

BOARD PROPOSAL FOR PUBLIC COMMENT OCTOBER 3, 1996

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

PART 105
APPEALS OF FINAL ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY (AGENCY) AND OFFICE OF THE
STATE FIRE MARSHAL (OSFM) DECISIONS

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

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. 4244, effective March 8, 1994; amended in R94-11 at 18 Ill. Reg. 16594, effective November 1, 1994. Part repealed, new Part adopted in R97-8 at __Ill. Reg. __, effective____.

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

PART 105 APPEALS OF FINAL ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (AGENCY) AND OFFICE OF THE STATE FIRE MARSHAL (OSFM) DECISIONS

SUBPART A: GENERAL

Section 105.100 Applicability

- a) This Part applies to adjudicatory proceedings before the Illinois Pollution Control Board (Board) which provide for appeals of Illinois Environmental Protection Agency (Agency) and Office of the State Fire Marshall (OSFM) final decisions as set forth in to Title X and XVI of Environmental Protection Act (Act). [415 ILCS 5/39-40.2 and 57- 57.17.]
- b) This Part shall be read in conjunction with 35 Ill. Adm. Code 101, which contains procedures generally applicable to all adjudicatory Board 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.

Section 105.102 Severability

If any provision of this Part or its application to any person or under any circumstances is adjudged invalid, such adjudication does not affect the validity of this Part as a whole or of any portion not adjudged invalid.

Section 105.104 Definitions

For the purpose of this Part, words and terms shall have the meaning as defined in 35 Ill. Adm. Code 101.Subpart B, unless otherwise provided.

Section 105.106 Filing and Service Requirements

The method of service and filing shall be in accordance with 35 Ill. Adm. Code 101.Subpart C.

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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 Sections 105.208, 105.308 or 105.406 of this Part;
- b) The petition is untimely pursuant to Sections 105.204 or 105.304 of this Part;
- c) The petitioner fails to timely comply with any order issued by the Board or the hearing officer, including but not limited to an order requiring additional information; or
- d) The petitioner does not have standing to petition the Board for review pursuant to Sections 40, 40.2, or 57.1 *et seq.* of the Act. [415 ILCS 5/40, 40.2 and 57.1 *et seq.*]

Section 105.110 Hearing Process

Proceedings held pursuant to this Part shall be in accordance with the rules set forth in 35 Ill. Adm. Code 101.Subpart F.

Section 105.112 Burden of Proof

- a) *The burden of proof is on the petitioner except as provided in subsection (b) below. [415 ILCS 5/40(a)(1), 40(b) and (e) and 40.2(a).]*
- b) *The burden of proof is on the Agency if the Agency issues a NPDES permit that imposes limits which are based upon a criterion or denies a permit based upon application of a criterion. 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).]*

Section 105.114 Calculation of Decision Deadline

- a) Pursuant to Sections 40(a) and 40.2(c) of the Act [415 ILCS 5/40 and 40.2] the Board will render its final decision upon the petition within 120 days of the date of filing of the petition with the Board, except:
 - 1) The petitioner may waive its right to a decision within the prescribed period in accordance with 35 Ill. Adm. Code 101.Subpart C;
 - 2) Where the petitioner submits an amended petition the decision deadline recommences from the date of filing with the Board of the amended petition; or
 - 3) The decision deadline may be extended at the discretion of the Board or the hearing officer when a continuance or cancellation of hearing is granted at petitioner's request pursuant to 35 Ill. Adm. Code 101.Subpart E.
- b) The petition for review is brought pursuant to Section 57.9(c)(2) of the Act for review of an OSFM decision where there is no statutory prescribed decision deadline for the Board decisions. [415 ILCS 5/57.9(c)(2).]

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- c) Computation of time is in accordance with 35 Ill. Adm. Code 101.Subpart C.

Section 105.116 Record Filing

The entire Agency or OSFM record shall be filed with the Board as directed by the Board or hearing officer in accordance with the applicable decision deadline.

Section 105.118 Sanctions for Filing a Late Record

As the Board is under a tight decision deadline time frame in petitions for review, failure to file the record on the date directed by the Board or hearing officer pursuant to Section 105.116 of this Part may subject the Agency to a \$500 penalty for every day the record is late and such other sanctions as may be ordered by the Board or hearing officer in accordance with 35 Ill. Adm. Code Part 101.Subpart H.

