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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

Petitioner,)

v.)

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)

Respondent.)

PCB No. 02-105
(NPDES Permit Appeal)

NOTICE OF FILING AND PROOF OF SERVICE


TO: Dorothy Gunn, Clerk, Illinois Pollution Control Board, 100 West Randolph Street,
James R. Thompson Center, Suite 11-500, Chicago, IL 60601-3218;

Carol Web, Hearing Officer, Illinois Pollution Control Board, 1021 North Grand Avenue
East, P.O. Box 19274, Springfield, IL 62794-9274

Sanjay K. Sofat, Illinois Environmental Protection Agency, 1021 North Grand Avenue
East, P.O. Box 19276, Springfield, IL 62794-9276

PLEASE TAKE NOTICE that on June 14, 2005, I filed with the Office of the Clerk of
the Pollution Control Board an original and nine copies of Petitioner SIUE's Reply to IEPA's
Response Memorandum by U.S. Mail.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing,
together with a copy of the document described above, were today served upon the hearing
officer and counsel of record of all parties to this cause by enclosing same in envelopes
addressed to such attorneys at their business addresses as disclosed by the pleadings of record
herein, with postage fully prepaid, and by depositing same in the U.S. Mail in Springfield,
Illinois on the 14th day of June, 2005.


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THIS FILING SUBMITTED ON RECYCLED PAPER

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PETITIONER SIUE'S REPLY TO IEPA'S RESPONSE MEMORANDUM

NOW COMES Petitioner, Board of Trustees of Southern Illinois University Governing Southern Illinois University, by and through its attorneys, Mohan, Alewelt, Prillaman & Adami, and respectfully submits this Reply to IEPA's Response Memorandum.

I. NOT EVERY GENERAL USE WATER OF THE STATE MUST MEET ALL GENERAL USE STANDARDS OF SUBPART B OF PART 302

A significant portion of IEPA's Response is devoted to the IEPA arguing, without citation to legal authority, that all general use waters must meet the general use standards of Subpart B of Part 302. After arguing that such an iron clad rule exists, the IEPA's Response admits to an exception to the rule: "The Agency agrees the language of Section 302.205 clearly limits the applicability of this Section to lakes and reservoirs." (IEPA Response, p. 8).

Another exception to the IEPA's iron clad rule is Section 302.211(j), which applies only to artificial cooling lakes. Section 302.211(j) is also found in Subpart B of Part 302. The IEPA recognized this exception when it informed SIUE that Section 302.211(j) is inapplicable to Tower Lake. (Record, p. 47).

Thus, the parties are in agreement that not all general use waters must meet all of the general use standards of Subpart B of Part 302. The issues before the Board are: (a) whether Section 302.211(e), which refers to “water temperature at representative locations in the main river”, applies to Tower Lake? and (b) if Section 302.211(e) is found to apply to Tower Lake, whether SIUE must monitor for compliance at the discharge point?

II. SECTION 302.211(e) IS INAPPLICABLE TO LAKES

Nothing in the IEPA’s Response supports a Board finding that Section 302.211(e) applies to Tower Lake. Without identifying the reference, the IEPA’s Response states: “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.” (IEPA Response, p. 8). The Board’s focus on rivers is evident throughout the several opinions referenced in SIUE’s Motion for Summary Judgment relevant to the adoption of Section 302.211.

The IEPA’s Response states, without explanation, that giving Section 302.211(e) its plain meaning would be “absurd”. (IEPA Response, p. 8). 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. Tellingly, the IEPA never explains how SIUE is to find the “main river temperature”, defined by Section 302.204 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”, in Tower Lake.

The IEPA’s Response states that a determination that Section 302.211(e) does not apply to Tower Lake is not supported by the Board’s opinion concerning the adoption of the regulations governing artificial cooling lakes. (IEPA Response, p. 8). The opinion cited, however, states that “...the coverage of this regulation is narrow; it applies only to the thermal effluents from steam-electric generating plants.” In the Matter of Water Quality and Effluent

Standards, Amendments, Cooling Lakes, PCB No. R75-2, 1995 Ill. ENV LEXIS 475 at *49 (Sept. 29, 1975). The Board was focusing on a specific problem: the huge amounts of hot water discharged by steam-electric generating plants into artificial cooling lakes. Thus, while the opinion does not provide direct support to SIUE's position, neither does it undermine SIUE's position.

The IEPA's Response claims that "[u]nder SIUE's incongruous reading of Section 302.211(e), Illinois will not have a water quality standard for thermal discharge into lakes." (IEPA Response, p. 8). This is false. Sections 302.211(a), (b), (c), (d), (f), (g), (h), and (i) apply to SIUE's discharge into Tower Lake. Further, even if, as the IEPA asserts, the IEPA has been consistently applying Section 302.211(e) to lakes, this is a "fact" not in the record and should not be considered by the Board. Even if this "fact" were in the record, it is irrelevant. Simply because the IEPA has been mis-applying a regulation does not mean the IEPA should be allowed to continue to do so. See People v. Agpro, 214 Ill.2d 222 (2005) (Although prosecutors had obtained mandatory injunctions for years pursuant to 415 ILCS 5/42(e), Section 42(e) did not support the granting of such relief until it was recently amended).

