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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 September 30th, 2005, I filed with the Office of the
Clerk of the Pollution Control Board an original and nine copies of Petitioner SIUE's
Memorandum in Opposition to Agency's Motion for Reconsideration 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 30th day of September, 2005.


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THIS FILING SUBMITTED ON RECYCLED PAPER

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PETITIONER SIUE'S MEMORANDUM IN OPPOSITION TO
AGENCY'S MOTION FOR RECONSIDERATION

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 Memorandum in Opposition to Agency's Motion for Reconsideration.

I. The Agency's Motion presents no valid grounds for reconsideration.

"In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Admin. Code 101.902. The Board may also consider facts in the record which may have been overlooked and errors in its previous application of existing law. Carmichael v. Browing-Ferris Industries, PCB No. 93-114, 1993 Ill. ENV LEXIS 1510 at *2-3 (Dec. 16, 1993).

Through its Motion, the Agency requests that the Board reverse that portion of its August 4, 2005, Order holding that Section 302.211(e) is not applicable to Tower Lake. The Agency offers no new law, previously unavailable evidence, overlooked facts, or errors in the Board's

previous application of existing law to warrant the Board reconsidering its Order. Instead, the Agency argues that the Board has the power to give Section 302.211(e) a more “liberal” construction and that the Board should now do so, reverse itself, and hold that Section 302.211(e) applies to all waters of the state. The Agency argues that by doing so, the Board will afford all waters of the state the same protection against thermal inputs rivers receive. This is simply a rehash of the Agency’s earlier arguments, and rearguing points already rejected is not a valid basis for seeking reconsideration of an earlier decision.

Wherefore, because the Agency has presented nothing which would warrant reconsideration by the Board, the Board has no cause to consider the Agency’s Motion.

II. The Board properly applied rules of statutory construction to determine that Section 302.211(e) does not apply to Tower Lake.

In part, Section 302.211(e) provides:

- 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

35 Ill. Adm. Code 302.211(e).

In its August 4, 2005, Order, the Board found: (a) the intent of the drafters of Section 302.211(e), as shown by the plain meaning of the unambiguous language used, was that Section

302.211(e) applied only to rivers; (b) the phrase “in addition” at the beginning of Section 302.211(e) indicates that the standards contained in Section 302.211(e), applicable only to rivers, are in addition to those standards applicable to all waters of the state; (c) the Board would not have defined “main river temperatures” and used the phrase “main river” in Section 302.211(e) had the Board intended Section 302.211(e) to apply to all waters of the state; and (d) a literal reading of Section 302.211(e) does not defeat the intent of the thermal regulations and is consistent with the history of the Board’s thermal regulations. Based on this statutory analysis, the Board correctly determined that Section 302.211(e) was not applicable to Tower Lake.

In its present Motion, the Agency has abandoned its argument that “main river” as used in Section 302.211(e) means all waters of the state. (Motion, p. 3; Memorandum, p. 9)). Apparently conceding that the Board’s literal interpretation of Section 302.211(e) was correct, the Agency argues that a “literal reading” of Section 302.211(e) should be avoided. (Memorandum, p. 9). Instead, the Agency suggests that the Board give Section 302.211(e) a more “liberal” construction and “read into” the actual language employed, (Motion, p. 3), a meaning unsupported by that language so that the Board can arrive at the following construction:

The narrative portion of Section 302.211(e) discusses the statistical variation that is allowed at the point of measurement in the case of a main river. The monthly maxima water temperature portion of the regulation would apply to all waters of the State.

(Motion, p. 2).

The Agency contends that with such an interpretation, aquatic life in lakes and rivers will be afforded the same protection. (Motion, p. 4).¹ The Agency argues that it was not the original

¹The Agency’s suggested construction would actually provide greater protection to all waters of the state than that provided rivers, as only rivers would be allowed to exceed the

drafter's intent to lessen the protection of aquatic life in lakes, (Memorandum, p. 10), but admits that it can "only speculate regarding the original intent." (Memorandum, p. 8).

The Agency, then, is asking the Board to disregard all rules governing statutory construction and to instead construe Section 302.211(e) in a manner that bears no relationship to the plain meaning of the language used in Section 302.211(e) or the intention of its drafters. The Board must reject this improper request.