SUBPART B: APPEAL OF AGENCY PERMIT AND OTHER FINAL DECISIONS

Section 105.200 Parties

- a) Petitioner. The person who files a petition for review of the Agency's final decision shall be named as petitioner.
- b) Respondent(s). The Agency shall be named as the respondent. If a petition is filed pursuant to Sections 105.202(b), 105.202(c) and 105.202(d) by a person other than the permit applicant, the permit applicant shall be named as a respondent in addition to the Agency.

Section 105.202 Who May File a Petition for Review

- a) Permit. *If the Agency refuses to grant or grants with conditions a permit under Section 39 of the Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency.* [415 ILCS 5/40(a)(1).]
- b) Resource Conservation Recovery Act (RCRA) Permit. The permit applicant, *a third party, other than the permit applicant or the Agency, may petition the Board within 35 days for a hearing to contest the issuance of a RCRA permit for a hazardous waste disposal site.* [415 ILCS 5/40(b).]
- c) Hazardous Waste Permit. The permit applicant or *any party to an Agency proceeding conducted pursuant to Section 39.3 of this Act may petition as of right to the Board for review of the Agency's decision.* [415 ILCS 5/40(c).]
- d) Clean Air Act Permit Program (CAAPP) Permit. The applicant, any person who participated in the public comment process pursuant to Section 39.5(8) of the Act, or any other person who could obtain judicial review pursuant to Section 41(a) of the Act may contest the decision of the Agency by filing with the Clerk of the Board a petition for review. [415 ILCS 5/40.2(a)(1).]
- e) Other Agency Final Decisions. If the Agency's decision is to deny or grant with conditions, the person seeking the Agency decision may petition the Board for review within 35 days of the date of service of the final decision.

Section 105.204 Time for Filing the Petition

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Petitions must be filed in accordance with this section or the Board does not have the authority to review the Agency's decision and will dismiss the case on its own motion or any parties' motion.

- a) Within 35 days of the date of service of the Agency's final decision the petitioner may file with the Clerk of the Board:
 - 1) A petition for review which contains the requirements of Section 105.208 of this Part; or
 - 2) A request for an extension of time to file a petition for hearing pursuant to Section 105.206(a), (b) and (c). However a petitioner may not file an extension to a file a petition for review when contesting the issuance of a RCRA Permit.
- b) Notwithstanding subsection (a) above, if the petition for review a CAAPP permit is based solely on grounds arising after the 35-day period expires, the petition may be filed within 35 days after the new grounds for review arise. If the applicant is challenging the Agency's failure to timely take final action pursuant to Section 39.5 of the Act, the petition shall be filed before the Agency takes such final action. [415 ILCS 5/39.5.] Under no circumstances, however, may a petition challenging the final permit action on a Phase II acid rain permit be filed more than 90 days subsequent to such final permit action.

Section 105.206 Extension of Time to File a Petition for Review

- a) Permit or Other Agency Final Decision. Pursuant to Section 40(a)(1) of the Act, *the 35-day period for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period.* [415 ILCS 5/40(a)(1).] The applicant and the Agency must jointly file Board Form # --, or reasonably similar format which contains all information required on the relevant form, with the Board within 35 days of the date of service of the Agency's final decision. Board Form # is electronically available on the Board's Home Page or may be obtained at the Board's Chicago or Springfield offices. Additionally a copy of Board Form#-- appears at 35 Ill. Adm. Code 101.Appendix G, Illustration D. Upon an appropriately filed request for an extension, the applicant has a total of 90 days from the date of service of the Agency's final decision to file a petition for review before the Board pursuant to Section 105.208 of this Part.
- b) Hazardous Waste Permit. Pursuant to Section 40(c) of the Act, *the 35-day period for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period.* The applicant and the Agency must jointly file Board Form # --, or reasonably similar format which contains all information required on the relevant form, with the Board within 35 days of the date of service of the Agency's final decision. Board Form # is electronically available on the Board's Home Page or may be obtained at the Board's Chicago or Springfield offices. Additionally a copy of Board Form#-- appears at 35 Ill. Adm. Code 101.Appendix G, Illustration D. *If another person with standing to appeal a hazardous waste disposal permit wishes to obtain an extension, there must be a written notice provided to the Board by that person, the Agency and the applicant within the initial appeal period.* If a party other than the applicant is petitioner, the Agency, applicant and the other party must jointly file Board Form # --, or reasonably similar format which contains all

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information required on the relevant form, with the Board within 35 days of the date of service of the Agency's final decision. Upon an appropriately filed request for an extension, the applicant has a total of 90 days from the date of service of the Agency's final decision to file a petition for review before the Board pursuant to Section 105.208 of this Part. [415 ILCS 5/40(c).]

