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POLLUTION CONTROL BOARD

NOTICE OF PROPOSED AMENDMENTS

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

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APPEALS OF FINAL DECISIONS OF STATE AGENCIES

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AUTHORITY: Authorized by Sections 26 and 27 of the Environmental Protection Act (Act) [415 ILCS 5/26 and 27] and implementing Sections 5, 9.1(c), 39, 39.5, 40, 40.1, 40.2, and 57 of the Act [415 ILCS 5/5, 9.1(c), 39, 39.5, 40, 40.1, 40.2 and 57].

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SOURCE: Filed with Secretary of State January 1, 1978; amended 4 Ill. Reg. 52, page 41, effective December 11, 1980; codified 6 Ill. Reg. 8357; amended in R93-24 at 18 Ill. Reg. 4344, effective March 8, 1994; amended in R94-11 at 18 Ill. Reg. 16594, effective November 1, 1994; old Part repealed, new Part adopted in R00-20 at 25 Ill. Reg. 406, effective January 1, 2001; amended in R04-24 at 29 Ill. Reg. 8811, effective June 8, 2005; amended in R14-21 at 39 Ill. Reg. 2369, effective January 27, 2015; amended in R16-17 at 40 Ill. Reg. 7980, effective May 20, 2016; amended in R17-18 at 41 Ill. Reg. 10084, effective July 5, 2017; amended in R19-1 at 44 Ill. Reg. _____, effective _____.

SUBPART A: GENERAL PROVISIONS

Section 105.104 Definitions

- a) Nonattainment New Source Review (NaNSR) means Illinois' rules for Major Stationary Sources Construction and Modification (MSSCAM) at 35 Ill. Adm. Code Part 203.
- b) Other ~~For the purpose of this Part,~~ words and terms will have the meanings as defined in 35 Ill. Adm. Code 101.Subpart B unless otherwise provided, or unless the context clearly indicates otherwise.

(Source: Amended at 44 Ill. Reg. _____, effective _____)

Section 105.108 Dismissal of Petition

A petition is subject to dismissal if the Board determines that:

- a) The petition does not contain the informational requirements set forth in Section 105.210, 105.304, 105.408, ~~or 105.506,~~ or 105.608;
- b) The petition is untimely under Section 105.206, 105.302, 105.404, ~~or 105.504,~~ or 105.606;
- c) The petitioner fails to timely comply with any order issued by the Board or the hearing officer, including an order requiring additional information;
- d) The petitioner does not have standing under applicable law to petition the Board for review of the State agency's final decision; or

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- e) Other grounds exist that bar the petitioner from proceeding.

(Source: Amended at 44 Ill. Reg. _____, effective _____)

Section 105.112 Burden of Proof

Unless this Part provides otherwise:

- a) *The burden of proof shall be on the petitioner except as provided in subsection (b) of this Section [415 ILCS 5/40(a)(1), 40(b) and (c)(3), and 40.2(a) and 40.3(a)(2)].*
- b) *The burden of proof is on the Agency if the Agency issues an NPDES permit that imposes limits which are based upon a criterion or denies a permit based upon application of a criterion, then the Agency shall have the burden of going forward with the basis for the derivation of those limits or criterion which were derived under the Board's rules. [415 ILCS 5/40(a)(1)]*

(Source: Amended at 44 Ill. Reg. _____, effective _____)

Section 105.116 Agency or OSFM Record Filing

- a) The State agency must file with the Board the entire record of the Agency's or OSFM's its decision, as applicable, within 30 days after the filing of the petition for review, unless this Part provides otherwise, or the Board or hearing officer orders a different filing date. If the Agency or OSFM State agency wishes to seek additional time to file its the record, it must file a request for extension before the date on which its the record is due to be filed. Under 35 Ill. Adm. Code 101.302(h)(2), each the State agency must file its the record through COOL or on compact disk or other portable electronic data storage device and, to the extent technically feasible, in text-searchable Adobe PDF. The record also must meet the requirements of 35 Ill. Adm. Code 101. Subpart J.
- b) The Agency record or OSFM record, as applicable, must be arranged in chronological sequence, or by category of material and chronologically within each category, and must be sequentially numbered with the letter "R" placed before the number of each page. This page number must appear in the top right corner of each page. The Agency record or OSFM record must be certified by the applicable State agency. The certification must be entitled "Certificate of Record on Appeal". The Certificate must contain an index that lists the documents

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comprising the Agency record or OSFM record and shows the page numbers upon which each document starts and ends. The Certificate of Record must be served on all parties by the State agency.

