The Agency claims that Board regulations require that waters of the State with no specific designation must meet the general use water quality standards. Ag. Mot. at 17; citing 35 Ill. Adm. Code 302.201. Further, states the Agency, the general use standards are designed to protect the "State's water for aquatic life." 35 Ill. Adm. Code 302.202.

The Agency asserts that conditions 2.A and 2.B of SIUE's Agency-issued NPDES permit are identical to Sections 302.211(d) and (e), respectively. Ag. Mot. at 6. The Agency contends that Section 302.211 contains temperature standards applicable to general use waters whether the water body is a stream or lake. *Id.* Further, the Agency states the permit requires SIUE to meet the Section 302.211 thermal standards at the end of the pipe because no mixing zone is provided for in the permit. In conclusion, the Agency states that the Act provides the Agency with limited authority in authorizing discharges to the waters of the State. Ag. Mot. at 7. The Agency must adhere to Board regulations, and thus has no authority to relax the temperature standards that apply to SIUE's discharge. For these reasons, the Agency urges the Board to grant summary judgment in its favor. *Id.*

Tower Lake is a General Use Water of the State. The Agency asserts that "designated uses" is a term of art that is identified in Parts 302 and 303 of the Board's regulations. Ag. Resp. at 6. The Agency states that "Part 303 contains water use designations which determine for a given body of water which set of Part 302 water quality standards applies." Ag. Resp. at 6; citing 35 Ill. Adm. Code 303.100. The Agency continues that the Board divides Part 303 into four subparts: Subpart A provides general provisions (35 Ill. Adm. Code 303.100-102); Subpart B lists nonspecific water use designations (35 Ill. Adm. Code 303.200-206); Subpart C lists specific use designations and site specific water quality standards (35 Ill. Adm. Code 303.300-444); and Subpart D contains site specific water quality based thermal discharge standards (35 Ill. Adm. Code 303.500, 502). Ag. Resp. at 7.

The Agency states that contrary to SIUE's argument, if a water body is a general use water, then Section 303.201 of the Board's regulations dictates that the water body must meet the general use standards of Subpart B of Part 302. Ag. Resp. at 7; citing 35 Ill. Adm. Code 303.201. Because Tower Lake does not have a specific designation or any site-specific standard under Subpart C of Part 303, the Agency contends that Subpart B of Part 303 must determine the applicable designation. Ag. Resp. at 7. Since Tower Lake is not a public or food processing water supply, nor does it have a secondary contact or an indigenous aquatic life designation, the Agency asserts that by default, Tower Lake is a general use water of the State. Accordingly,

states the Agency, Section 302.211(e), within Subpart B of Section 302, applies to Tower Lake. Id.

Section 302.211(e) Applies to All General Use Waters of the State. The Agency disagrees with SIUE's argument that the use of the term "main river" means that the Board did not intend for Section 302.211(e) to apply to all waters of the State. The Agency claims that "concluding that Section 302.211(e) only applies to rivers is an absurd reading of the regulations and must be rejected." Ag. Resp. at 8. The Agency asserts that the opinion adopting Section 302.211(e) makes no suggestion that the Board intended to limit the applicability of this section to rivers only. Ag. Resp. at 8; citing Water Quality Standards Revisions, R71-14 (Dec. 21, 1971). The Agency states that the Board instead adopted a case-by-case approach to address thermal discharges. Ag. Resp. at 10.

Further, the Agency states that SIUE's interpretation of Section 302.211(e) is not supported by the discussion in the Board's adopting opinion in Water Quality and Effluent Standards Amendments, Cooling Lakes, R75-2 (Sept. 29, 1975). Ag. Resp. at 8. The Agency explains that in that rulemaking, the proponent sought a revision of the Board's thermal standards as they apply to cooling lakes for steam-electric generating plants. According to the Agency, while the Board set specific thermal standards applicable to an individual artificial cooling lake in that rulemaking, the Board rejected the proponent's request to generally exempt discharges to artificial cooling lakes from the thermal standards stating:

The record indicates that there is no question that excessive thermal inputs can be damaging to the aquatic environment of an artificial cooling lake . . . No individual factor can justify the complete de-regulation of these lakes, and no individual factor, (such as recreational use), can by itself provide the test of acceptability for an artificial cooling lake." Ag. Resp. at 9; citing Water Quality and Effluent Standards Amendments, Cooling Lakes, R75-2, slip op. at 25.

