



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS  
Pollution Control Board

BOARD OF TRUSTEES OF SOUTHERN )  
ILLINOIS UNIVERSITY GOVERNING )  
SOUTHERN ILLINOIS UNIVERSITY, )  
EDWARDSVILLE )

Petitioner, )

v. )

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )

Respondent. )

PCB 02-105  
(NPDES Permit Appeal)

**AGENCY'S RESPONSE TO SIUE'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") by and through its attorney, Sanjay K. Sofat, Assistant Counsel and Special Assistant Attorney General, pursuant to 35 Ill. Adm. Code 101.516, hereby submits this Agency's Response to the Southern Illinois University at Edwardsville's ("SIUE" or "Petitioner") Motion For Summary Judgment to the Illinois Pollution Control Board ("Illinois PCB" or "Board"). The Illinois EPA respectfully requests the Board to **GRANT** the Agency's Motion For Summary Judgment, and **DISMISS** the SIUE's petition filed on May 6, 2002. The Agency provides the following arguments in support of its request:

## AGENCY DISPUTES SIUE'S STATED FACTS

Though the Agency disputes some of the facts stated by SIUE, it does not consider them to be of material nature, and thus not pertinent to the resolution of this motion. However, some of the facts stated by SIUE in its Motion For Summary Judgment (hereinafter "SIUE Mot") are not founded in the Record. Citing to page 6 of the Record, SIUE states that, "[t]he temperature of the water drawn from Tower Lake for cooling purposes varies widely." *SIUE Mot at 3*. The Record doesn't contain any such statement at page 6. The Agency requests the Board to consider the above stated quote as SIUE's conclusion rather than an undisputed fact stated in the Record.

Next, SIUE states that, "Tower Lake's surface typically reaches its maximum temperature in August, and it does not appreciably cool until November." *SIUE Mot at 3*. The stated fact is partially correct. This phenomenon only occurs if the lake warms up in August of that year. The actual statement on page 44 of the Record is, "[w]hile the lake will be well under the temperature limits for April through July, if the lake warms in August it will not appreciably cool until November."

SIUE claims that, "[i]mprovements to plant since SIUE submitted its permit application are expected to reduce the total heat input to Tower Lake by fifty percent, (Record, p.43), but even with these plant improvements, there is no assurance SIUE can meet that portion of Special Condition 2.B. of the NPDES permit derived from Section 302.211(e) if SIUE is required to monitor for compliance with Section 302.211(e) of the point of discharge." *SIUE Mot at 4*. This is not an undisputed fact; rather, it is SIUE's claim based on diminutive evidence. There is no engineering or scientific evidence presented by SIUE in the Record to support its claim. The Agency is not aware of any

reason why after reducing that total heat input to Tower Lake by fifty percent, SIUE would not be able to meet the thermal permit limits at the end of the discharge pipe. The Agency issued this permit to SIUE in January 2002, therefore, SIUE had more than three years to work on its claim of reducing the total heat input to Tower Lake by fifty percent. Has SIUE achieved this objective? if so, SIUE should be barred from seeking any mixing zone or a regulatory relief from the Board. Clearly, SIUE knows the ways to reduce the total heat input to Tower Lake, and therefore, has the capability to meet the temperature limits as specified in the permit. As the permit limits are in accordance with the Board regulations, SIUE's petition must be dismissed.

The Agency believes that the material facts for this motion are that Tower Lake is water of the State, and that SIUE is discharging heat as pollutant from a point source into Tower Lake.

#### BURDEN OF PROOF

Section 39 of the Illinois Environmental Protection Act ("Act") provides the directive for the issuance of this permit. Section 39(a) states in part:

When the Board has by regulation required a permit for the construction, installation, or operation of any type of facility ... 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 that facility ... will not cause a violation of this Act or of regulations hereunder. 415 ILCS 5/39(a) (2004) (*emphasis added*).

