

ILLINOIS POLLUTION CONTROL BOARD
October 20, 2011

IN THE MATTER OF:)
)
PROCEDURAL RULES FOR) R12-11
AUTHORIZATIONS UNDER) (Rulemaking – Procedural)
P. A. 97-220 FOR CERTAIN LANDSCAPE)
WASTE AND COMPOST APPLICATIONS)
AND ON-FARM COMPOSTING)
FACILITIES: NEW 35 ILL. ADM. CODE)
106.SUBPART I

Proposed Rule. First Notice.

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

Today the Board proposes new rules for first notice publication in the *Illinois Register*, to be codified at 35 Ill. Adm. Code 106. Subpart I. These rules apply to Board authorizations made under P. A. 97-220, signed and effective July 28, 2011. Among other things, P.A. 95-115 amends Section 21(q) of the Environmental Protection Act (Act), 415 ILCS 5/21(q) (2010). The amendments to Section 21(q) now specify that the Board (rather than the Illinois Environmental Protection Agency (Agency) as previously provided) may authorize certain exceptions to the provisions of that section.

One type of Board authorization is available under Section 21(q)(2) would allow any person to apply landscape waste or composted landscape waste at a rate greater than “agronomic rates” of not more than 20 tons per acre per year. The other type of Board authorization is under Section 21(q)(3), and is limited to farm owners or operators of a composting facility on which the landscape waste composting material is utilized who wish to operate the compost facility on more than 2% of the property’s total acreage. Without such Board authorizations, these activities are prohibited acts under Section 21(q), and violators are subject to enforcement.

As explained below, the Board believes that the only rules immediately necessary are a new Subpart I to the Board’s procedural rules at 35 Ill. Adm. Code Part 101. 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 (2010). 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 (2010).

DISCUSSION

Among other sections not relevant to this rulemaking, P. A. 97-220 amends the waste disposal prohibitions portion of the Act at Section 21(q). As shown below, these amendments are minor, striking out the word “Agency” in four locations and replacing it with the word “Board” (as underlined):

- q) Conduct a landscape waste composting operation without an Agency permit, provided, however, that no permit shall be required for any person:
- 1) conducting a landscape waste composting operation for landscape wastes generated by such person’s own activities which are stored, treated or disposed of within the site where such wastes are generated; or
 - 2) applying landscape waste or composted landscape waste at agronomic rates; or
 - 3) operating a landscape waste composting facility on a farm, if the facility meets all of the following criteria:
 - A) the composting facility is operated by the farmer on property on which the composting materials is utilized and the composting facility constitutes no more than 2% of the property’s total acreage, except that the Board ~~Agency~~ may allow a higher percentage for individual sites where the owner or operator has demonstrated to the Board ~~Agency~~ that the site’s soil characteristics or crop needs require a higher rate;
 - B) the property on which the composting facility is located, and any associated property on which the compost is used, is principally and diligently devoted to the production of agricultural crops and is not owner, leased, or otherwise controlled by any waste hauler or generator of nonagricultural compost materials, and the operator of the composting facility is not an employee, partner, shareholder, or in any way connected with or controlled by any such waste hauler or generator;
 - C) all compost generated by the composting facility is applied at agronomic rates and used as mulch, fertilizer or soil conditioner on land actually farmed by the person operating the compost facility, and the finished compost is not stored at the composting site for a period longer than 18 months

prior to its application as mulch, fertilizer, or soil conditioner;

- D) The owner or operator, by January 1, 1990 (or the January 1 following commencement of operation, whichever is later) and January 1 of each year thereafter, (i) registers the site with the Agency, (ii) reports to the Agency on the volume of composting material received and used at the site, (iii) certifies to the Agency that the site complies with the requirements set forth in subparagraphs (A), (B), and (C) of this paragraph (q) (3) and (iv) certifies to the Agency that all composting material was placed more than 200 feet from the nearest potable water supply well, was placed outside the boundary of the 10-year floodplain or on a part of the site that is floodproofed, was placed at least ¼ mile from the nearest residence (other than a residence located on the same property as the facility) and there are not more than 10 occupied non-farm residences within ½ mile of the boundaries of the site on the date of application, and was placed more than 5 feet above the water table.

For the purposes of this subsection (q), “agronomic rates” means the application of not more than 20 tons per acre per year, except that the Board Agency may allow a higher rate for individual sites where the owner or operator has demonstrated to the Board Agency that the site’s soil characteristics or crop needs require a higher rate. P.A. 97-220, eff. July 28, 2011, as it amends 415 ILCS 5/21(q) only.