(Source: Amended at 44 Ill. Reg. _____, effective _____)

Section 105.118 Sanctions for Non-Compliant Filing of the Agency Record or the OSFM Record

If the Agency or OSFM State agency ~~State agency~~ unreasonably fails to timely file ~~its the~~ record on or before the date required under this Part, or unreasonably fails to prepare the record in accordance with this Part and 35 Ill. Adm. Code 101 Subpart J, the Board may sanction the relevant State agency in accordance with 35 Ill. Adm. Code 101.Subpart H.

(Source: Amended at 44 Ill. Reg. _____, effective _____)

SUBPART B: APPEAL OF AGENCY PERMIT DECISIONS AND OTHER FINAL DECISIONS OF THE AGENCY

Section 105.200 Applicability

This Subpart applies to any appeal to the Board of the Agency's final permit decisions and other final decisions of the Agency, except:

- a) When the appeal is of a final CAAPP decision of the Agency, which is addressed in Subpart C ~~of this Part; and~~
- b) When the appeal is of a final leaking underground storage tank decision of the Agency, which is addressed in Subpart D ~~of this Part; and~~
- c) When the appeal is of a final PSD permit decision of the Agency, which is addressed in Subpart F.

(Source: Amended at 44 Ill. Reg. _____, effective _____)

Section 105.210 Petition Content Requirements

In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C, the petition must include:

- a) The Agency's final decision or issued permit;

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- b) A statement specifying the date of issuance or service of the Agency's final decision or issued permit, as applicable under Section 105.206;
- c) A statement specifying the grounds of appeal; and
- d) For petitions under Section 105.204(b), *a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the Agency public hearing on the NPDES permit application, if an Agency public hearing was held, and a demonstration that the petitioner is so situated as to be affected by the permitted facility.* [415 ILCS 5/40(e)(2)]

(Source: Amended at 44 Ill. Reg. _____, effective _____)

Section 105.212 The Agency Record

- a) The Agency must file its entire Agency record of its decision with the Clerk in accordance with Section 105.116.
- b) The Agency record must include:
 - 1) Any permit application or other request that resulted in the Agency's final decision;
 - 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;
 - 3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;
 - 4) The Agency public hearing record ~~file~~ of any Agency public hearing that may have been held before the Agency, including any transcripts and exhibits; and
 - 5) Any other information the Agency relied upon in making its final decision.

(Source: Amended at 44 Ill. Reg. _____, effective _____)

Section 105.214 Board Hearing

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- a) Except as provided in subsections (b), (c) and (d), the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F, upon an appropriately filed petition for review. The hearing will be based exclusively on the Agency record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the Agency record under Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact.
- b) The Board will not hold a hearing on a petition for review under this Subpart if the Board disposes of the petition on a motion for summary judgment brought under 35 Ill. Adm. Code 101.516.
- c) The Board will not hold a hearing on a petition for review under Section 105.204(c) if the Board determines that:
 - 1) The petition is duplicative or frivolous; or
 - 2) The petitioner is so located as to not be affected by the permitted facility.
- d) The Board will not hold a hearing on a petition for review under Section 105.204(b) or (d) if the Board determines that the petition is duplicative or frivolous.
- e) If the Board determines to hold a hearing, the Clerk will give notice of the hearing under 35 Ill. Adm. Code 101.602.

(Source: Amended at 44 Ill. Reg. _____, effective _____)

SUBPART C: CAAPP PERMIT APPEALS

Section 105.302 General Requirements

- a) The definitions of 35 Ill. Adm. Code 101.202 and Section 39.5 of the Act will apply to this Subpart unless otherwise provided, or unless the context clearly indicates otherwise.
- b) If the Agency denies a CAAPP permit, permit modification, or permit renewal it must provide to USEPA, the permit applicant and, upon request, affected states, any person who participated in the public comment process and any other person

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who could obtain judicial review under Section 41(a) of the Act [415 ILCS 5/41(a)] a copy of each notification of denial pertaining to the permit applicant.