The Agency further states that it has been applying thermal standards to artificial cooling lakes across the State and those affected have applied for adjusted standards from Section 302.211. Ag. Resp. at 9; citing Illinois Power Company (Clinton Power Station), PCB 92-142 (Aug. 26, 1993). Accordingly, argues the Agency, if Section 302.211 standards are applicable to artificial cooling lakes, these standards also apply to Tower Lake, a water of the State. Ag. Resp. at 10.

SIUE's Reply

In reply, SIUE states that nothing in the Agency's response supports a Board finding that Section 302.211(e) applies to Tower Lake. SIUE Reply at 2. SIUE contends that "with all due respect to the IEPA, what is 'absurd' is the IEPA's attempt to apply a rule applicable to rivers to Tower Lake." Id. SIUE claims the Agency never explained how SIUE is to determine the "main river temperature" of Tower Lake.

SIUE states that in Water Quality and Effluent Standards Amendments, Cooling Lakes, R75-2, the Board was focusing specifically on thermal effluents from steam-electric generating

plants. Therefore, argues SIUE, while the opinion does not directly support SIUE's position, it also does not undermine SIUE's position. SIUE Reply at 3.

SIUE contends that "simply because the IEPA has been mis-applying a regulation does not mean the IEPA should be allowed to continue to do so." SIUE Reply at 3; citing People v. Agpro, 214 Ill. 2d 222, 824 N.E.2d 270 (2005). SIUE states that even if the Agency has been consistently applying Section 302.211(e) to lakes, as the Agency states, that contention is irrelevant to the Board's decision in this matter. Based on the facts, the record, and the applicable law, SIUE moves the Board to find that SIUE's discharge to Tower Lake is not subject to Section 302.211(e) and grant summary judgment in its favor. SIUE Reply at 4.

Board Analysis

On this issue only, the Board grants summary judgment in favor of SIUE finding that Special Condition 2.B and any reference to Section 302.211(e) must be stricken from SIUE's January 2, 2002 NPDES permit. The Board concludes that the pleadings and admissions on file disclose there is no genuine issue of material fact, and SIUE is entitled to judgment as a matter of law. Even when viewing the facts in a light most favorable to the Agency, the Board finds that condition 2.B of SIUE's NPDES permit is not consistent with Board regulations.

The issue before the Board is the construction of the definition of "main river" as that term is used in Section 302.211(e) of the Board's regulations, and how it affects the applicability of Section 302.211(e). In construing administrative rules, the same rules that apply to statutory construction apply. Ohio Grain Co. v. IEPA, PCB 90-143, slip op. at 16 (Oct. 16, 1992); citing May v. PCB, 35 Ill. App. 3d 930, 342 N.E.2d 784 (1976). Statutory interpretation also requires that the intention of the drafter be ascertained and given effect. Piatak v. Black Hawk College Dist. #503, 269 Ill. App. 3d 1032, 647 N.E.2d 1079 (3rd Dist. 1995); People v. Kerans, 103 Ill. App. 3d 522, 431 N.E.2d 726 (1982). The initial source for determining intent is the plain meaning of the language used, and where unambiguous, the plain meaning of the language controls. Finally, where a literal meaning would defeat the obvious and clearly expressed purposes, the courts need not adhere to the literal reading. Village of Woodridge v. DuPage County, 144 Ill. App. 3d 953; 494 N.E.2d 1262.

Here, the plain meaning of the language of Section 302.211(e) of the Board's water quality regulations would apply the thermal regulations contained in that subsection to representative locations in the main river. Further, the Board interprets the words "in addition" at the beginning of Section 302.211(e) to indicate that the standards contained in that subsection applicable to rivers are in addition to those standards applicable to all waters of the state.