The Board has not received any regulatory proposals to implement the amendments of Section 21(q) of the Act, or to amend the substantive provisions of the Board’s compost rules as codified at 35 Ill. Adm. Code Part 830-832. The Board today begins by proposing amendments to its procedural rules for adjusted standards.¹

The question then arises as to what procedural mechanisms are available for Section 21(q) authorizations. Once a Board authorization is granted under Section 21(q)(2) for an increase in the agronomic rate and once the landscape waste or composted landscape waste is applied to land, the legislation appears to contemplate that it will

¹ The Board notes that some minor revisions to the Board’s compost facilities regulations at 35 Ill. Adm. Code 830.102, and 830.106 are needed to reflect the amendments to Section 21(q) of the Act. The Board will consider these changes upon receiving a rulemaking proposal to amend Part 830 from the Agency. However, the Board further notes that a proposal to amend Parts 830-832 is not one of the current Agency listings on the July 2011 semi-annual regulatory required by the APA. *See* 35 Ill. Reg. 9108-9187 (June 17, 2011).

remain in place, not to be removed. Consequently, use of the variance procedures under Sections 35-37 of the Act, 415 ILCS 5/35-37 (2010), and the Board's procedural rules at 35 Ill. Adm. Code 104.Subpart B are not appropriate by their terms, as "ultimate compliance" within five years is not contemplated.

The same would be true for a farm owner or operator requesting long term relief under Section 21(q)(3) to operate a compost facility on more than 2% of the farmer's acreage. It is conceivable that a Section 21(q)(3)(A) on-farm composting facility might petition the Board to occupy more than 2% of the property's total acreage for a period of 5 years or less, and then return the composting site to its original size. In this instance, the farm owner or operator could seek a variance for the temporary condition, under the existing variance procedures. However, the Board surmises that the latter request would be the exception rather than the rule.

Consequently, the Board expects that the more usual procedural mechanism for granting Section 21(q)(2) and Section 21(q)(3) authorizations would be under the adjusted standards procedures under Section 28.1 of the Act, 415 ILCS 5/28.1 (2010), and the Board's procedural rules at 35 Ill. Adm. Code 104.Subpart D. But, P.A. 97-220 articulates the standard for Board decision of Section 21(q) authorizations a bit differently than the Act provides for either variances or adjusted standards. *Compare* 415 ILCS 5/21(q)(3) 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 Section 21 (q) authorizations as a new Subpart I, to be entitled "Authorizations For Certain Landscape Waste And Compost Applications and On-Farm Composting Facilities" to existing Part 106, entitled "Proceedings Pursuant to Specific Rules or Statutory Provisions". The Board here also 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 I follows the general format of the other subparts within Part 106. 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 Section 21(q). The Board intends the new procedures to become effective upon filing of the adopted rules.

The Board notes that members of its legal and technical staff have reported receiving inquiries from some individuals who would like to receive Section 21(q) authorizations this fall. Staff reports that interested persons have expressed concern at hearing that Section 21(q) authorizations were formal proceedings that could take roughly 120-180 days to complete, including requirements for newspaper publication of their request and the possibility that a member of the public might request a hearing on their request. Persons seeking authorizations

have asked Board staff why they cannot just “come in and sit down and explain the situation to someone”, as they formerly could when the Agency made these determinations.

The Board observes that the possibility for public participation in proceedings concerning these requests is precisely the result that the General Assembly appears to have intended in making Section 21(q) authorizations a matter of Board adjudication. There is no guaranteed right for the public to participate in permit proceedings concerning land application of landscape waste or compost. *See, e.g. United City of Yorkville v. IEPA and Hamman Farms*, PCB 8-95 (Oct. 16, 2008) (Board dismissal of attempted third party appeal of Agency-issued permit for land application of landscape waste due to lack legislative authority for such appeals and United City of Yorkville v. Hamman Farms, PCB 8-96 (still-pending two count complaint by municipality alleges refuse was mixed with the land-applied landscape waste at a 2200 acre farm in Kendall County). But, public participation opportunities are an integral part of the formal adjusted standard (and variance) proceedings. While the formal proceedings may slow down the application process, it guarantees that all interested persons can be heard before any material is applied to the land.

The Board presently does not intend to hold a hearing on these proposed Part 106.Subpart I rules unless requested to do so. The Board is not required to hold a public hearing to amend its procedural rules pursuant to Sections 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.

