

ILLINOIS POLLUTION CONTROL BOARD

February 2, 2012

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. Second First Notice.

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

Today the Board proposes new rules for a second first notice publication in the *Illinois Register* under the Administrative Procedure Act (APA), 100 ILCS 5/5-1 et seq. (2010). These rules are to be codified at 35 Ill. Adm. Code 106.Subpart I, and will apply to Board authorizations made under P.A. 97-220, signed and effective July 28, 2011. Among other things, P.A. 97-220 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 or IEPA) as previously provided) may authorize certain exceptions to the provisions of that section.

These rules differ from the original first notice rules as they relate to publication of an application required by the applicant for a Section 21(q) authorization. These revised rules add provisions requiring the petitioner to file newspaper notice of the filing of a 21(q) authorization application, triggering a 21-day period in which anyone may request the Board to hold a hearing. This is similar to existing requirements under the adjusted standard process in Section 28.1 of the Act (415 ILCS 5/28.1 (2010) and the Board's procedural rules at 35 Ill. Adm. Code Part 104.

One type of Board authorization 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. Under Section 21(q)(3), farmers who operate a composting facility may be authorized to use landscape waste compost 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 continues to propose that these rules become effective upon filing with the Secretary of State.

The Board adopted first notice of the proposed rules on October 20, 2011. The first notice was published at 35 Ill. Reg. 18492 (Nov. 14, 2011). Consequently, the 45-day Administrative

Procedure Act (APA) first notice public comment period closed on December 29, 2011. 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).

In its original, October 20, 2011 first notice opinion, the Board stated its intent to hold a hearing only if requested to do so during the public comment period. The Board received three public comments from Leonard and Roxanne Saunoris, residents of Peotone, Illinois on December 22, 2011 (PC 1), Richard P. Duran, Village President of Peotone on December 23, 2011 (PC 2), and Lisa M. Dugan, State Representative, on December 28, 2011 (PC 3), which are discussed in detail below. While the public comments request changes to enhance notice to the public of any applications to the Board under these rules, they do not request a public hearing in this rulemaking. Since no request for public hearing was made and to conserve Board resources, the Board will not hold a hearing. But, given the proposed enhancements to the public notice requirements as outlined in this order, the Board believes that it is appropriate to cause a second first notice publication in the *Illinois Register*.

PROCEDURAL HISTORY

The Board opened this docket on its own motion on October 20, 2011. The Board adopted a first notice opinion and order proposing procedural rules to implement amendments to Section 21(q) of the Act, 415 ILCS 5/21(q) (2010), added by P.A. 97-220, effective July 28, 2011. The first notice was published at 35 Ill. Reg. 18492 (Nov.14, 2011). Consequently, the 45-day APA first notice public comment period closed on December 29, 2011. See Section 5-40 of the APA, 100 ILCS 5/5-40 (2010).

On November 10, 2011, the Board received JCAR's First Notice Version of the rule text for use in creating Second Notice Changes for Part 106.

On November 16, 2011, the Board received JCAR's request for analysis of the economic and budgetary effects of this rulemaking pursuant to Section 5-40(c) of the APA, 100 ILCS 5/5-40(c) (2010).

No hearing requests were received. The Board received three comments on this rulemaking: the first from Leonard and Roxanne Saunoris, residents of Peotone, Illinois, on December 22, 2011 (PC 1), the second from Peotone Village President, Richard P. Duran, on December 23, 2011 (PC 2), and the third from State Representative, Lisa M. Dugan on December 28, 2011 (PC 3). Each is discussed in further detail below, following discussion of the contents of the first notice proposal.

THE BOARD'S FIRST NOTICE PROPOSAL

In its October 20, 2011 first notice opinion and order, the Board explained the reasons leading it to open this docket and propose procedural rules. The Board observed that, 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 had 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. Consequently, the Board proposed amendments to its procedural rules for adjusted standards.¹

The first question the Board examined was 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 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.

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 agenda required by the APA. *See* 35 Ill. Reg. 9108-9187 (June 17, 2011).

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 surmised that the latter request would be the exception rather than the rule.

Consequently, the Board stated that it expected 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 proposed 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 also proposed to amend Subpart A to Part 106 to include the rules proposed within the Part's scope.

The proposed 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 did 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, the Board proposed that a hearing would 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 intended the new procedures to become effective upon filing of the adopted rules.