- c) The applicant, any person who participated in the public comment process under Section 39.5(8) of the Act, or any other person who could obtain judicial review under Section 41(a) of the Act may contest the decisions of the Agency enumerated in this subsection (c) by filing with the Clerk a petition for review of the Agency's action in accordance with this Section:
- 1) Denial of a CAAPP permit, including a permit revision or permit renewal, or a determination of incompleteness regarding a submitted CAAPP application;
 - 2) Issuance of a CAAPP permit with one or more conditions or limitations;
 - 3) Failure of the Agency to act on an application for a CAAPP permit, permit renewal, administrative permit amendment or significant permit modification within the time frames specified in Section 39.5(5)(j) or Section 39.5(13) of the Act, as applicable; or
 - 4) Failure of the Agency to take final action within 90 days after receipt of an application requesting minor permit modification procedures (or 180 days for modifications subject to group processing requirements) under Section 39.5(14) of the Act.
- d) For purposes of this Subpart, a person who participated in the Agency public comment process is someone who, during the Agency public comment period, either commented on the draft permit, submitted written comments, or requested notice of the final action on a specific permit application.
- e) The petition filed under subsection (c) must be filed within 35 days after the Agency's final permit action unless:
- 1) The petition is based solely on grounds arising after the 35 day period expires, in which case the petition may be filed within 35 days after the new grounds for review arise.

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- 2) The applicant is challenging the Agency's failure to timely take final action under Section 39.5 of the Act, in which case the petition must be filed before the Agency takes the final action.
- 3) However, under no circumstances may a petition challenging the final permit action on a Phase II acid rain permit be filed more than 90 days subsequent to the final permit action.
- f) The Agency must appear as respondent at the hearing and must file, within 30 days after service of the petition, an answer consisting of the entire Agency record of the application, including the CAAPP permit application, the Agency public hearing record, the CAAPP permit denial or issuance letter, and correspondence with the applicant concerning the CAAPP permit application.
- g) The Clerk will give notice of the petition and hearing in accordance with 35 Ill. Adm. Code 101.
- h) The proceeding will be conducted in accordance with 35 Ill. Adm. Code 101.
- i) *The Agency shall notify USEPA, in writing, of any petition for hearing brought under this Part involving a provision or denial of a Phase II acid rain permit within 30 days of the filing of the petition. USEPA may intervene as a matter of right in any such hearing. The Agency shall notify USEPA, in writing, of any determination or order in a hearing brought under this Section that interprets, voids, or otherwise relates to any portion of a Phase II acid rain permit. [415 ILCS 5/40.2(e)]*

(Source: Amended at 44 Ill. Reg. _____, effective _____)

Section 105.304 Petition Content Requirements

- a) The petition must include:
 - 1) Aa concise description of the CAAPP source for which the permit is sought;
 - 2) Aa statement of the Agency's decision or part thereof to be reviewed;
 - 3) Aa justification as to why the Agency's decision or part thereof was in error; and

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- 4) The ~~the~~ other materials upon which the petitioner relies in its petition.
- b) The petition may include a request to stay the effectiveness of a denial of the CAAPP permit until final action is taken by the Board under Section 40.2 of the Act.

(Source: Amended at 44 Ill. Reg. _____, effective _____)

SUBPART D: APPEAL OF AGENCY LEAKING UNDERGROUND
STORAGE TANK (LUST) DECISIONS

Section 105.410 The Agency Record

- a) The Agency must file the entire Agency record of its decision with the Board in accordance with Section 105.116.
- b) The Agency record must include:
 - 1) The plan or budget submittal or other request that requires an Agency decision;
 - 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the plan or budget submittal or other request;
 - 3) The final determination letter; and
 - 4) Any other information the Agency relied upon in making its determination.

(Source: Amended at 44 Ill. Reg. _____, effective _____)

Section 105.412 Board Hearing

The Board will conduct a public hearing in accordance with 35 Ill. Adm. Code 101.Subpart F including any hearing held by videoconference (see 35 Ill. Adm. Code 101.600 (b)) upon an appropriately filed petition for review, unless a petition is disposed of by a motion for summary judgment brought under 35 Ill. Adm. Code 101.516. The hearing will be based exclusively on the Agency record before the Agency at the time the permit or decision was issued.