A literal reading of this subsection would not defeat the Illinois Sanitary Water Board's intent of the State's original thermal regulations, which it promulgated. Those regulations, as SIUE notes, applied to specific rivers, sections of rivers, and Lake Michigan. Illinois Sanitary Water Board Rules and Regulations: Water Quality Standards, SWB-14 (Mar. 7 1967). Even when the Board originally adopted the Sanitary Water Board's thermal standards as Rule 203(i), the Board adopted the standards as applicable to specific rivers, such as the Wabash, Ohio, and Mississippi Rivers, as well as to "other streams." In the Matter of Effluent Criteria, R70-8;

Water Quality Standards Revisions, R71-14; Water Quality Standards Revisions for Intrastate Waters, R71-20, slip op. at 9 of the Board's opinion (Mar. 7, 1971).

Interpreting Section 302.211(e) to apply only to rivers would not leave other waters of the State unregulated with respect to thermal standards. The language of Section 302.211(d), included as condition 2.A of SIUE's permit, does not limit the applicability of that thermal standard to rivers. 35 Ill. Adm. Code 302.211(d).

The Board will not, as the Agency suggests, interpret "main river" to mean all waters of the State. Reinforcing this position, the Board even expressly defines "main river temperatures" within the Board's general water quality standards (and SIUE's NPDES permit) as "temperatures of those portions of a river essentially similar to and following the same thermal regime as the temperatures of the main flow of the river." 35 Ill. Adm. Code 302.104. Had the Board intended the thermal temperatures in Section 302.211(e) to apply to waters of the State other than rivers, it could have changed the language of Section 302.211(e) or the section defining main river temperatures. Having done neither, the Board does not now interpret "main river" to apply to all waters of the State.

The Board agrees with the Agency that because Tower Lake does not have a designated use and no site-specific standard applies to it, Tower Lake is a general use water that must meet the general use water quality standards of Subpart B of Part 302. The parties concede that Section 302.211(j) does not apply because Tower Lake is not an artificial cooling lake. Similarly, the Board finds Section 302.211(e) does not apply because Tower Lake is not a river. That the Agency has historically included Section 302.211(e) in permits applicable to waters of the state other than rivers is also not persuasive. The Board will not make a strained interpretation of a Board regulation included in an Agency-issued permit simply because of the Agency's past usage. The plain meaning of Section 302.211(e) is clear and unambiguous and consistent with the history of the Board's thermal regulations.

The Board finds that SIUE has succeeded in demonstrating that condition 2.B of its NPDES permit is inconsistent with Board regulations. The Board orders the Agency to strike Special Condition 2.B and any reference to Section 302.211(e) from SIUE's NPDES permit. Next, the Board discusses SIUE's alternative argument regarding the proper point of monitoring for compliance with water quality standards.

Proper Point of Measurement: Receiving Lake or Prior to Discharge

SIUE's Arguments

Alternatively, SIUE argues that if the Board determines that Section 302.211 applies, SIUE requests that the Board strike the portion of the permit requiring SIUE to monitor for compliance with Section 302.211(e) at the point of discharge into Tower Lake. SIUE contends that the requirement in the NPDES permit to monitor compliance with Section 302.211(e) at the discharge point runs counter to the plain language of Section 302.211(e) itself. SIUE Reply at 2. SIUE states that Section 302.211(e) provides: "water temperature at representative locations in the main river shall not exceed the maximum limits." 35 Ill. Adm. Code 302.211(e). According

to SIUE, Section 302.211(e) specifies a location at which to measure water temperature: representative locations in the main river. SIUE Mot. at 9; 35 Ill. Adm. Code 302.211(e).

SIUE asserts that the requirement to measure temperature at the discharge point does not fulfill the requirements of Section 302.211(e) to measure water temperature at representative locations in the main river. SIUE Mot. at 9.