The Board noted that members of its legal and technical staff have reported receiving inquiries from some individuals who would have liked to receive Section 21(q) authorizations this past fall. Staff reported that interested persons expressed concern 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. Persons seeking authorizations 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 observed 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 MI proceedings concerning authorizations for

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 authorization for land application of landscape waste due to lack of 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, the Board remarked, public participation opportunities are an integral part of the formal adjusted standard (and variance) proceedings. The Board commented that, while the formal proceedings may slow down the application process, it would guarantee that all interested persons have the opportunity to be heard before any material is applied to the land.

Public Comments Received During the First Notice Period

Among other things, the three public comments received by the Board each addressed the issue of what sort of notice of the filing of the petition the Board should require. Additionally, each addresses the history of a particular site: Terrona Farms located at 8452 W. Joliet Road in Peotone, Will County.

The Board notes that, on September 20, 2011, the Board received a request submitted by Jim Kerwin from Terrona Farms for an adjusted agronomic rate for leaf application. The Board docketed this request as an adjusted standard captioned Terrona Farms' Request for Adjusted Standard for Composting Under 415 ILCS 21(q)(3)(A), AS 12-2. The Board acknowledged receipt of the petition by order of October 20, 2011, but ordered petitioner to cure noted deficiencies by filing an amended petition. As the Board had not received an amended petition by December 1, 2011, on that day the Board issued an order stating that if an amended petition was not filed by January 16, 2012, the docket would be dismissed.

On December 21, 2011, the Board received a public comment signed by the Peotone Township Board in opposition to the grant of an adjusted standard in AS 12-2, citing prior problems at the site. The Board notes that the Village of Peotone also asked that the December 21, 2011 comment it filed in this rule docket also be considered as formal opposition to grant of relief in the AS 12-2 docket.

As no amended petition was filed in AS 12-2, the docket has been closed by order dated February 2, 2012.

Public Comment 1: Leonard and Roxanne Saunoris. The Board received the first public comment on December 22, 2011 from Leonard and Roxanne Saunoris (Saunoris' comment), citizens of Peotone (PC 1). The Saunoris' comment contends that the rule as proposed does not contain sufficient public notice to neighboring landowners of requests for changes under the rules. PC 1 at 1. The Saunoris' public comment requests the Board to

Please enact a rule that requires certified or registered mail to the owners of all real property located within 250 feet of the boundaries of the proposed site and the 10 nearest residences within 1 ½ miles of the boundaries of the proposed site (sic). PC 1 at 6.

The Saunoris' comment explains that the Village of Peotone is particularly sensitive to farming/composting operations from the problems the community faced starting in 1990 with the site (Terrona Farms) which was then owned by Robert DiCola, located near the Saunoris' property. PC 1 at 4. Attached to the Saunoris' public comment are: attachments documenting Robert DiCola's applications and rejections for permit to the IEPA for his composting operation most recently known as Terrona Farms, police reports regarding the operation which eventually led to an injunction by the Will County State's Attorney entered on October 22, 1991, as well as the various newspaper notifications for previous applications.

The Saunoris' 6-page comment extensively references the record in AS 12-2. PC 1 at 1-3. With regard to the Board's October 20, 2011 order in AS 12-2 concerning the newspaper publications required for adjusted standards under the Act, *see* 415 ILCS 28.1 (2010), the Saunoris' comment opines that "this is not much public notice for effected residence and property owners to have their voice heard prior to ruling...[because some people] don't read any newspapers let alone all newspapers." The Saunoris' comment contends that the required publication in the area "likely to be affected [requirement]". . . is non specific language." PC 1 at 2. As an example, attached to the Saunoris' public comment is a "small ad buried in the classified [section that] met the law in April of 1991 for composting permits [of a] 'general circulation newspaper' despite the fact this paper is from a town 20 miles away from the site...even though there is a well [known] circular paper 1.5 miles away..." *Id.* The Saunoris' comment calculated that the Board issued its first order in AS 12-2 47 days after the date of the application, and the comment stated that "the time requirement does not leave much time for the communit[ies] to respond to an application." PC 1 at 2.