In particular, the Board seeks comment on what changes may be advisable in the petition content requirements proposed in Section 106.904.

ORDER

The Board directs the Clerk to cause the publication of the following rules for first notice publication 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	
106.800	General

106.802	Definitions
106.804	Initiation of Proceeding
106.806	Petition Content Requirements
106.808	Response and Reply
106.810	Hearing
106.812	Burden of Proof

SUBPART I: AUTHORIZATIONS FOR CERTAIN LANDSCAPE WASTE AND COMPOST APPLICATIONS AND ON-FARM COMPOSTING FACILITIES

<u>Section</u>	
<u>106.900</u>	<u>General</u>
<u>106.902</u>	<u>Initiation of Proceeding</u>
<u>106.904</u>	<u>Petition Content Requirements</u>
<u>106.906</u>	<u>Response and Reply</u>
<u>106.908</u>	<u>Hearing</u>
<u>106.910</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), 21(q), 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. 11486, effective July 23, 2010; amended in R12-11 at 36 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], and authorizations for certain landscape waste and compost applications and on-farm composting facilities.

- 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 36 Ill. Reg. _____, effective _____.)

SUBPART I: AUTHORIZATIONS FOR CERTAIN LANDSCAPE WASTE AND COMPOST APPLICATIONS AND ON-FARM COMPOSTING FACILITIES

Section 106.900

General

- a) Applicability. This Subpart applies to any person who files a petition for Board authorization concerning an individual site to:
- i) apply landscape waste or composted landscape waste at a rate greater than the agronomic rates of 20 tons per acre per year pursuant to Section 21(q)(2) of the Act; or
 - ii) operate an on-farm composting facility constituting more than 2% of the property's total acreage pursuant to Section 21(q)(3) of the Act.
- b) Demonstration. Any person who files a petition for Board authorization under this Subpart must demonstrate *that the site's soil characteristics or crop needs require a higher rate.* 415 ILCS 21(q).
- c) Parties. The person filing the petition for authorization must be named the petitioner and the Agency must be named the respondent.
- d) 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 36 Ill. Reg. _____, effective _____.)

Section 106.902

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 36 Ill. Reg. _____, effective _____.)

Section 106.904**Petition Content Requirements**

The petition must contain the following information:

- a) A written statement, signed by the petitioner or an authorized representative, concerning the property for which authorization is sought, outlining a description of the specific percentage of the property or the specific application rate sought, the duration of, the reasons for, and the basis for the authorization sought, consistent with the burden of proof stated in Section 106.910 of this Part;
- b) The nature of the petitioner's operations;
- c) Any other applicable information which may be required by Section 21 (q) of the Act, including but not limited to a map of the location where land application or composting would take place, a description of the uses of the surrounding areas, the method for nutrient calculations, the number of soil samples, the intended crop or planting, a description of any additives to the landscape waste, the method and timeframe for incorporating the landscape waste or compost into the soil, the method of minimizing stormwater/snowmelt runoff, the measures for removal of noncompostable wastes from the incoming loads, and the method of preventing nuisance conditions such as vectors, odors, litter.

(Source: Added at 36 Ill. Reg. _____, effective _____.)

Section 106.906**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 36 Ill. Reg. _____, effective _____.)

Section 106.908**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 36 Ill. Reg. _____, effective _____.)

Section 106.910**Burden of Proof**

The burden of proof for is on the petitioner. A petitioner may seek authorization, for an individual site, to:

- a) Apply landscape waste or composted landscape waste at rates greater than “agronomic rates” of not more than 20 tons per acre per year. 415 ILCS 21(q). An owner or operator seeking to apply landscape waste or composted landscape waste in accordance with Section 21(q)(2) of the Act at rates greater than agronomic rates must demonstrate to the Board that the site’s soil characteristics or crop needs require a higher rate as specified in the petition. 415 ILCS 21(q)(2).
- b) Increase in total acreage of on-farm composting facility. A farm owner or operator seeking to apply landscape waste or landscape waste compost in accordance with Section 21(q)(3)(A) of the Act at a composting facility on which the composting materials is utilized and who proposes to do so on more than 2% of the property’s total acreage on which the composting material is utilized by the farmer, must demonstrate to the Board that the site’s soil characteristics or crop needs require a higher rate as specified in the petition. 415 ILCS 21(q)(3)(A).

(Source: Added at 36 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 October 20, 2011, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board