Further support for measuring temperature after discharge to Tower Lake rather than prior to discharge, according to SIUE, is found in the Board's adopting opinion of thermal regulations for Lake Michigan. SIUE Mot. at 9; citing Thermal Standards, Lake Michigan, PCB R70-2 (June 9, 1971). There, the Board specified monitoring locations "outside of a mixing zone which shall be no greater than a circle with a radius of 1000 feet or an equal fixed area." SIUE Mot. at 10; citing Thermal Standards, Lake Michigan, R70-2 at 62 (now codified at 35 Ill. Adm. Code 302.507). SIUE states the adopting opinion of the Lake Michigan thermal standards illustrates its argument that the Board is concerned with the temperature of the main river, not the temperature at the discharge point.

SIUE claims that the evolution of the Board's thermal standards, as well as the Part 303 regulations that use almost the same language to govern the temperature of specific rivers, further demonstrates that the location to monitor for compliance with Section 302.211(e) is not the point of discharge, but rather at representative locations in the main river. SIUE Mot. at 11. SIUE explains that before the Board came into existence, the Illinois Sanitary Water Board had enacted thermal rules and regulations applicable to Illinois waters. SIUE continues that when the Board adopted the Sanitary Water Board's thermal standards, the Board adopted standards specifically applicable to rivers, sections of rivers, and Lake Michigan.

SIUE claims that the first thermal standards adopted by the Board prohibited temperature rises of more than five degrees Fahrenheit above natural temperatures. SIUE Mot. at 12; citing Ohio-Wabash Thermal Standards, R71-12, slip op. at 2-565-66 (Sept. 30, 1971). The Board rule provided that the 5 degree F standard must be met within no more than 600 feet from the discharge and also adopted monthly maximum temperatures. The Board again adopted a 5 degree F temperature rise at the edge of a 600-foot mixing zone and set monthly maxima applicable to the main river in Mississippi Thermal Standards, R70-16 (Nov. 23, 1971).

In 1973, the Board adopted new thermal rules without the 600 foot mixing zone, instead stating that mixing zones, with radii of no more than 600 feet, would be granted on a case-by-case basis. Rule 201(a), July 1973. In 1982, the Board revised the water pollution regulations and codified the water quality standards as Part 302 and the site-specific rules and water use designations as Part 303. SIUE Mot. at 17; citing Rulemaking for Codification of Chapter 3: Water Pollution, R81-3 (Jan 21, 1982). Section 302.211(e) remains as it was adopted in R81-3.

SIUE cites several Board opinions it asserts also support the argument that the proper point of temperature measurement is in Tower Lake. First, SIUE states that in the past, the Board has granted an exemption from the Section 302.211 thermal standards for water discharged from an artificial cooling lake into a water body, relying on data collected from

within the water body. SIUE Mot. at 18; citing Illinois Power Company (Clinton Power Station), PCB 92-142, slip op. at 10 (Aug. 26, 1993).

Second, SIUE states that in a past request for variance, the Board has noted that available data proved a violation of the Section 302.211(e) standards would occur during low flow conditions. SIUE Mot. at 19; citing Deere and Co., John Deere Foundry v. IEPA, PCB 81-163 (Oct. 5, 1982). According to SIUE, the Board's reference to low flow conditions indicates that monitoring would occur at representative locations in the main river, not at the discharge point.

Third, SIUE cites a 1978 request for an exemption from the thermal standards for the same proposition that monitoring for compliance with Rule 203(i)(4), like for Section 302.211(e), requires monitoring at representative locations in the main river. SIUE Mot. at 20; citing CIPS (Hutsonville Power Station) v. IEPA, PCB 78-108 (Oct. 19, 1978).

Finally, SIUE reiterates that the purpose of the monthly maxima rule requires that thermal measurements be taken in Tower Lake rather than at the point of discharge. SIUE Mot. at 17. SIUE claims that monitoring at the point of discharge, as required by its NPDES permit, "provides absolutely no information as to whether the 'monthly maxima' regulation is being violated; monitoring at a representative location in the main river does provide the relevant information." SIUE Mot. at 17. SIUE asserts that the permit, as issued, deprives SIUE of using the diluting capacity of Tower Lake for heat that is specifically allowed by Section 302.211. SIUE Mot. at 18.