Saunoris explains that Peotone had a "real problem" with the Robert DiCola property now called "Terrona Farms". PC 1 at 4. According to Saunoris, because of the problems the Village of Peotone faced due to the bad composting practices of Terrona Farms in the past, members of the Peotone community lobbied House Bill 2250 which became effective on November 17, 1991 to establish "agronomic rates" of 20 tons per acre per year to be incorporated into soil within 18 months. *Id.* Further, the Santouris' comment stated:

the notification laws for composting were also tightened effective December 31, 1990 under Senate Bill 1702 to require an applicant to give notice (1) in person or by mail to the members of the General Assembly from the legislative district in which the proposed facility is located, (2) by registered or certified mail to the owners of all real property located within 250 feet of the site of the proposed facility (determined as provided in subsection (b) of section 39.2 of the Act) . . . and (3) to the general public by publication in a newspaper of general circulation in the county in which the proposed facility is to located. PC 1 at 4.

The Saunoris comment is asking for more expansive public notice requirements than proposed since "citizens . . . do not want to relive the nightmare of 20 years ago". PC 1 at 6. Attached to the Saunoris' public comment is a petition with 44 signatures from residents of Peotone, the majority of whom are property owners within 1.5 miles of Terrona Farms. PC 1 at 5-6. The petition requests that:

any application to exceed “agronomic rates” (adjusted standard) give written notice by certified or registered mail to property owners within 1 ½ mile of boundary’s of the site. Or at least match the law for composting facilities. (Owners of all real property located within 250 feet of the site of the facility) 30 days prior to application date and publication in the nearest paper in general circulation. So affected residents and property owners have time to address concerns and comments, public hearings, etc. PC 1 .

Also attached to the Sauronis letter and petition were:

- Notice that the Illinois Native Nursery/DiCola applied with Illinois Environmental Protection Agency for a permit to develop and operate composting facility for landscape waste (and handwritten note that “Ill Native Nursery/Bob DiCola, Terrona Farms/Jim Kerwin are the same place, same address. Bob DiCola is the Owner, Jim Kerwin is the Manager”);
- Map of the location of Robert DiCola’s property;
- Court order (91 CH 4099) entered October 22nd 1991 whereby Bob DiCola agrees to “accept no further landscape waste on the Peotone site unless issued a permit by the Illinois Environmental Protection Agency to compost landscape waste”;
- Will County sheriff’s report dated August 10, 1990, where Robert Jares, a landowner near DiCola’s compost site, states “several times during the week, trucks from Evergreen Scavenger Service, Inc. drop as many as six loads of landscaping debris at the composting site. Much of the larger debris, such as tree stumps is burned openly on the DiCola property”. Also in the report, William Hopman, who is located directly north of the DiCola composting site related “the composting site receives almost daily deliveries of landscape debris from Evergreen Scavenger Service. On days when the compost piles are turned, a strong stench fills the air on Hopman’s property causing him and his family to remain indoors [and] that many times the odor penetrates into his house”;
- Will County land use violation letter, dated August 19, 1990, addressed to Mr. DiCola, stating that in order to operate his facility, a special use permit is required;
- Will County State’s Attorney’s violation letter, dated October 30, 1990, stating that Mr. DiCola is in violation of Will County Zoning Ordinance, Section 7.1-3(1);
- Letter from Bob DiCola’s attorney, Louis R. Yangas, on November 6, 1990 stating that he is “composting landscape waste for his own use and . . . as a soil conditioner to his property” and is “not operating a composting facility on his property.” The letter also states that Mr. DiCola “has applied to the State of Illinois for a permit to operate a landscape facility which permit has not been issued” and that “in the interim he will only compost landscape waste for his sole personal use and benefit on his farm”;
- Complaint for injunction filed by the State’s Attorney of Will County against Mr. DiCola (91 CH 4099) directing Mr. DiCola to cease and desist operations and assess fines, notarized on March 25, 1991;
- Letters from the Will County Land Use Department to Mr. DiCola, dated August 16, 1990, October 4, 1990 and another on March 13, 1991 stating that Mr. DiCola is operating a composting facility without the required IEPA permit and attached inspection reports;