The Act also states that when granting permits, the Agency, "may impose such 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." 415 ILCS

5/39(a) (2004). Thus, when appealing conditions imposed in a permit, the petitioner must 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. Illinois EPA*, PCB 91-17, September 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 and PCB*, 336 Ill. App. 3d 582, 784 N.E.2d 867 (4<sup>th</sup> Dist. 2003).

To prevail on its claim, SIUE must prove that the temperature conditions in its NPDES permit are not necessary to accomplish the purposes of the Act and Board regulations.

#### STANDARD OF REVIEW

The Board has consistently held that the appropriate standard of review in a permit appeal proceeding is limiting the Board's review to the record before the Agency when it made the decision. 415 ILCS 5/40(e) (2004). 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). For the purposes of the motions pending before the Board, therefore, the Board must construe the pleadings, depositions, and affidavits strictly against the petitioner on its motion for summary judgment. *Roger Stone v. Illinois EPA and Naperville Park District*, PCB 01-68 (January 18, 2001).

## ARGUMENTS

SIUE makes two arguments in its motion for summary judgment. First, the language in Section 302.211(e) is specific to rivers. Therefore, the temperature standard contained in Section 302.211(d) does not apply to Tower Lake. Second, Section 302.211(e) requires the point of monitoring for compliance to be in the river itself, and not at the point of discharge.

SIUE's arguments are not a reasonable interpretation of the Board regulations, and fail to establish that the Section 302.211(e) conditions in its NPDES permit are not necessary to accomplish the purposes of the Act and Board regulations. *Noveon v. Illinois EPA*, PCB 91-17. Further, as there are no genuine issues of material fact, and the Agency is entitled to judgment as a matter of law, the Agency requests the Board GRANT the Agency's motion for summary judgment. To support its claim, the Agency provides the following arguments:

### I. SECTION 302.211(e) OF THE BOARD REGULATIONS APPLIES TO TOWER LAKE

Rules and regulations promulgated by the Board have the force and effect of law, are presumed to be valid.... *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill.2d 149, 162, 184 Ill.Dec. 402, 613 N.E.2d 719, 724 (1993).

SIUE argues that Section 302.211(e) is not a general use water quality standard applicable to all waters of the State. *SIUE Mot at 6*. In support of its argument, SIUE argues that, "Section 302.211(e) is specifically directed toward rivers." *Id.* Further, SIUE states that, Section 302.211(e) is inapplicable to all other waters of the State per the

exclusionary language of Section 303.201, which provides, “Except as otherwise specifically provided, all waters of the State must meet the general use standards of Subpart B of Part 302.” *Id.*

SIUE’s argument shows a fundamental misunderstanding of the applicability of the Board regulations. The purpose of the Board regulations is “to protect the water quality standards required to sustain the designated uses; to establish effluent standards to limit the contaminants discharged to the waters; and to prescribe additional regulations necessary to implementing, achieving and maintaining the prescribed water quality.” 35 Ill. Adm. Code 301.102 (*emphasis added*). “Designated uses”, are the uses that are identified by the Board in Part 302 and Part 303 of its regulations. Designate use is a term of art.

In Part 303, the Board provides an outline of various designated uses assigned to the waters of the State. The Board divides the Part 303 into four subparts. Subpart A provides the general provisions. In this subpart, the Board under Scope and Applicability section 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.” 35 Ill. Adm. Code. 303.100.

Therefore, the first step of the analysis is to determine the water use designation for a given water body. To help determine the water use designation, Part 303 of the Board regulations divides the waters of the State into Nonspecific water use designations, under Subpart B, and Specific use designation under Subpart C. Subpart B lists General use waters; Public and Food Processing water supplies; Underground waters; and Secondary Contact and Indigenous Aquatic Life waters as nonspecific water use

designations. 35 Ill. Adm. Code Subpart B, Part 303. Subpart C lists all specific designated uses applicable to the waters of the State. Subpart C also contains some site-specific water quality standards. 35 Ill. Adm. Code Subpart C, Part 303. Subpart D contains site specific water quality based thermal discharge standards. 35 Ill. Adm. Code Subpart D, Part 303.