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(Source: Amended at 44 Ill. Reg. _____, effective _____)

SUBPART E: APPEAL OF OSFM LUST DECISIONS

Section 105.508 OSFM Record and Appearance

- a) Within 14 days after a petition for review of an OSFM eligibility or deductibility determination, the attorney representing the OSFM must file an appearance with the Board.
- b) The OSFM must file the entire OSFM record of its decision with the Board in accordance with Section 105.116. The OSFM record must include:
 - 1) The request for OSFM determination of eligibility or deductibility;
 - 2) Correspondence with the petitioner;
 - 3) The denial letter; and
 - 4) Any other information the OSFM relied upon in making its determination.

(Source: Amended at 44 Ill. Reg. _____, effective _____)

SUBPART F: PSD PERMIT APPEALS

Section 105.600 Applicability

This Subpart applies to proceedings before the Board concerning appeals from final PSD permit determinations made under Section 9.1(d) of the Act and 35 Ill. Adm. Code Part 204.

(Source: Added at 44 Ill. Reg. _____, effective _____)

Section 105.602 Parties

- a) Petitioner. The person who files a petition for review of the Agency's final decision must be named the petitioner.

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- b) Respondent. The Agency must be named the respondent. If a petition is filed under Section 105.604(c) by a person other than the permit applicant, the permit applicant must be named as a respondent in addition to the Agency.

(Source: Added at 44 Ill. Reg. _____, effective _____)

Section 105.604 Who May File a Petition for Review

- a) If the Agency refused to grant or grants with conditions a PSD permit under Section 9.1(d) of the Act and 35 Ill. Adm. Code Part 204, the applicant may petition for a hearing before the Board to contest the decision of the Agency. [415 ILCS 5/40.3(a)(1)]
- b) If the Agency fails to act on an application for a PSD permit within the time frame specified in Section 39(f)(3) of the Act, the applicant may petition for a hearing before the Board to compel the Agency to act on the application in a time that is deemed reasonable by the Board. [415 ILCS 5/40.3(a)(1)]
- c) Any person who participated in the Agency public comment process for a PSD permit and is either aggrieved or has an interest that is or may be adversely affected by the PSD permit may petition for a hearing before the Board to contest the decision of the Agency. If the petitioner failed to participate in the Agency's public comment process, the person may still petition for a hearing, but only upon issues where the final permit conditions reflect changes from the proposed draft permit that was made available during the Agency public comment process. [415 ILCS 5/40.3(a)(2)]

(Source: Added at 44 Ill. Reg. _____, effective _____)

Section 105.606 Time to File Petition for Review

- a) Except as provided in subsection (b), a person who may petition the Board under Section 105.604 for review of the Agency's final decision must file the petition with the Clerk within 35 days after the date of the Agency's final permit action.
- b) A permit applicant who wishes to appeal the Agency's failure to act on an application for a PSD permit within the time frame specified in Section 39(f)(3) of the Act must file a petition for review with the Clerk before the Agency denies or issues the final permit.

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(Source: Added at 44 Ill. Reg. _____, effective _____)

Section 105.608 Petition Content Requirements

- a) All petitions under Section 105.604 must comply with 35 Ill. Adm. Code 101.Subpart C.

- b) A petition under Section 105.604(a) or (c) must be contained within the body of the petition all pertinent information in support of each issue raised for review. The Board will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. *The petition must include:*
 - 1) The Agency's final decision or issued PSD permit;

 - 2) A statement as to how the petitioner participated in the Agency public comment process;

 - 3) *All such facts as necessary to demonstrate that the petitioner is aggrieved or has an interest that is or may be adversely affected;*

 - 4) *The issues proposed for review, citing to a specific permit term or condition where applicable and to the Agency record where those issues were raised, citing to any relevant page numbers in the public comments submitted to the Agency and attaching this public comment to the petition. If the issues proposed for review were not raised with reasonable specificity during the public comment period, the petition must explain why such issues were not required to be raised during the Agency public comment process; and*

 - 5) *An explanation why the Agency's previous response, if any, to the issues proposed for review was:*
 - A) *Clearly erroneous; or*

 - B) *An exercise of discretion or an important policy consideration that the Board should, in its discretion, review. [415 ILCS 5/40.3(a)(2)]*

- c) A petition under Section 105.604(b)