- DiCola’s applications to the IEPA for composting facility (Log nos. 1990-451, 1992-216);
- Letters from the Illinois Environmental Protection Agency, on December 31, 1990 and October 6, 1992, denying Mr. DiCola’s permit applications to develop and operate a composting facility for landscape waste;
- Peotone Vedette newspaper articles regarding hearings on Mr. DiCola’s operation from, August 21 and 29 and September 5, 1990 as well as April 22, 1992;
- Letter from Peotone Village President to the IEPA, dated December 6, 2010 stating that the Village of Peotone is opposed to the variance application filed for Mr. DiCola’s operation located at 8452 W. Joliet Road, Peotone;
- Newspaper article from the Peotone Vedette, dated December 9, 2010 stating that Mr. DiCola applied to the IEPA for a land application variance;
- Letter from Roxanne Saunoris to the IEPA, dated December 18, 2010 asking the IEPA not to grant the variance to Terrona Farms;
- Letter from Don Gould, Will County Board Commissioner, to IEPA, dated December 24, 2010, asking the IEPA not to grant the variance to Terrona Farms;
- Letter from Gene Younker, Peotone Township Clerk, to Curt Paddock, Will County Land Use Dept., dated May 27, 2011, asking the Will County Land Use Dept. to “hold Terrona Farms to fully comply in a timely manner with both the IL EPA response (LPC No. 1970750007 – Will County) and 1991 Court Order No. 91 CH 4099”; and
- Letter from Stephen Nightingale, IEPA, to Mr. Jim Kerwin of Terrona Farms, dated May 2, 2011, stating “an increase in the land application rates above the standard 20 tons/acre per year of landscape waste has not been justified.”

Public Comment 2: Peotone Village President, Richard P. Duran. On December 23, 2011, the Board received a two-page letter from the Peotone Village President, Richard R. Duran (PC 2). The letter commented that

the Village of Peotone strongly feels that municipalities should receive written notice by certified mail for any requests to exceed agricultural limits of landscape waste application on sites within 1.5 miles of the corporate limits, . . . [because] the application of landscape wastes can have more impact on the life of Peotone resident and business owners than many of the court zoning or variance applications.” PC 2 at 1.

Without citing the case by number, the Village’s letter then discussed the merits of the Terrona Farms petition in AS 12-2, which the Village asserts lies within the 1.5 mile formal planning area outside its corporate limits. PC 2 at 1. The letter references the 1990 DiCola problem and Will County State’s Attorney injunction mentioned by the Saunoris’ public comment (PC 2 at 1). The letter concludes that, “the Village of Peotone is opposed to the application [AS 12-2] filed for the property located at 8452 W. Joliet Road, Peotone.” PC 2 at 2.

Public Comment 3: State Representative Lisa Dugan. On December 28, 2011, the Board received a one-page letter from State Representative Lisa Dugan (79th District) stating that she “support[s] the Petition of the residents of Peotone and agrees that registered or certified mail

notification for application to exceed agronomic rates should be put into law.” PC3.
Representative Dugan further believes

a good compromise between rural and urban areas could be that verification that the applicant has given notice by registered or certified to the owners of all real property located within 250 feet of the boundaries of the proposed site and the 10 nearest residences within 1 ½ miles of the boundaries of the proposed site.” PC3.

Representative Dugan attached a copy of a petition signed by 53 persons requesting enhanced notification of petitions under Section 21(q).²

DISCUSSION

The substance of the public comments received since first notice pertains only to the type of notice to be given to potentially affected individuals as well as the amount of time for members of the public to respond. Therefore, the discussion will focus on these issues.³

Section 21(q) of the Act does not dictate any particular type of notice to be given to the surrounding community. Accordingly, the rules proposed at first notice required the petitioner to serve the Agency with a copy of any petition filed with the Board under Section 21(q). The Board provides notice of any filings made before it on its website, and the rules proposed at first notice did not provide any particular method by which the applicant was to notify surrounding landowners of the filing of an application.

The Saunoris’ comment (PC 1) requests that notice include “certified or registered mail to the owners of all real property located within 250 feet of the boundaries of the proposed site and the 10 nearest residences within 1 ½ miles of the boundaries of the proposed site.” The petition appended to their public comment, as well as to that of Representative Dugan, stated:

This petition is asking that any application to exceed “agronomic rates” (adjusted standard) give written notice by certified or registered mail to all property owners within 1 1/2 mile of boundary’s of the site. Or at least match the law for composting facilities. (Owners of all real property located within 250 feet of the site of the facility.) 30 days prior to application date and publication in the nearest paper in general circulation. So affected residents and property owners

² The petitions appended to the Santouris’ comment (PC 1) and Representative Dugan’s comment (PC 3) appear to be identical, except that the petition in PC 1 is missing one of the pages contained in PC 3. The petition in PC 1 contains 44 signatures and the petition in PC 3 contains 52 signatures.