In determining which water quality standards apply for a given water body, the first step is to determine whether the waterbody falls under Subpart B, C, or D of Part 303. If the given water body is a general use water, then pursuant to Section 303.201, the waterbody must meet the general use standards of Subpart B of Part 302. 35 Ill. Adm. Code 303.201. Unlike what SIUE claims, the exclusionary language of Section 303.201 refers to Sections 303.202, 303.203 and 303.204, and Subpart C of Part 303 of the Board regulations. Subpart B together with the specific designations of Subpart C determine which set of water quality standards of Part 302 apply to a given body of water.

Tower Lake does not have a specific designation nor does it have any site-specific standard under Subpart C of Part 303. Therefore, Subpart B of Part 303 determines the applicable designation. Since Tower Lake neither falls under Public and Food Processing Water Supplies designation nor under Secondary Contact and Indigenous Aquatic life designation, it must be the general use waters of the State. Which means, Tower Lake must meet the general use standards of Subpart B of Part 302. Stated differently, Section 302.211(e) applies to Tower Lake. The general use designation is the default designation for all waters of the State. Tower Lake falls into this default designation.

SIUE contends that use of term "rivers" in Section 302.211(e) means that this section does not apply to all waters of the State. *SIUE Mot at 6*. Section 302.201



mandates that, "Subpart B contains general use water quality standards which must be met in waters of the State for which there is no specific designation." 35 Ill. Adm. Code 302.201. Again, the phrase "specific designation" refers to specific designations provided under Subpart C of Part 303, and does not refer to some isolated use of the word "rivers" in the rule language.

The Agency is not arguing that the Board does not have the authority to adopt water quality standards based on the type of the waterbody. SIUE's argument is based on semantics and lacks any support in the Board's adopting opinion for Section 302.211. The Agency agrees the language of Section 302.205 clearly limits the applicability of this Section to lakes and reservoirs. *See In the Matter of Water Quality Standards revisions, R71-14 (December 21, 1971).* There is no discussion in the Board's adopting opinion for Section 302.211 that suggests that the Board intended to limit the applicability of this section to rivers only. Concluding that Section 302.211(e) only applies to rivers is an absurd reading of the regulations and must be rejected. The Board "has the power to construe its own rules and regulations to avoid absurd or unfair results." *Village of Fox River Grove v. Pollution Control Board*, 299 Ill. App. 3d 869, 880, 234 Ill. Dec. 316, 702 N.E.2d 656, 664 (1998).

Further, SIUE's interpretation of Section 302.211(e) is not supported by the discussion in the Board's adopting opinion in R75-2. *In the Matter of Water Quality and Effluent Standards Amendments, Cooling Lakes, R75-2 (September 29, 1975).* The R75-2 rulemaking was proposed by the Commonwealth Edison Company, seeking revision of the Board's thermal standards as applied to artificial cooling lakes, associated with steam-electric generating plants. Specifically, Commonwealth Edison argued that the

application of water quality standards in Rule 203(i) to artificial cooling lakes is unnecessary for the protection of the environment. *Id.* at 5. It should be noted that Rule 203(i) was codified as 35 Ill. Adm. Code 302.211(e), August 1, 1982. Commonwealth Edison further argued that because the thermal conditions are unnecessary, it is not economically reasonable to apply them to artificial cooling lakes. As regulatory amendment, Commonwealth Edison offered the following amendment, “[t]he preceding temperature provisions shall not apply to discharges into an artificial cooling lake.” *Id.* at 5. The Board rejected the Commonwealth Edison’s request to exempt cooling lakes from thermal standards. Instead, the Board adopted a case-by case approach to the situation. The Board concluded that, “[t]he record indicates that there is no question that excessive thermal inputs can be damaging to the aquatic environment of an artificial cooling lake. Each artificial cooling must be judged on its own merits. 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.” *Id.* at 25 (*emphasis added*). The above discussion clearly shows that the Board intended the Section 302.211(e) requirements to apply to lakes.

