

ILLINOIS POLLUTION CONTROL BOARD

March 18, 2010

IN THE MATTER OF:)
)
PROCEDURAL RULES FOR) R10-19
AUTHORIZATIONS UNDER P. A. 95-115) (Rulemaking – Procedural)
(REGULATION OF PHOSPHORUS IN)
DETERGENTS ACT): NEW 35 ILL. ADM.)
CODE 106.SUBPART H)

Proposed Rule. First Notice.

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

Today the Board proposes for first notice publication in the *Illinois Register* new rules, to be codified at 35 Ill. Adm. Code 106. Subpart H. These rules apply to Board authorizations made under P. A. 95-115, signed and effective August 13, 2007. P.A. 95-115 was codified at 415 ILCS 92/1 *et seq.* (2008).

The Regulation of Phosphorus in Detergents Act prohibits the manufacture, distribution, sale, and use of "any cleaning agent" that contains more than 0.5% phosphorus by weight, expressed as elemental phosphorus after July 1, 2010. 415 ILCS 92/5(a) and (b). The law includes a number of definitions and exclusions. 415 ILCS 92/5(c) (2008). Section 5(d) provides that the Board

The Illinois Pollution Control Board may authorize the use of additional cleaning agents that contain phosphorus of an amount exceeding 0.5% by weight upon finding that there is no adequate substitute for that cleaning agent or that compliance with this Section would otherwise be unreasonable or create a significant hardship on the user. The Illinois Pollution Control Board shall promulgate rules for the administration and enforcement of the provisions of this Section. 415 ILCS 92/5(d) (2008).

As explained below, the Board believes that the only rules necessary are a new Subpart H, to be entitled "Authorizations under the Regulation of Phosphorus in Detergents Act" to existing Part 106, entitled "Proceedings Pursuant to Specific Rules or Statutory Provisions". *See* 415 ILCS 5/35-37 and 28.1 and 35 Ill. Adm. Code 104.Subpart B and Subpart D. The Board proposes that these rules become effective upon filing with the Secretary of State.

The Board presently does not intend to hold a hearing on these proposed rules unless requested to do so. (The Board is not required to hold a public hearing to amend its procedural rules pursuant to Section 26 and 27 of the Act. 415 ILCS 5/26 and 27 (2008).) The Board invites public comment on this proposal, and will accept comment for 45 days from the date of publication of the proposed rules in the *Illinois Register*. *See* Section 5-40 of the Administrative Procedure Act (APA), 100 ILCS 5/5-40 (2008).

DISCUSSION

The Regulation of Phosphorus in Detergents Act is a stand-alone act, which is not codified as part of the Illinois Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* The Regulation of Phosphorus in Detergents Act is fairly short, and is set forth in its entirety below in the interests of clarity:

Section 1. Short title.

This Act may be cited as the Regulation of Phosphorus in Detergents Act.

Section 5. Prohibition; definition; exceptions.

- (a) On and after July 1, 2010, no person may use, sell, manufacture, or distribute for sale any cleaning agent containing more than 0.5% phosphorus by weight, expressed as elemental phosphorus, in Illinois, except as otherwise provided in this Section.
- (b) As used in this Section, "cleaning agent" means a laundry detergent, dishwashing compound, cleanser, household cleaner, metal cleaner or polish, degreasing compound, commercial cleaner, industrial cleaner, or other substance that is used or intended to be used for cleaning purposes.
- (c) This Section does not apply to cleaning agents that are used:
 - (1) In agricultural, biofuel, or dairy production, including bottling equipment.
 - (2) To clean commercial food, brewery, or beverage processing equipment and containers, and in commercial automatic dishwashing machines, flatware presoak products, or commercial dishwashing rinse additive products.
 - (3) In hospitals, clinics, nursing homes, other healthcare facilities, or veterinary hospitals or clinics, or for use as commercial bathroom cleaners.
 - (4) In any medical, biological, chemical, engineering, or other such laboratory, including those associated with any academic or research institution.
 - (5) In commercial laundries that provide cleaning services for a hospital, health care facility, or veterinary hospital.