- c) CAAPP Permit. Pursuant to Section 40.2(a) of the Act, *the 35-day period for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period.* The applicant and the Agency must jointly file Board Form # --, or reasonably similar format which contains all information required on the relevant form, with the Board within 35 days of the date of service of the Agency's final decision. Board Form # is electronically available on the Board's Home Page or may be obtained at the Board's Chicago or Springfield offices. Additionally a copy of Board Form#-- appears at 35 Ill. Adm. Code 101.Appendix G, Illustration D. *If another person with standing to appeal the CAAPP permit wishes to obtain an extension, there must be a written notice provided to the Board by that person, the Agency, and the applicant within the initial appeal period.* If a party other than the applicant is petitioner, the Agency, applicant and the other party must jointly file Board Form # --, or reasonably similar format which contains all information required on the relevant form, with the Board within 35 days of the date of service of the Agency's final decision. Upon an appropriately filed request for an extension, the applicant has a total of 90 days from the date of service of the Agency's final decision to file a petition for review before the Board pursuant to Section 105.208 of this Part. [415 ILCS 5/40.2(a).]

Section 105.208 Petition Content Requirements

- a) The petition for review shall be accompanied by completed Board Form # - or reasonably similar format which contains all information required on the relevant form. Board Form # -- is electronically available on the Board's Home Page or may be obtained at the Board's Chicago or Springfield offices. Additionally a copy of Board Form#-- appears at 35 Ill. Adm. Code 101.Appendix G, Illustration E.
- b) In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C the petition shall be captioned in accordance with 35 Ill. Adm. Code 101.Appendix A, Illustration F and include:
- 1) The Agency's final decision or issued permit;
 - 2) A statement specifying the date of service of the Agency's final decision or issued permit; and
 - 3) A statement specifying the grounds of appeal.

Section 105.210 Agency Record and Notification

- a) The entire Agency record of its decision shall be filed with the Board as directed by the Board or hearing officer pursuant to Section 105.116 of this Part.
- b) The record shall include:
- 1) The permit application or other request which requires an Agency decision;

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- 2) Correspondence with the petitioner;
 - 3) The permit denial letter which conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision [415 ILCS 5/39];
 - 4) The hearing file of any hearing which may have been held before the Agency, including any transcripts and exhibits; and
 - 5) Any other information the Agency relied upon in making its determination.
- c) In a CAAPP permit review the Agency in addition to the above *shall notify USEPA, in writing, of any petition brought under this subsection involving a provision or denial of a Phase II acid rain permit within 30 days after 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 subsection that interprets, voids, or otherwise relates to any portion of a Phase II acid rain permit.* [415 ILCS 5/40.2(e).]

Section 105.212 Board Hearing

- a) The Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F upon an appropriately filed petition for review, unless a petition is disposed of by a motion for summary judgment brought pursuant to 35 Ill. Adm. Code 101.516. [415 ILCS 5/26.] Such hearing shall be *based exclusively on the record before the Agency* at the time the permit or decision was issued. [415 ILCS 5/40 and 5/40.2.]
- b) However, the Board will not hold a hearing on a petition for review of an Agency RCRA or hazardous waste disposal permit decision if the Board determines that:
 - 1) The petition is duplicitous or frivolous;
 - 2) The petitioner is so located as not to be affected by the permitted facility; or
 - 3) The permit was granted for the disposal or utilization of sludge from publicly owned sewage works.
- c) If the Board determines to hold a hearing the Clerk of the Board shall give notice of the hearing pursuant to 35 Ill. Adm. Code 101.602.

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

Section 105.300 Parties

- a) **Petitioner.** The person who files a petition for review of the Agency's final decision made pursuant to Sections 57.1 et seq. shall be named as petitioner. [415 ILCS 5/57.1 et seq.]
- b) **Respondent.** The Agency shall be named as the respondent.

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Section 105.302 Who May File a Petition for Review

Any owner or operator may file a petition for review pursuant to Section 40 of the Act of an Agency final determination made pursuant to Sections 57.1 et seq. [415 ILCS 5/40 and 57.1 et seq.] There are several Agency determinations which can be appealed pursuant to Section 40 of the Act. [415 ILCS 5/40.] The Agency determinations which may be appeal are included in Illustration A of this Part.