Under SIUE’s incongruous reading of Section 302.211(e), Illinois will not have a water quality standard for thermal discharge into lakes. The Agency has been consistently applying Section 302.211(e) to both lakes and streams. The Agency has been applying this thermal standard in the permits issued to cooling lakes across the State. In some cases, where the discharger was unable to meet these standards, they requested regulatory relief from the Board. One such example is *Illinois Power Company (Clinton Power Station)*, PCB 92-142 (August 26, 1993), involved a petition for

hearing to determine specific thermal standards pursuant to 35 Ill. Adm. Code 302.211(j). The Board's opinion specifically states that, "Section 302.211 sets for the standards for temperature levels in artificial cooling lakes." *Id.* at 3. If Section 302.211 standards are applicable to artificial cooling lakes, how could SIUE argue that the Board did not intend these standards to apply to Tower Lake, a water of the State. The Board had many opportunities to define the applicability of Section 302.211(e) to lakes. If the Board had intended Section 302.211(e) not to apply to lakes, the Board would have stated so in these cases. The Board's intent that Section 302.211 applies to lakes is clear from the Board's opinion in *Commonwealth Edison v. EPA*.

Tower Lake is a general use waterbody. Along with the thermal discharge, it also receives a discharge from SIUE's sewage treatment plant. It is irrational to argue that the Board did not intend Section 302.211(e) to apply to a waterbody like Tower Lake when the Board's adopting opinion in R75-2 expressly rejected the Commonwealth Edison's request to exempt artificial cooling lakes from Section 302.211(e) thermal standard. Instead the Board adopted a case-by-case approach to address thermal discharges. In that rulemaking, the Board provided for an individual regulatory proceeding to set specific thermal standards applicable to an individual cooling lake. *Id.* at 26.

In sum, Section 302.211 applies to all waters of the State unless the Board has set specific thermal standard applicable to that waterbody through a regulatory proceeding.

## II. REQUIRING SIUE TO MEET SECTION 302.211(e) THERMAL STANDARD AT THE END OF DISCHARGE PIPE IS CONSISTENT WITH THE ACT AND THE BOARD REGULATIONS

SIUE contends that it should not be required to comply with the NPDES permit's requirements at a point representative of discharge. *SIUE Mot at 8*. SIUE believes that Section 302.104 language clearly provides that temperature is not to be monitored at the discharge point. *Id.* at 8. SIUE misses the real issue. The real issue here is whether the Agency's inclusion of a monitoring requirement is consistent with the requirements of the Act and Board regulations. 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.

The Board regulations provide the Agency with the authority to establish reporting and monitoring requirements. *See* 35 Ill. Adm. Code 309.146. In establishing the terms and conditions of an NPDES permit, the Board regulations require the Agency to apply and ensure compliance with "any more stringent limitation, including those necessary to meet water quality standards ... established pursuant to any Illinois statute or regulations." *See* 35 Ill. Adm. Code 309.141(d)(1). Under Section 309.142, in establishing permit terms and conditions, the Agency must determine and verify that the discharge authorized by the permit "will not violate applicable water quality standards...." *See* 35 Ill. Adm. Code 309.142 (*emphasis added*).