- (6) As water softeners, anti-scale agents, or corrosion inhibitors, if that use is in a closed system such as a boiler, air conditioner, cooling tower, or hot water heater.
 - (7) As industrial or institutional sanitizers, metal brighteners, or metal cleaning or metal conditioning, including products containing phosphoric acid or trisodium phosphate.
- (d) This Section does not apply to cleaning agents that:
- (1) contain phosphorus in an amount not exceeding 0.5%, expressed as elemental phosphorus by weight;
 - 2) are manufactured, stored, sold, or distributed for use solely outside the State; or
 - (3) are regulated by federal law, including the Food, Drug, and Cosmetic Act and the Federal Insecticide, Fungicide, and Rodenticide Act.
- (e) The Illinois Pollution Control Board may authorize the use of additional cleaning agents that contain phosphorus of an amount exceeding 0.5% by weight upon finding that there is no adequate substitute for that cleaning agent or that compliance with this Section would otherwise be unreasonable or create a significant hardship on the user. The Illinois Pollution Control Board shall promulgate rules for the administration and enforcement of the provisions of this Section.
- (f) The regulation of phosphorus in detergents is an exclusive power and function of the State. A home rule unit may not regulate phosphorus in detergents. This Section is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution.

Section 99. Effective date.

This Act takes effect upon becoming law [*i.e.* August 13, 2007].
415 ILCS 92 *et seq.* (2008).

The Board notes that it has received no regulatory proposals to implement the Regulation of Phosphorus in Detergents Act. The Board reads this statute as being self-implementing, except to the extent that it leaves to the Board establishment of procedures for Board issuance of authorization to continue use past July 1, 2010 of “cleaning agents containing more than 0.5% phosphorus by weight, expressed as elemental phosphorus”.
415 ILCS 92.5(a).

If the Regulation of Phosphorus in Detergents Act was codified as part of the Act, the Board would direct persons seeking cleaning agent authorizations for five years or less to use the variance procedures under Sections 35-37 of the Act, 415 ILCS 5/35-37 (2008), and the Board's procedural rules at 35 Ill. Adm. Code 104.Subpart B. Similarly, the Board would direct persons seeking cleaning agent authorizations for more than five years to use the adjusted standards procedures under Section 28.1 of the Act, 415 ILCS 5/28.1 (2008), and the Board's procedural rules at 35 Ill. Adm. Code 104.Subpart D.

But, as previously stated the Regulation of Phosphorus in Detergents Act is a stand-alone act, albeit one which authorizes the Board to adopt implementing regulations. Moreover, the Regulation of Phosphorus in Detergents Act articulates the standard for Board decision of cleaning agent authorizations a bit differently than the Act provides for either variances or adjusted standards. *Compare* 415 ILCS 92.5 (d) above with the 415 ILCS 5/35 (a) "arbitrary or unreasonable hardship" standard for variances and the 415 ILCS 5/28.1 (c)(1)-(4) justification factors for adjusted standards.

Under these circumstances, the Board believes the appropriate course is to propose to codify the procedures for cleaning agent authorizations as a new Subpart H, to be entitled "Authorizations under the Regulation of Phosphorus in Detergents Act" to existing Part 106, entitled "Proceedings Pursuant to Specific Rules or Statutory Provisions". The Board here proposes to amend Subpart A to Part 106 to include the rules proposed here within the Part's scope.

The new 35 Ill. Adm. Code 106.Subpart H follows the general format of the other subparts within Part 106. The rules incorporate the definitions from the Regulation of Phosphorus in Detergents Act, as well as definitions from the Board's procedural rules at 35 Ill. Adm. Code 101.Subpart B. Unlike the other types of determinations in Part 106, the Board does not propose that a hearing be held on every petition filed; in the interests of administrative economy the Board is making every effort to trim expenditures. However, a hearing will be held upon timely request. The burden of proof is on petitioner, and the standard for Board decision is quoted directly from the Regulation of Phosphorus in Detergents Act.

The Board intends the new procedures to become effective upon filing of the adopted rules, rather than on July 1, 2010 when the prohibitions of the Regulation of Phosphorus in Detergents Act become effective. This is intended to allow forward-thinking persons to initiate cleaning agent authorization petitions as soon as possible.

The Board presently does not intend to hold a hearing on these proposed Part 106.Subpart H rules unless requested to do so. The Board is not required to hold a public hearing to amend its procedural rules pursuant to Section 26 and 27 of the Act, and in the interests of administrative economy the Board is making every effort to trim expenditures. The Board invites public comment on this proposal, and will accept comment for 45 days from the date of publication of the proposed rules in the *Illinois Register*. The Board encourages the timely filing of public comments, to allow for adoption of these rules in advance of July 1, 2010.

ORDER

The Board directs the Clerk to cause the publication of the following rule for first notice in the *Illinois Register*. New language is indicated by underlining, and language to be deleted by strike-through.