For these reasons, SIUE argues that the NPDES permit requirements to monitor for compliance with Section 302.211(e) at a point representative of discharge rather than in Tower Lake is arbitrary, unnecessary to accomplish the purposes of the Act, and should be stricken.

Agency Arguments

Regarding the point of sampling, the Agency states that to prevail on this issue, SIUE must prove that requiring the thermal standard be met at the discharge point is not necessary to accomplish the purposes of the Act and Board regulations. Ag. Resp. at 11. The Agency states that it issued an NPDES permit requiring SIUE to meet Section 302.211(e) limits at the discharge point in order to ensure compliance with the Section 309.142 requirement that "the authorized discharge will not violate applicable water quality standards." Ag. Resp. at 11; citing 35 Ill. Adm. Code 309.142. Further, the Agency states that the Board's regulations on mixing zones provide that dischargers may comply with water quality standards within a mixing zone, "provided the discharger has made every effort to comply with the requirements of 35 Ill. Adm. Code 304.102." Ag. Mot. at 18; citing 35 Ill. Adm. Code 302.102.

The Agency claims that because SIUE did not meet the mixing zone requirements, a mixing zone was not assigned to SIUE's discharge. Ag. Mot. at 18. The Agency states that it believes SIUE could have lowered lake temperatures by lowering the condenser inlet and also by discharging below the thermocline, in the deeper, colder strata of the lake. However, the Agency states that the Board regulations do not permit the Agency to grant mixing zones in instances where the whole lake is subject to high temperatures, and SIUE has not attempted to find

alternatives to lower lake temperatures. Accordingly, the Agency states it could not have granted SIUE a mixing zone, and absent a mixing zone, SIUE must meet the applicable standards at the point of discharge.

The Agency states that the caselaw SIUE cites in the motion for summary judgment are not applicable. The Agency states that the cases cited, such as Illinois Power Company, are requests for regulatory relief that presume the general applicability of the regulation, as opposed to permit appeals which challenge the conditions based on the application of the regulation.

The Agency concludes that SIUE's permit is consistent with the mandates of the Act and Board regulations and the conditions are necessary to accomplish the purposes of the Act and Board regulations. Accordingly, the Agency requests that the Board deny SIUE's motion for summary judgment.

SIUE's Reply

In response, SIUE claims that the Agency never addressed the plain language used by the Board to identify the monitoring point. SIUE Reply at 4. By ignoring the plain language of Sections 302.211(e) and 302.104, SIUE states that the Agency has conceded the point that monitoring should occur in Tower Lake. *Id.*

SIUE disputes the Agency's position that the only possible monitoring points are at the edge of a mixing zone or at the point of discharge. SIUE Reply at 4. SIUE states that in this case Section 302.211(e) explicitly provides that monitoring must occur "at representative locations in the main river." SIUE Reply at 4-5; citing 35 Ill. Adm. Code 302.211(e).

SIUE states it is merely asking that the Agency apply Board regulations as they are written. SIUE Reply at 5. SIUE further urges the Board to find that it has met its burden in this proceeding to show that monitoring for compliance with the Board's thermal regulations at the discharge point is inconsistent with Section 302.211(e). Accordingly, SIUE contends that if the Board determines that Section 302.211(e) is applicable to discharges into Tower Lake, the Board should grant summary judgment in SIUE's favor as to the proper monitoring point. *Id.*

Board Analysis

The Board finds that whether or not Section 302.211(e) applies, the proper point of sampling for compliance for water quality standards in Tower Lake is at the point of discharge. The Board is persuaded by the Agency's argument that a lack of a mixing zone requires compliance with Section 302.211 at the point of discharge. SIUE does not argue that a mixing zone should apply to its discharge, only that, if applicable, the proper sampling point to determine compliance with the Board's thermal standards should be at some point within Tower Lake.