Here, the Agency issued an NPDES permit that requires SIUE to meet the Section 302.211(e) limits at the discharge point. This was necessary to ensure compliance with the Section 309.142 requirement that "the authorized discharge will not violate applicable water quality standards." In other words, the permit conditions must be such that the discharge will not cause violation of applicable water quality standards. This can only be established by either requiring the permittee to meet the standard at the discharge point or

in the receiving stream if mixing zone is granted. As no mixing zone is assigned to SIUE's discharge, SIUE must meet the applicable standards at the discharge point. The Agency's decision to not assign a mixing zone is based on the determination that SIUE failed to meet the requirements of the mixing zone regulations at 35 Ill. Adm. Code 302.102. In making its permit decisions, the Agency is required to apply the Board regulations as written, and does not have the authority to negotiate the applicability of regulations on a permit-by-permit basis.

The Agency is without any authority to impose permit conditions inconsistent with the applicable Board regulations. Only the Board has the authority to grant variances from standards, limitations, and requirements imposed by the NPDES permits upon a showing that compliance would impose an arbitrary and unreasonable hardship on the applicant or permittee. Only upon the Board's order, the Agency has the authority to issue or modify an NPDES permit consistent with the Board Order, the Clean Water Act, Federal NPDES regulations and the Act. See 35 Ill. Adm. Code 309.184.

In support of its argument, SIUE cites to the Board's adopting opinion on thermal regulations for Lake Michigan. *In the Matter of Thermal Standards, Lake Michigan*, PCB R70-2, 1971. *SIUE Mot at 9-10*. SIUE contends that the Board's regulations require compliance outside a mixing zone, and not the discharge point. SIUE's argument, in fact, strengthens the Agency's contention. The Agency is required to issue permits consistent with the applicable Board regulations. Section 302.507 language specifically directs that "[a]ll sources of heated effluents ... shall meet the following restrictions outside a mixing zone which shall be no greater than a circle with a radius of 1000 feet ...." 35 Ill. Adm. Code 302.507. As the Board regulation specifically directs

that all dischargers are to meet applicable standard outside a specified mixing zone, the Agency must issue a permit that requires heated effluent source to meet the applicable standard outside the mixing zone. For permits covered under the Section 302.507 requirement, the Agency does not have the authority to include a permit condition that requires compliance at the discharge point. However, if the Board regulation does not specify a mixing zone, compliance is required at the discharge point, absence any mixing zone assigned to the discharge or any specific regulatory relief. Section 302.211(e) language gives the Agency no such directive. As Section 302.211(e) does not specify any mixing zone, and the Agency has determined that a mixing zone is not appropriate in the case, then the Agency must issue an NPDES permit that requires the discharger to meet the applicable standards at the end of pipe to ensure that the authorized discharge will not violate thermal standards.

SIUE then cites to the regulatory history leading up to the codification of Section 302.211(e). The discussion is irrelevant here as the issue here is whether the Agency followed the mandates of the Act and Board regulations in issuing this permit. The proper review is whether the Agency has the authority to issue NPDES permits with water quality based effluent limits. Above discussion makes it clear that the Agency has the duty to ensure that the permitted discharge will not violate applicable standards. Therefore, where such circumstances exist, the Agency may incorporate water quality based effluent limits.

SIUE next argues that “[u]nder the terms of the NPDES permit as issued, if SIUE discharged one gallon of 94 degrees Fahrenheit water into Tower Lake in August when Tower Lake’s natural temperature and main river temperature were both 89 degrees

Fahrenheit, the 5 degree Fahrenheit above natural temperature permit requirement would not be violated, but the monthly maxima permit requirement would be, although no measurable increase in the temperature of Tower Lake would occur.” *SIUE Mot at 18*. SIUE again provide an absurd reading of the regulations. The general principle is that the Board regulations are construed and applied to avoid absurd and unfair results. *See Village of Fox River Grove v. Pollution Control Board*, 299 Ill. App. 3d 869, 880, 234 Ill. Dec. 316, 702 N.E. 2d 656, 664 (1998). Another general principle embedded in the Act is that the Agency is required to apply the Board regulations as written, and does not have the authority to negotiate the applicability of regulations on a permit-by-permit basis. Here, we are not dealing with a case where application of Section 302.211(e) requirements will result in absurd or unfair result. SIUE’s discharge is of substantial nature. Outfall 1 of the SIUE’s discharge has an average flow of 15 MGD, and a maximum flow of 19.5 MGD. *Agency Record at 13*.