Section 105.304 Time for Filing the Petition

Petitions must be filed in accordance with this section or the Board does not have the authority to review the Agency's decision and will dismiss the case on its own motion or any parties.

- a) Within 35 days of the date of service of the Agency's final decision the petitioner may file with the Clerk of the Board:
 - 1) a petition for review which contains the requirements of Section 105.308 of this Part; or
 - 2) a request for an extension of time to file a petition for hearing pursuant to Section 105.306 of this Part.

Section 105.306 Extension of Time to File a Petition for Review

Pursuant to Section 40(a)(1) of the Act, *the 35-day period for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period.* The applicant and the Agency must jointly file Board Form # --, or reasonably similar format which contains all information required on the relevant form, with the Board within 35 days of the date of service of the Agency's final decision. . Board Form # is electronically available on the Board's Home Page or may be obtained at the Board's Chicago or Springfield offices. Additionally a copy of Board Form#-- appears at 35 Ill. Adm. Code 101.Appendix G, Illustration D. Upon an appropriately filed request for an extension, the applicant has a total of 90 days from the date of service of the Agency's final decision to file a petition for review before the Board pursuant to Section 105.308 of this Part. [415 ILCS 5/40.]

Section 105.308 Petition Content Requirements

- a) The petition for review shall be accompanied by completed Board Form # - or reasonably similar format which contains all information required on the relevant form. Board Form # -- is electronically available on the Board's Home Page or may be obtained at the Board's Chicago or Springfield offices. Additionally a copy of Board Form#-- appears at 35 Ill. Adm. Code 101.Appendix G, Illustration F.
- b) In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C the petition shall be captioned in accordance with 35 Ill. Adm. Code 101.Appendix A, Illustration G and also include:
 - 1) The Agency's final decision;
 - 2) A statement specifying the date of service of the Agency's final decision; and
 - 3) A statement specifying the grounds of appeal.

Section 105.310 Agency Record

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- a) The entire Agency record of its decision shall be filed with the Board as directed by the Board or hearing officer pursuant to Section 105.116 of this Part.
- b) The record shall include:
 - 1) The plan or budget submittal or other request which requires an Agency decision;
 - 2) Correspondence with the petitioner;
 - 3) The final determination letter; and
 - 4) Any other information the Agency relied upon in making its determination.

Section 105.312 Board Hearing

- a) The Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F upon an appropriately filed petition for review, unless a petition is disposed of by a motion for summary judgment brought pursuant to 35 Ill. Adm. Code 101.516. [415 ILCS 5/26.] Such hearing shall be *based exclusively on the record before the Agency* at the time the permit or decision was issued. [415 ILCS 5/40 and 5/40.2.]

SUBPART D: APPEAL OF OSFM LUST DECISIONS

Section 105.400 Applicability

This Subpart applies to proceedings before the Board concerning appeals from OSFM final determinations made pursuant to Section 57.9(c) of the Environmental Protection Act. [415 ILCS 5/57.9(c).]

Section 105.402 General Overview

The process before the Board for review of final determinations by the OSFM includes, but is not limited to, the following steps. Upon receipt of a petition for review, unless the Board determines that the petition is insufficient, a hearing date and location will be assigned. Though hearings will be publicly-noticed in the county where the underground storage tank site is located, in most cases the hearings will take place in either Chicago or Springfield. The Board envisions that if the parties enter into settlement prior to or during the hearing process, the parties may request that the Board accept and enter a final order adopting a proposed settlement agreement; such an order may be requested with or without a hearing.

Section 105.404 General Requirements

- a) Who may file. Any owner or operator of an underground storage tank who has been issued an "Eligibility and Deductibility Final Determination" letter may file a petition with the Board seeking review of that final decision. The owner/operator shall be named as the petitioner, and the OSFM shall be named as the respondent. Filing requirements are set forth at 35 Ill. Adm. Code 101.Subpart C.
- b) Timely Petition. The petition for review must be filed with the Board within 35 days after the date of the OSFM's "Eligibility and Deductibility Final Determination"

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letter. There shall be a rebuttable presumption that petitioner received the OSFM's "Eligibility and Deductibility Final Determination" letter four days from the date indicated on the letter.

- c) Service and Filing. The petitioner shall serve all filings upon the OSFM at the address listed in 35 Ill. Adm. Code 101.Subpart C. All filings shall be accompanied by a notice of filing. Methods and proof of service, as well as the effective date of service, are governed by 35 Ill. Adm. Code 101.Subpart C.