³ The Board had also sought comment on what changes might be advisable in the petition content requirements proposed in Section 106.904, but received no suggestions. See R12-11, slip op. at 5, (Oct. 20, 2011).

have time to address concerns and comments, public hearing, etc. PC 1, attached Petition at 1 (emphasis in original).

Representative Dugan suggests “a good compromise between rural and urban areas could be that verification that the applicant has given notice by registered or certified to the owners of all real property located within 250 feet of the boundaries of the proposed site and the 10 nearest residences within 1 ½ miles of the boundaries of the proposed site.” PC 3. In PC 2, Peotone Village President, Richard Duran requested “that *municipalities* should receive written notice by certified mail for any requests to exceed agricultural limits of landscape waste application on sites within 1.5 miles of the corporate limits.” PC 2 (emphasis added).

Read together, the three public comments received since first notice are requesting notification similar to an application for local siting of a pollution control facility under 415 ILCS 5/39.2(b).⁴ This is a reasonable reaction on their part to a prior problem at the site. However, the Board is reluctant to rework its proposed rules on the basis of a single incident that happened more than 20 years ago. The Board needs to consider how its procedural rules will apply to the entire state.

The notice requirements for applications for local siting approval of pollution control facilities under 415 ILCS 5/39.2(b) are the most stringent ones for any type of proceeding under the Act. While there is no information regarding costs in this record, past Board experience and the information from the Board’s Clerk as explained below indicates that the pollution control facility siting notice requirements are time consuming and costly for the applicant, and failure to meet any requirement deprives the local siting authority and this Board of jurisdiction over the application. The General Assembly reserves such requirements for those types of proceedings where various inherent circumstances clearly support enhanced notification. *Compare* 415

⁴ 415 ILCS 5/39.2(b) (2010) provides:

No later than 14 days before the date on which the county board or governing body of the municipality receives a request for site approval, the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways.

Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the county in which the site is located.

ILCS 5/ 28.1 (2010) (newspaper notice of adjusted standard petition to be published by petitioner), 415 ILCS 5/35-37 (2010) (newspaper notice of variance petition to be published by the Agency), and 415 ILCS 5/39.2 (2010) (applicant for siting of pollution control facility to publish newspaper notice, provide notice to specified members of General Assembly, and notify in person or by registered mail specified surrounding landowners.) The General Assembly did not articulate in P.A. 97-220 that such notice was required for Section 21(q) petitions.

As the Board previously observed, in removing the Section 21(q) application process from the Agency, the General Assembly clearly wished to heighten the opportunities for public participation. As the Board further noted, the Section 21(q) proceeding is in the nature of an adjusted standard. In Section 21(q), the General Assembly did not require the same type of newspaper notice as specified in Section 28.1 of the Act and Part 104 of the Board's procedural rules (35 Ill. Adm. Code 104). But, the Board feels that requiring a Section 21(q) applicant to make similar newspaper notice is reasonable, and provides the public with greater transparency in this process as compared to the prior IEPA permit process.

The Board finds that use of the notification requirements under the adjusted standard procedures of Section 28.1 of the Act and 35 Ill. Adm. Code 104.408 provides sufficient notice to potentially affected individuals of 21(q) petitions. Similarly, the timeline for requesting hearing and opportunity for public comment for an adjusted standard is an appropriate mechanism for expression of concerns of the surrounding community.

JCAR has requested an economic and budgetary analysis of the effects of this rule. Generally speaking, the Board believes that any economic and budgetary effects of this rule stem from P.A. 97-220, the legislation amending Section 21(q). The requirement of enhanced notification by the applicant that the Board is adding to the rule is not, however, directly required by the legislation.

