

ILLINOIS POLLUTION CONTROL BOARD  
October 6, 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 today's order, the Board denies the respondent's September 15, 2005 motion for reconsideration (Mot.) and reaffirms the Board's August 4, 2005 final opinion and order in this matter.

On January 1, 2002, the Environmental Protection Agency (Agency) issued a final National Pollutant Discharge Elimination System (NPDES) permit for discharges from Southern Illinois University, Edwardsville's (SIUE) heating and cooling facility to Tower Lake at the SIUE campus, Highway 157, Edwardsville, Madison County. On May 6, 2002, SIUE requested review of the NPDES permit on four primary grounds: (1) the discharge of its non-contact cooling water should not have to meet the temperature requirements of 35 Ill. Adm. Code 302.211(d) because Tower Lake is man-made and has no natural temperature; (2) the permit requirements concerning 35 Ill. Adm. Code 302.211(e) are not applicable because they apply to rivers, not lakes; (3) the proposed permit provides no monitoring points in Tower Lake; and (4) the monitoring requirements for the permit are inconsistent.

On August 4, 2005, the Board granted SIUE's motion for summary judgment in part and denied it in part. Similarly, the Board granted the Agency's cross motion for summary judgment in part and denied it in part. Specifically, the Board ordered 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 affirmed the remaining contested conditions of that permit, specifically Special Conditions 2.A and 3. Section 302.211(e) sets temperature limits for the different months of the year, known as "monthly maxima." 35 Ill. Adm. Code 302.211(e).

A party may move the Board to reconsider and modify a decision within 35 days after receiving a final Board order. 35 Ill. Adm. Code 101.520(a). The Agency received the Board's final order on August 10, 2005. The motion for reconsideration, filed September 15, 2005, is

therefore timely. Accompanying the motion for reconsideration, the Agency also filed a memorandum in support of the motion (Memo). SIUE responded on October 3, 2005 (Resp.).

In its motion, the Agency moves the Board for reconsideration of its final opinion and order arguing that the Board should “apply the monthly maxima temperature limits portion of Section 302.211(e) to all waters of the State.” Mot. at 4. The Agency “admits that the Section 302.211(e) language is poorly drafted.” Memo at 8. Accordingly, the Agency urges the Board to avoid a literal reading of Section 302.211(e) in favor of a liberal one. *Id.* at 9. A literal interpretation that applies the monthly maxima limits to all waters of the state, argues the Agency, would protect waters at temperatures necessary for propagation of fish in waters of the State other than rivers. Memo at 10.

In response, SIUE states the Agency offers no new law, previously unavailable evidence, overlooked facts, or errors in the Board’s previous application of the existing law to warrant the Board’s reconsideration of the final opinion and order. Resp. at 1-2. SIUE states the Agency’s motion must fail for two reasons. First, SIUE states that by asking the Board to apply a “liberal” interpretation rather than a “literal reading” of Section 302.211(e), the Agency is essentially asking the Board to disregard all rules governing statutory construction. Resp. at 5. SIUE contends the basic rules of statutory construction require the Board to consider the plain meaning of Section 302.211(e). Resp. at 5; citing *In re Marriage of Hawking*, 240 Ill. App. 3d 419, 427 (1st Dist. 1992); *Henrich v. Libertyville H.S.*, 186 Ill. 2d 381, 391 (1998).

Second, SIUE states the Board must also reject the Agency’s public policy argument that if Section 302.211(e) is construed as applying only to rivers, then lakes will not receive the same two-tiered protection afforded rivers. Resp. at 6. SIUE emphasizes that the Agency admits that Section 302.211(e) is poorly written. SIUE contends that poorly drafted language, however, does not afford a court the liberty to “rewrite statutes to make them consistent with the court’s idea of orderliness and public policy.” Resp. at 7; citing *Henrich*, 186 Ill. 2d 381, 394-95. For these reasons, SIUE states the Board must deny the Agency’s motion for reconsideration.

A motion to reconsider may be brought “to bring to the [Board’s] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board’s] previous application of existing law.” *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. A motion to reconsider may specify “facts in the record which were overlooked.” *Wei Enterprises v. IEPA*, PCB 04-23, slip op. at 5 (Feb. 19, 2004). “Reconsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probable that a different judgment would be reached.” *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App. 3d 1, 8, 626 N.E.2d 1066, 1071 (1st Dist. 1993).

The Board denies the Agency’s motion for reconsideration, finding the Agency has presented no newly discovered evidence, changes in the law, or errors in the Board’s application of the existing law. The Agency asks the Board to change its interpretation of Section 302.211(e).

The Board agrees with the Agency that a two-tiered system of thermal requirements, both a maximum temperature rise and monthly maxima, may be necessary to adequately protect aquatic life in Illinois waterbodies other than rivers. However, the Board will not go so far as to construe “main river” to mean “lake” to achieve that result. In order to apply Section 302.211(e) to all waters of the state, the rule language must be amended to reflect that plain meaning. The Agency contends that the Board’s literal interpretation of Section 302.211(e) would “create inconsistency by providing lesser protection to the aquatic life use in waters of the State other than rivers.” Memo at 9. However, the Board finds even greater inconsistencies would result from interpreting “main river” to apply to all waters of the State.

Finding no grounds for reconsideration, the Board reaffirms its August 4, 2005 final opinion and order.

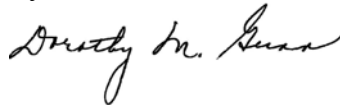
### **CONCLUSION**

The Board denies the Agency’s motion, finding no justification to reconsider its August 4, 2005 opinion and order. The Board, therefore, reaffirms its final opinion and order in its entirety.

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 October 6, 2005, by a vote of 4-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board