TITLE 35: ENVIRONMENTAL PROTECTION
 SUBTITLE A: GENERAL PROVISIONS
 CHAPTER I: POLLUTION CONTROL BOARD

PART 106
 PROCEEDINGS PURSUANT TO SPECIFIC RULES OR STATUTORY PROVISIONS

SUBPART A: GENERAL PROVISIONS

Section	
106.100	Applicability
106.102	Severability
106.104	Definitions

SUBPART B: HEATED EFFLUENT, ARTIFICIAL COOLING LAKE, AND SULFUR DIOXIDE DEMONSTRATIONS

Section	
106.200	General
106.202	Petition Requirements
106.204	Additional Petition Requirements in Sulfur Dioxide Demonstrations
106.206	Notice
106.208	Recommendation and Response
106.210	Burden of Proof

SUBPART C: WATER WELL SETBACK EXCEPTION PROCEDURES

Section	
106.300	General
106.302	Initiation of Proceeding
106.304	Petition Content Requirements
106.306	Response and Reply
106.308	Hearing
106.310	Burden of Proof

SUBPART D: REVOCATION AND REOPENING OF CLEAN AIR ACT PERMIT PROGRAM (CAAPP) PERMITS

Section	
106.400	General

106.402	Definitions
106.404	Initiation of Proceedings
106.406	Petition Content Requirements
106.408	Response and Reply
106.410	Hearing
106.412	Burden of Proof
106.414	Opinion and Order
106.416	USEPA Review of Proposed Determination

SUBPART E: MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY DETERMINATIONS

Section	
106.500	General
106.502	Definitions
106.504	Initiation of Proceedings
106.506	Petition Content Requirements
106.508	Response and Reply
106.510	Hearing
106.512	Burden of Proof
106.514	Board Action

SUBPART F: CULPABILITY DETERMINATIONS FOR PARTICULATE MATTER LESS THAN OR EQUAL TO 10 MICRONS (PM-10)

Section	
106.600	General
106.602	Initiation of Proceedings
106.604	Petition Content Requirements
106.606	Response and Reply
106.608	Hearing
106.610	Burden of Proof

SUBPART G: INVOLUNTARY TERMINATION OF ENVIRONMENTAL MANAGEMENT SYSTEM AGREEMENTS (EMSAs)

Section	
106.700	Purpose
106.702	Applicability
106.704	Termination under Section 52.3-4(b) or (b-5) of the Act
106.706	Who May Initiate, Parties
106.707	Notice, Statement of Deficiency, Answer
106.708	Service
106.710	Notice of Hearing
106.712	Deficient Performance
106.714	Board Decision
106.716	Burden of Proof

106.718	Motions, Responses
106.720	Intervention
106.722	Continuances
106.724	Discovery, Admissions
106.726	Subpoenas
106.728	Settlement Procedure
106.730	Authority of Hearing Officer, Board Members, and Board Assistants
106.732	Order and Conduct of Hearing
106.734	Evidentiary Matters
106.736	Post-Hearing Procedures
106.738	Motion after Entry of Final Order
106.740	Relief from Final Orders

**SUBPART H: AUTHORIZATIONS UNDER THE REGULATION OF PHOSPHORUS IN
DETERGENTS ACT**

Section	
<u>106.800</u>	<u>General</u>
<u>106.802</u>	<u>Definitions</u>
<u>106.804</u>	<u>Initiation of Proceeding</u>
<u>106.806</u>	<u>Petition Content Requirements</u>
<u>106.808</u>	<u>Response and Reply</u>
<u>106.810</u>	<u>Hearing</u>
<u>106.812</u>	<u>Burden of Proof</u>

106.APPENDIX A Comparison of Former and Current Rules (Repealed)

AUTHORITY: Implementing and authorized by Sections 5, 14.2(c), 22.4, 26, 27, 28, 28.1, 28.1, 35, 36, 37, 38, 39.5 and 52.3 of the Environmental Protection Act (the Act) [415 ILCS 5/5, 14.2(c), 22.4, 26, 27, 28, 28.1, 28.1, 35, 36, 37, 38, 39.5 and 52.3], and Section 92.5 of the Regulation of Phosphorus in Detergents Act [415 ILCS 92.5].

SOURCE: Filed with Secretary of State January 1, 1978; amended at 4 Ill. Reg. 2, p. 186, effective December 27, 1979; codified at 6 Ill. Reg. 8357; amended in R85-22 at 10 Ill. Reg. 992, effective February 2, 1986; amended in R86-46 at 11 Ill. Reg. 13457, effective August 4, 1987; amended in R82-1 at 12 Ill. Reg. 12484, effective July 13, 1988; amended in R88-10 at 12 Ill. Reg. 12817, effective July 21, 1988; amended in R88-5(A) at 13 Ill. Reg. 12094, effective July 10, 1989; amended in R88-5(B) at 14 Ill. Reg. 9442, effective June 5, 1990; amended in R93-24 at 18 Ill. Reg. 4230, effective March 8, 1994; amended in R93-30 at 18 Ill. Reg. 11579, effective July 11, 1994; amended in R99-9 at 23 Ill. Reg. 2697, effective February 16, 1999; old Part repealed, new Part adopted in R00-20 at 25 Ill. Reg. 550, effective January 1, 2001; amended in R04-24 at 29 Ill. Reg. 8817, effective June 8, 2005, amended in R10-19 at 34 Ill. Reg. _____, effective _____.