The IEPA's Response argues that "[i]f 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." (IEPA Response, p. 10). Section 302.211(j), however, states that "[a]ll effluents to an artificial cooling lake must comply with the applicable provisions of the thermal water quality standards set forth in this Section and 35 Ill. Adm. Code 303, except when all of the following requirements are met...." 35 Ill. Admin. Code 302.211(j)(emphasis added). Thus, by regulating the temperature of the effluent, the rule applicable to artificial cooling lakes is more stringent than Section 302.211(e) unless the listed

exceptions are met and the discharger obtains its own thermal standards. This makes sense given the huge amounts of heated water generated by electric plants.

Accordingly, based on the undisputed facts and the applicable law, SIUE prays that the Board find that SIUE's discharge to Tower Lake is not subject to Section 302.211(e).

III. TEMPERATURE MONITORING FOR COMPLIANCE WITH SECTION 302.211(e) IS TO OCCUR AT REPRESENTATIVE LOCATIONS IN THE MAIN RIVER

Both Section 302.211(e) and Section 302.104 ("Main river temperatures are 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."), along with the case law cited in SIUE's Motion for Summary Judgment, conclusively establish that monitoring for compliance with Section 302.211(e) is to occur at representative locations in the main river. In its Response, the IEPA never addresses the plain language used by the Board to identify the monitoring point. Further, the IEPA argues that the regulatory history leading up to the codification of Section 302.211(e), and which history confirms that monitoring is not to occur at the discharge point, is irrelevant. (IEPA Response, p. 13). By ignoring the plain language chosen by the Board and the Board's opinions leading up to the codification of Section 302.211(e), the IEPA has, in reality, conceded the point.

Undeterred, the IEPA argues that there are only two possible monitoring points: (a) the discharge point; or (b) the edge of a mixing zone. (IEPA Response, pp. 11-12). The IEPA argues that no mixing zone was granted to SIUE, so SIUE must monitor at the discharge point. Whether or not this is the general rule, and whether or not Section 302.211(e) itself includes a mixing zone (see SIUE's Reply to IEPA's Motion for Summary Judgment, p. 2), IEPA's general rule is inapplicable to Section 302.211(e) which contains an explicit directive regarding where

water monitoring must occur. The IEPA's insistence of monitoring for compliance with Section 302.211(e) at the discharge is inconsistent with Section 302.211(e)'s purpose because it provides no information concerning main river temperatures—the concern of Section 302.211(e). (See SIUE's Motion for Summary Judgment, p. 15).

The IEPA's Response repeatedly recognizes that the IEPA must apply Board regulations as written. (IEPA Response, pp. 12-14). That is all SIUE is asking here. SIUE's burden is to show that monitoring for compliance with Section 302.211(e) at the discharge point is inconsistent with Section 302.211(e). Based on the undisputed facts and applicable law, SIUE has carried its burden. Accordingly, if the Board determines that Section 302.211(e) is applicable to discharges into Tower Lake, summary judgment should be granted in SIUE's favor as to where monitoring for compliance with Section 302.211(e) is to occur.

IV. "FACTS" NOT INCLUDED IN THE RECORD SHOULD BE STRICKEN FROM IEPA'S RESPONSE

The IEPA's motion and memorandum contained several statements of "fact" that are not included in the record. The IEPA's Response suffers from the same defect, and SIUE requests that the following "facts" found in the Response similarly be stricken from the Response:

pg. 2 "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."

pg. 9 "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."

pg. 10 "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."

p.10 "...it also receives a discharge from SIUE's sewage treatment plant."

p.12 "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."

Accordingly, SIUE requests that the Board not consider these unsupported statements of "fact" and that the Board strike them from the IEPA's Response.

V. CONCLUSION

Wherefore, Petitioner, Board of Trustees of Southern Illinois University Governing Southern Illinois University, prays that the Board strike all statements of "fact" offered by the IEPA which are not supported by the record. Additionally, Petitioner prays that the Board grant Petitioner's Motion for Summary Judgment and strike all requirements that Petitioner comply with Section 302.211(e) from the NPDES permit or, alternatively, and only if the Board determines that Section 302.211(e) is applicable to Petitioner's discharge, strike that portion of the NPDES permit requiring SIUE to monitor for compliance with Section 302.211(e) at a point

representative of the discharge but prior to entry into Tower Lake and direct the IEPA to modify the permit so that Petitioner is required to monitor for Section 302.211(e) compliance in Tower Lake.

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

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI
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