Section 105.406 Petition Content Requirements

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

- a) A copy of the OSFM's "Eligibility and Deductibility Final Determination" letter;
- b) A complete and precise description of the underground storage tank site, including but not limited to the location of the site, including the county, the number of underground storage tanks on-site, the substance(s) stored in each tank, the date of the tank(s) registration; and the date of Illinois Emergency Management Agency notification;
- c) A statement specifying the date of service of the OSFM's final determination letter and documentation to demonstrate the petition's timely filing;
- d) A statement specifying the grounds of appeal;
- e) If the owner or operator is represented by counsel, an appearance shall be filed in conjunction with the petition; and
- f) A request to hold the hearing in either Springfield or Chicago, or a request to conduct the hearing at a specified location other than Springfield or Chicago, specifying the reasons for that request. A hearing will be held in an alternate location only to prevent material prejudice or undue delay.

Section 105.408 OSFM Record and Appearance

- a) Within 14 days of a petition for review of an OSFM eligibility or deductibility determination, the attorney representing the OSFM shall file an appearance with the Board.
- b) The entire OSFM record of its decision shall be filed with the Board as directed by the Board or hearing officer. The record shall 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 Agency relied upon in making its determination.

Section 105.410 Location of Hearing

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The hearing will be held in either Springfield or Chicago or in such other location as the hearing officer or the Board may designate to prevent material prejudice or undue delay. Upon the case being set for hearing, the Clerk will cause notice of the hearing to be published. Public notice will be published at least 21 days before the hearing by public advertisement in a newspaper of general circulation in the county in which the UST site in question is located.

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Illustration A:

The following table includes Agency final determinations which may be appealed to the Board pursuant to the Leaking Underground Storage Tank Program, Title XVI of the Act. Appealable determinations are listed in Title XVI, so the reader should consult the Act for amendments to Title XVI which may affect this list.

Description of Final Determination	Section of the Act Citation.	35 Ill. Adm. Code Citation.
Agency's determination concerning the owner's or operator's physical soil classification and groundwater investigation plan.	57.7(a)(1)(A)	732.305(a) and (c) and 732.503(b) and (f)
Agency's determination as to a request for reimbursement for costs associated with early action pursuant to Section 57.6(b) of the Act.	57.7(a)(1)(B)	732.305(b)(1) and (c) and 732.602
Agency's determination concerning the owner's or operator's budget for the physical soil classification and groundwater investigation plan.	57.7(a)(2)	732.305(b)(2) and (c) and 732.503 (b) and (f)
Agency's determination concerning the site classification.	57.7(b)	732.309, 732.500(a) and 732.503(b) and (f)
Agency's determination concerning the corrective action plan submitted for a high priority site.	57.7(c)(1)(A)	732.405(a) and 732.503(b) and (f)
Agency's determination concerning the budget associated with a corrective action plan submitted for a high priority site.	57.7(c)(1)(B)	732.405(b) and 732.503(b) and (f)
Agency's determination as to issuance of a no further remediation letter in accordance with Section 57.10 of the Act for a high priority site.	57.7(c)(1)(E)	732.410(a) and (d)
Agency's determination concerning the groundwater monitoring plan and associated budget submitted for a low priority site.	57.7(c)(2)(B)	732.403(b) and (c) and 732.503(b) and (f)
Illustration A Cont.		
Description of Final Determination	Section of the Act Citation.	35 Ill. Adm. Code Citation.
Agency's determination associated with a groundwater monitoring completion report.	57.7(c)(2)(C)	732.403(g)
Agency's determination as to issuance of a no further remediation letter in accordance with Section 57.10 of the Act for a low priority site.	57.7(c)(2)(E)	732.403(f) and 732.410(d)
Agency's determination as to the site classification for a no further action site.	57.7(c)(3)(B)	732.402 and 732.410(d)

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Agency's determination as to amount of reimbursement.	57.8(i)	732.602(h)
Agency's determination concerning the completeness of plan or budget submittals by the owner or operator.		732.502(b), 732.503(f)
Agency's determination concerning the completeness of reimbursement submittals by the owner or operator.		732.602(a) and (b)

(Board Note: The above list was complete at time of adoption. However, the list is subject to subsequent changes in the Act, the Board's regulations and the interpretation of the corresponding law. By no means should this list be interpreted to limit any right to appeal an Agency final determination before the Board. The list should only be used as an aid for interpreting Title XVI and the corresponding law.)