In further support to its position, SIUE then cites to several Board cases to point out that Section 302.211(e) temperature standard applies in streams. The fundamental flaw with SIUE’s reasoning is that these cases are regulatory relief cases. In regulatory relief cases the permittee sought specific relief from application of the applicable regulations. The instant case involves an appeal of the application of Section 302.211(e) in the permit context. Regulatory cases presume the general applicability of the regulation. Permit appeals challenge the conditions based upon application of the regulation. The standard of review for SIUE in the permit appeal is whether the condition reasonably relates to application of the regulation. SIUE cases are, therefore, inapplicable here.

*Illinois Power Company (Clinton Power Station)*, PCB 92-142 (August 26, 1993), involved a petition for hearing to determine specific thermal standards pursuant to 35 Ill. Adm. Code 302.211(j). SIUE's reliance on *Illinois Power* to argue that Agency cannot require it to meet the Section 302.211(e) requirements at the discharge point is misplaced. *Illinois Power* does not involve the Board's review of permit conditions, but rather is a regulatory relief proceeding under Section 302.211(j).

Similarly, *Deere and Company, John Deer Foundry v. IEPA*, PCB 81-163 (October 5, 1982), does not stand for the position that, in no circumstances, the Agency has the authority to require Section 302.211(e) compliance at the discharge point. *Deere and Company* involves a variance request from water quality standards for temperature, and is not a case involving the Board's review of permit conditions.

*Central Illinois Public Service (Hutsonville Power Station) v. IEPA*, PCB 78-108 (October 19, 1978), also is not a case involving the Board's review of the Agency's decision. But involves a proceeding for the Board's determination pursuant to Rule 203(i)(5).

Just like *Illinois Power*, *Deere and Company*, and *CIPS*, SIUE can also ask the Board to grant it specific thermal standard. But the Board, not the Agency, has the authority to grant such relief. SIUE must file a separate petition with the Board to seek specific thermal standard as the Board does not grant such specific thermal standard relief as part of a permit appeal.

In sum, the Agency issued the SIUE's permit consistent with the mandates of the Act and Board regulations. As the permit conditions are necessary to accomplish the



purposes of the Act and Board regulations, the Agency requests the Board to GRANT its motion for summary judgment.

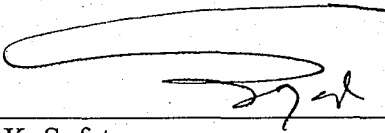
### CONCLUSION

It is evident from the above discussion that SIUE has filed to prove that the permit conditions, as written, in the permit are not necessary to accomplish the purposes of the Act and Board regulations. As there are no genuine issues of material fact, therefore, the Agency is entitled to judgment as a matter of law. Further, the Agency's right is clear and free from doubt.

For the reasons and arguments provided above, the Agency respectfully requests that the Board GRANT the Agency's motion for summary judgment.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

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SS

**PROOF OF SERVICE**

I, the undersigned, on oath state that I have served the attached the **AGENCY'S RESPONSE TO SOUTHERN ILLINOIS UNIVERSITY AT EDWARDSVILLE'S MOTION FOR SUMMARY JUDGMENT** upon the persons to whom it is directed, by placing a copy in an envelope addressed to:

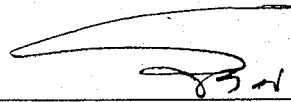
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and mailing it from Springfield, Illinois on May 16, 2005, by U.S. Mail with sufficient postage affixed.



SUBSCRIBED AND SWORN BEFORE ME  
THIS 16<sup>th</sup> DAY OF MAY, 2005.

Brenda Boehner



THIS FILING PRINTED ON RECYCLED PAPER