There is no information in this record concerning costs of notice. The records of the Board's Clerk can provide some idea of the costs of publication of newspaper notice. 35 Ill. Adm. Code 101.630. The costs of publication of a single legal notice of Board hearing in a newspaper of general circulation in "the area likely to be affected" can range from roughly \$25.00 to \$60.00 on the low end to \$700-\$1,000 on the high end, depending on where the newspaper is published. The EBB2 Board estimates that the notice of a petition required under Section 28.1, and these rules as amended, would occupy at least two or as many as four times the space of a Board hearing notice, given the additional content requirements. Thus, newspaper notice costs to any given Section 21(q) applicant would vary accordingly.

The Board appreciates the issues that the Village of Peotone, Peotone Township, and Will County faced in the past with one particular facility. But, the Board reminds that the General Assembly has not required permits for persons meeting the requirements under Section 21(q)(1), (2), and (3) for landscape waste composting, landscape waste and compost application, and on-farm composting. See 415 ILCS 5/21(q)(2010). Additionally, the General Assembly has made clear that it believes that application of landscape waste and compost at increased agronomic rates is not to be banned entirely, but can be allowed under appropriate circumstances as determined by the Board, depending upon a given site's soil characteristics or crop needs. *Id.*

The Act's enforcement process exists to address allegations of pollution and improper waste disposal. *See* 415 ILCS 5/31 (2010).

The Board would appreciate any additional comments from those who have already filed in this docket, as well as from any other person. The Board would particularly appreciate any comments as to the cost of providing various types of notice of petitions. Finally, the Board would also appreciate receiving comment from the Agency on the proposed rules, including the proposed provisions for petition content and Agency response.

ORDER

The Board directs the Clerk to cause the publication of the following rules for a second 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>Petition Notice Requirements</u>
<u>106.908</u>	<u>Proof of Petition Notice Requirements</u>
<u>106.910</u>	<u>Response and Reply</u>
<u>106.912</u>	<u>Hearing</u>
<u>106.914</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 Petition Notice Requirements

- a) The petitioner shall submit to the Board proof that, within 14 days after the filing of the petition, it has published notice of the filing of the petition by advertisement in a newspaper of general circulation in the area likely to be affected by the petitioners activity that is the subject of the Section 21 (q) petition.
- b) The title of the notice must be in the form as follows: “Notice of Petition For Authorization Under 415 ILCS 5/21(q) by [petitioner's name] before the Illinois Pollution Control Board.” The notice must contain the name and address of the petitioner and the statement that the petitioner has filed with the Board an authorization petition under Section 21(q). The notice must also provide the date upon which the petition was filed, the Board docket number, the proposed authorization, and a general description of the petitioner's activity that is the subject of the authorization proceeding, and the location of that activity. This information must be presented so as to be understood in accordance with the context of this Section's requirements. The concluding portion of the notice must read as follows:

“Any person may cause a public hearing to be held in the above-described authorization proceeding by filing a hearing request with the Illinois Pollution Control Board within 21 days after the date of the publication of this notice. The hearing request should clearly indicate the docket number for the adjusted standard proceeding, as found in this notice, and must be mailed to the Clerk of the Board, Illinois Pollution Control Board, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601.”

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

Section 106.908 Proof of Petition Notice Requirements

Within 30 days after the filing of the petition, the petitioner must file a certificate of publication, issued by the publisher of the authorization petition notice certifying the publication of that notice. The certificate must be issued in accordance with Section 1 of the Notice by Publication Act [715 ILCS 5/1].

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

Section 106.910 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 106.912 Hearing

- a) Any person can request that a public hearing be held in an authorization proceeding. The requests must be filed not later than 21 days after the date of the publication of the petition notice in accordance with Section 106.906 of this Part. Requests for hearing should make reference to the Board docket number assigned to the proceeding. A copy of each timely hearing request will be mailed to the petitioner and Agency by the Clerk of the Board. Participation by the public at the hearing must be in accordance with 35 Ill. Adm. Code 101.110 and 101.628. The Board may also, in its discretion, hold a public hearing when it determines a public hearing is advisable.
- b) Where all parties and participants who have requested a hearing pursuant to this Subpart have withdrawn their requests for a hearing, the hearing will not be held unless the Board in its discretion deems it advisable.
- c) The hearing officer will set a time and place for the hearing. The hearing officer will make an attempt to consult with the petitioner and the Agency prior to the scheduling of a hearing. Hearings are to be held in the county likely to be affected by the petitioner's activity that is the subject of the proposed authorization proceeding.

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

Section 106.914 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 February 2, 2012, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board