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- d) must include the date that a complete permit application for a PSD permit was submitted to the Agency and an explanation as to why the submittal made on such date made the application complete.
- d) A petition under Section 105.604(a) or (c) may include a request to stay the effectiveness of any final Agency action on a PSD permit application until final action is taken by the Board under Section 40.3 of the Act. Any stay request must include a clear delineation of all the contested conditions of the PSD permit. To the extent that a stay of any or all of the uncontested conditions of the permit is sought, any stay request must indicate how these uncontested conditions would be affected by the Board's review of the contested conditions.
- e) For petitions under Section 105.604(c), any stay request must also demonstrate:
- 1) *That an immediate stay is required in order to preserve the status quo without endangering the public;*
 - 2) *That it is not contrary to public policy; and*
 - 3) *That there is a reasonable likelihood of success on the merits. [415 ILCS 5/40.3(d)(3)]*

(Source: Added at 44 Ill. Reg. _____, effective _____)

Section 105.610 Board Standards for Granting Stays

- a) *If requested by the permit applicant, the Board may stay the effectiveness of any final Agency action on a PSD permit application during the pendency of the review process. In such cases, the Board shall stay the effectiveness of all the contested conditions of the PSD permit and may stay the effectiveness of any or all uncontested conditions only if the Board determines that the uncontested conditions would be affected by its review of contested conditions. Any stays granted by the Board shall be deemed effective upon the date of final Agency action appealed by the applicant. [415 ILCS 5/40.3(d)(2)]*
- b) *If requested by a party other than the permit applicant, the Board may stay the effectiveness of any final Agency action on a PSD permit application during the pendency of the review process. In such cases, the Board may stay the effectiveness of all the contested conditions of the PSD permit and may stay the effectiveness of any or all uncontested conditions only if the Board determines*

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that the uncontested conditions would be affected by its review of contested conditions. The party requesting the stay has the burden of demonstrating that an immediate stay is required in order to preserve the status quo without endangering the public, that it is not contrary to public policy and that there is a reasonable likelihood of success on the merits. Any stays granted by the Board shall be deemed effective upon the date of final Agency action appealed under Section 105.606 of this Subpart and shall remain in effect until a decision is issued by the Board on the petition. [415 ILCS 5/40.3(d)(3)]

(Source: Added at 44 Ill. Reg. _____, effective _____)

Section 105.612 The Agency Record

- a) The Agency must file a copy of its entire Agency record of its decision with the Clerk in accordance with Section 105.116.
- b) The Agency record must include:
 - 1) Any permit application or other request that resulted in the Agency's final decision;
 - 2) Correspondence with the applicant and any documents or material submitted by the applicant to the Agency related to the permit application;
 - 3) The project summary, statement of basis or fact sheet;
 - 4) The Agency public hearing record of any Agency public hearing held under 35 Ill. Adm. Code 252.205, including any transcripts and exhibits;
 - 5) All written comments received during the Agency public comment period under 35 Ill. Adm. Code 252.201, including any extension or reopening under 35 Ill. Adm. Code 252.208;
 - 6) The response to comments required by 35 Ill. Adm. Code 252.210 and any new material placed in the Agency record under that Section;
 - 7) The final permit; and
 - 8) Any other information the Agency relied upon in making its final decision.

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(Source: Added at 44 Ill. Reg. _____, effective _____)

Section 105.614 Board Hearing

Except as provided in subsections (a) and (b), the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101, Subpart F, upon an appropriately filed petition for review under this Subpart. The hearing and decision of the Board will be based exclusively on the Agency record at the time the permit or decision was issued, unless the parties agree to supplement the Agency record. Any PSD permit issued by the Agency must be upheld by the Board if the technical decisions contained therein reflect considered judgment by the Agency.
[415 ILCS 5/40.3(d)(1)]

- a) The Board will not hold a hearing on a petition for review under this Subpart if the Board disposes of the petition on a motion for summary judgment brought under 35 Ill. Adm. Code 101.516.

- b) The Board will not hold a hearing on a petition for review under this Subpart if the Board determines that:
 - 1) The petition is *frivolous*; or

 - 2) The petition *lacks facially adequate factual statements* as required by Section 105.608 [415 ILCS 5/40.3(a)(2)].

- c) If the Board determines to hold a hearing, the Clerk will give notice of the hearing under 35 Ill. Adm. Code 101.602.

(Source: Added at 44 Ill. Reg. _____, effective _____)