The plain language of Section 302.211(e) cannot be ignored. In re Marriage of Hawking, 240 Ill. App. 3d 419, 427 (1st Dist. 1992) ("Canons of statutory construction prevent this court from ignoring words which plainly appear in a statute.") "There is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute says." Henrich v. Libertyville H.S., 186 Ill. 2d 381, 391 (1998). There is a direct relationship between the "narrative portion" of Section 302.211(e) and the monthly maxima table. The "narrative portion" refers directly to the "following table", i.e., the monthly maxima table. "[A]t such locations" in the second sentence of the narrative portion of Section 302.211(e) is a direct reference to the phrase "representative location in the main river" in the first sentence. The "narrative portion" states that the "water temperature at representative locations in the main river shall not exceed the maximum limits in the following table...."

The Agency is asking the Board to interpret the monthly maxima table as applying to all waters of the state by simply looking at the table in isolation. In construing a statute, all of its terms must be considered. It is impermissible to focus on a phrase in a statute or regulation (or, as here, a table), and base the construction solely on that portion. In the present case, doing so

monthly maxima for brief time periods.

would not necessarily lead to the result sought by the Agency, because the maxima table alone contains absolutely no language suggesting what it might apply to. It is the language immediately preceding the table that informs the reader that the table is applicable to rivers. “Under the well-established rules of statutory construction, the words used in a statute must be given their ordinary and popularly understood meaning, and the relevant language must be read within the context of the entire provision of which it forms an integral part.” Gardner v. City of Chicago, 319 Ill. App. 3d 255, 263 (1st Dist. 2001)(quoting Illinois Wood Energy Partners, L.P. v. County of Cook, 281 Ill. App. 3d 841, 850 (1st Dist. 1995)).

Further, SIUE disagrees with the Agency’s assertion that the original intent of the drafters is unknown. As set forth in SIUE’s Motion for Summary Judgment and memoranda filed in support thereof, the drafters did intend for Section 302.211(e) to apply to rivers. See In re Mississippi Thermal Standards, PCB No. R70-16 at *17, 1971 Ill.ENV. LEXIS 37 (Nov. 23, 1971) (“The monthly maxima apply to the main river....”).

For these reasons, the Board should reject the Agency’s suggestion that the Board ignore the rules of statutory construction.

IV. The Agency’s argument that it would be better public policy to hold that Section 302.211(e) applies to lakes is irrelevant to the statutory construction issue.

The Agency complains that Section 302.211(e) is poorly written. The Agency argues that if Section 302.211(e) is construed as written, i.e., as only applying to rivers, then lakes will not receive the same two-tiered protection afforded rivers. The Agency argues that Wisconsin and Indiana provide two-tiered protection to lakes, and the Board should construe Section 302.211(e) so that Illinois also does so.

The Agency is making a policy argument. Even if the Board agreed with the Agency's policy argument, it is not a valid ground for holding that Section 302.211(e) applies to lakes when its unambiguous language makes it clear that it applies only to rivers. It is the actual language used in Section 302.211(e) that must be examined, not language the Agency wishes had been used. "A court must interpret and apply statutes in the manner in which they are written. A court must not rewrite statutes to make them consistent with the court's idea of orderliness and public policy." Henrich v. Libertyville H.S., 186 Ill. 2d 381, 394-395 (1998).

Apparently, the Agency offers the Wisconsin and Indiana regulations as examples of how Section 302.211(e) might have been drafted, but, as it was not so drafted, these regulations are irrelevant to the issue presented. It is interesting to note, however, that the Wisconsin regulation differentiates between streams and lakes, and Wisconsin even has different regulations dependent upon the type of fish that may live in the water. The Indiana regulations also differentiate between streams and lakes and reservoirs, and, like Illinois, has different monthly maxima requirements dependent upon the type of stream at issue (i.e., Ohio River or other streams). Even if a consideration of these regulations were relevant, both sets of regulations show that it is proper to differentiate between different types of waters, and the Indiana regulation tends to show that it is not necessarily unusual to apply monthly maxima exclusively to rivers or streams and not to lakes, as Indiana has done.

Wherefore, whether it would have been better policy to apply the monthly maxima to lakes may not be considered by the Board when construing Section 302.211(e) as written.

V. Conclusion.

For the reasons discussed herein, Petitioner, Board of Trustees of Southern Illinois University Governing Southern Illinois University requests that the Board deny the Agency's Motion for Reconsideration.

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

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI
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