The Board disagrees with SIUE's argument that Board precedent, specifically Illinois Power, demonstrates that the proper point of measurement for compliance is in Tower Lake, not at a point prior to discharge. As discussed by the Agency, Illinois Power was a thermal

demonstration proceeding. In Illinois Power, the petitioner conducted monitoring in the receiving water body to demonstrate that the discharge from the power station caused no significant ecological damage pursuant to Section 302.211(f), not to show compliance with Section 302.211(e). Illinois Power, PCB 92-142 slip op. at 14-15.

Other Board thermal demonstrations, however, support the Agency's argument regarding the proper point of monitoring for compliance. The Board granted an adjusted thermal standard as it applies to that facility's discharges in 410(c) Petition for Dresden Nuclear Generating Station, PCB 79-134 (Jul. 9, 1981). The Board in Dresden Nuclear Generating Station prohibited the temperature of plant discharges from exceeding 32.2°C more than 10% of the time (rather than 1% as provided in Rule 203(i)(3) and (4), now Section 302.211(e)) in the period and never exceeding 33.9°C (93°F)). The amended thermal standard granted by the Board did not include a mixing zone. The Board's decision in Dresden Nuclear Generating Station demonstrates that in instances where no mixing zone applies, the proper point to monitor for compliance is the facility's discharge rather than a point in the receiving water body.

The Board finds the requirement Special Condition 2.A contains a thermal requirement that is an applicable water quality standard. However, because no mixing zone applies to SIUE's discharge, SIUE must produce an effluent that complies with the water quality standards. Accordingly, the Board agrees with the Agency's designation of a point prior to discharge as the representative sampling point in Special Condition 3.

The Agency's argument that a point prior to discharge was chosen because SIUE did not meet mixing zone requirements is persuasive as supported by Dresden Nuclear Generating Station. The cases SIUE cites in its motion for summary judgment are not permit appeals. The Board agrees that the cited Board opinions demonstrate that Section 302.211 is concerned with the temperature of the water body at issue, not the temperature of the effluent prior to discharge. However, the Board also finds that without a designated mixing zone, SIUE must demonstrate that its effluent complies with any applicable water quality standard. The Board finds that even when considered in favor of SIUE, the record shows that sampling SIUE's effluent prior to discharge is necessary to further the purposes of the Act and is consistent with Board regulations. The Board grants summary judgment in favor of the Agency on this issue and declines to strike condition 3 from SIUE's permit.

CONCLUSION

The Board grants SIUE's motion for summary judgment in part and denies the motion in part. Simultaneously, the Board grants the Agency's motion for summary judgment in part and denies it in part. The Board finds that SIUE has successfully demonstrated that condition 2.B of its NPDES permit, as issued by the Agency to SIUE on January 2, 2002, is not necessary to accomplish the purposes of the Act, as it is inconsistent with Board regulations. The Board grants summary judgment in favor of SIUE on the applicability of Section 302.211(e).

On the other hand, the Board grants summary judgment in favor of the Agency on the issues of the maximum temperature standard and the proper point of monitoring for compliance, finding the permit properly issued with respect to Special Conditions 2.A and 3, respectively.

Accordingly, the Board orders the Agency to strike Special Condition 2.B and any reference to Section 302.211(e) from SIUE's NPDES permit no. IL 0075311. The record indicates that the high temperatures of SIUE's discharge as well as determining the "natural temperature," as required by Special Condition 2.A, of Tower Lake are outstanding issues that the Board does not address in this permit appeal. Nonetheless, monitoring SIUE's discharge for compliance with the remaining standards in SIUE's permit must occur prior to discharge, not in Tower Lake.

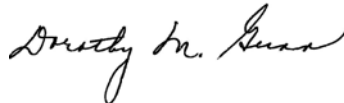
ORDER

The Board orders the Agency to strike Special Condition 2.B and remove any reference to Section 302.211(e) from SIUE's National Pollutant Discharge Elimination System permit no. IL 0075211. The Board affirms the issuance of permit no. IL 0075211 with respect to the remaining contested conditions, Special Condition 2.A and 3. Today's order resolves the issues on appeal, and this docket is closed.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2004); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 4, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board