SUBPART A: GENERAL PROVISIONS

Section 106.100 Applicability

- a) This Part applies to adjudicatory proceedings pursuant to specific rules or statutory provisions. Specifically, the Part applies to heated effluent, artificial cooling lake and sulfur dioxide demonstrations, water well setback exception procedures, revocation and reopening of CAAPP permits, maximum achievable control technology determinations, culpability determinations for particulate matter less than or equal to 10 microns, ~~and~~ the involuntary termination of environmental management system agreements, and authorization of use of cleaning agents under the Regulation of Phosphorus in Detergents Act [415 ILCS 92.5].
- b) This Part must be read in conjunction with 35 Ill. Adm. Code 101 which contains procedures generally applicable to all of the Board's adjudicatory proceedings. In the event of a conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Part, the provisions of this Part apply.

(Source: Amended at 34 Ill. Reg. _____, effective_____.)

**SUBPART H: AUTHORIZATIONS UNDER THE REGULATION OF
PHOSPHORUS IN DETERGENTS ACT**

Section 106.800 General

- a) Description. This Subpart applies to any person who files a petition for Board authorization *to use cleaning agents that contain phosphorus of an amount exceeding 0.5% by weight* as provided in Section 5/92. 5(d) of the Regulation of Phosphorus in Detergents Act [415 ILCS 92.5 (d)].
- b) Parties. The person filing the petition for authorization must be named the petitioner and the Agency must be named the respondent.
- c) Filing and service. The filing and service requirements of 35 Ill. Adm. Code 101.Subpart C will apply to the proceedings of this Subpart.

(Source: Added at 34 Ill. Reg. _____, effective_____.)

Section 106.802 Definitions

The definitions of 35 Ill. Adm. Code.Subpart B and Section 92.5 of the Regulation of Phosphorus in Detergents Act [415 ILCS 92.5] Act will apply to this Subpart unless otherwise provided, or unless the context clearly indicates otherwise. If there is a conflict, the definitions of Section 92.5 of the Act will apply.

(Source: Added at 34 Ill. Reg. _____, effective_____.)

Section 106.804 Initiation of Proceeding

The petitioner must file the petition for authorization with the Clerk of the Board and must serve one copy upon the Agency.

(Source: Added at 34 Ill. Reg. _____, effective _____.)

Section 106.806 Petition Content Requirements

The petition must contain the following information:

- a) A written statement, signed by the petitioner or an authorized representative, concerning the cleaning agent containing excess phosphorus for which authorization is sought, outlining a description of the cleaning agent and its phosphorus content, the duration of, the reasons for, and the basis of the authorization sought, consistent with the burden of proof stated in Section 106.812 of this Part;
- b) The nature of the petitioner's operations;
- c) Any other information which may be required by Section 92.5 of the Regulation of Phosphorus in Detergents Act [415 ILCS 92.5].

(Source: Added at 34 Ill. Reg. _____, effective _____.)

Section 106.808 Response and Reply

- a) Within 21 days after the filing of a petition, the Agency may file a response to any petition in which it has not joined as co-petitioner. The response must include the comments concerning potential Board action on the petition.
- b) The petitioner may file a reply within 14 days after the service of any Agency response.

(Source: Added at 34 Ill. Reg. _____, effective _____.)

Section 106.810 Hearing

The Board will hold a public hearing in an authorization proceeding only if a hearing is requested by the petitioner, the Agency, or any other person within 14 days after the filing of any reply under Section 106.806(b). The hearing officer will schedule the hearing. The Clerk will give notice of hearing in accordance with 35 Ill. Adm. Code 101. The proceedings will be in accordance with 35 Ill. Adm. Code 101.Subpart F.

(Source: Added at 34 Ill. Reg. _____, effective _____.)

Section 106.812 Burden of Proof

The burden of proof is on the petitioner. The petitioner must demonstrate that:

- a) *There is no adequate substitute for that cleaning agent for which authorization is sought, or*
- b) *Compliance with the requirements of Section 5/92.5 of the Act would otherwise be unreasonable or create a significant hardship on the user.*

(Source: Added at 34 Ill. Reg. _____, effective_____.)

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 18, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board