ILLINOIS POLLUTION CONTROL BOARD
September 20, 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 Notice

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

Today the Board proposes new rules for second notice review by the Joint Committee on Administrative Rules (JCAR) under the Administrative Procedure Act (APA), 100 ILCS 5/5-1 et seq. (2010). There are no substantive changes in these rules from those proposed in the Board's June 21, 2012 third first notice order, as no public comments have been received. The Board is now confident that it has given adequate notice to the public and regulated community of proposed changes, including those made by the Board in response to a March 26, 2012 public comment filed by the Illinois Environmental Protection Agency (Agency or IEPA).

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) 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.

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.

The proposed rules would establish informational requirements for applicants for such authorizations, and establishes the procedural framework for Board decisions. These new rules, to be codified as a new Subpart I in Part 106 (35 Ill. Adm. Code 106.SubpartI) are similar to those for adjusted standards under Section 28.1 of the Act (415 ILCS 5/28.1 (2010), and the other specific determinations required to be made by the Act or rule governed by Part 106. The rules are proposed to become effective upon filing with the Secretary of State.

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).

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). While the public comments requested changes to enhance notice to the public of any applications to the Board under these rules, they did not request a public hearing in this rulemaking.

In response to the first three public comments received, the Board authorized a second first notice publication in a February 2, 2012 opinion and order. After discussing the three public comments, the Board determined to enhance public notice requirements from those first proposed. Given the proposed enhancements to the public notice requirements, as outlined in that order, the Board caused a second first notice publication in the *Illinois Register*.

The second first notice was published at 36 Ill. Reg. 2643 (Feb. 24, 2012). Consequently, the 45-day APA public comment period for the second first notice closed on April 9, 2012. On March 26, 2012, the Agency filed a public comment (PC 4) on the second first notice proposal. The Agency comment made some specific requests for language changes, and some more general, conceptual, requests for changes in the information to be required in Section 21 (q) demonstrations.

Due to the nature and extent of the changes suggested, in a June 21, 2012 third first notice opinion and order, the Board stated its belief that yet another first notice publication wass necessary to allow the Agency and the affected composting persons and entitites, as well as the public, adequate notice and opportunity to comment on the proposed changes. The Board also stated that, to minimize confusion, the Board would publish formal notices of withdrawal of the first and second first notice in the *Illinois Register*.

The notice of withdrawal of the first and second first notice orders was published at 36 Ill. Reg. 10537 (July 13, 2012). The third first notice was published at 36 Ill. Reg. 9924 on July 13, 2012. No public comments were received during the first notice period, which expired August 27, 2012, and no public comments have been received since then. On July 30, 2012, the Board received "JCAR's First Notice Version for Use in Creating Second Notice Changes for Part 106".

THE BOARD'S OCTOBER 20, 2011 FIRST 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 compositing 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 material is utilized and the composing 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 composing 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 owned, 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 composing material was placed more than 200 feet from the nearest potable water supply well, was placed outside the boundary of the10-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.

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.

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 followed 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 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 Original First Notice Period (PC 1, 2, 3)

Among other things, the three public comments received by the Board concerning the original first notice 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 Sauronis' 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 Sauronis, 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 1991whereby 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).[1]

THE BOARD'S FEBRUARY 2, 2011 SECOND FIRST NOTICE PROPOSAL

In its second first notice opinion of February 2, 2012, the Board noted that the substance of the public comments (PC 1, 2, 3) received since the original 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 February 2, 2012 discussion focused only on these issues.[2]

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 the original 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

[1] 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.

[2] 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).

> 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 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).[3] The Board commented that this was a reasonable reaction on their part to a prior problem at the site. However, the Board also expressed reluctance to rework its proposed rules on the basis of a single incident that happened more than 20 years ago, noting that the Board needs to consider how its procedural rules will apply to the entire state.

The Board remarked that 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 noting that there is no information regarding costs in this record, the Board explained that past Board experience and the information from the Board's Clerk as explained below indicate that the pollution control facility siting notice requirements are time consuming and costly for the applicant, and failure to meet any requirement deprives the

---

[3] 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.

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 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.

Under these circumstances, the Board found 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 Board opined that 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, of which the Board may take official notice. 35 Ill. Adm. Code 101.630 "Official Notice". 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 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 expressed its awareness of the issues that the Village of Peotone, Peotone Township, and Will County faced in the past with one particular facility. But, the Board reminded 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).

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

THE BOARD'S JUNE 21, 2012 THIRD FIRST NOTICE PROPOSAL

As previously stated, the only public comment received in response to the second first notice opinion was that filed by the Agency (PC 4). In its March 26, 2012 public comment, the Agency did not provide comment on the costs or appropriateness of the mechanism for public notice of Section 21(q) filings proposed in the second first notice. Consequently, the Board will not further discuss the issue of public notice, relying on its earlier analysis as presented in its second first notice opinion.

The Agency did, however, provide comments on the proposed petition requirements and Agency Recommendation process. The Agency comment and the Board's response are set forth below in the Section by Section discussion of the comments. The typographical error pointed out by the Agency in 106.906 is corrected in the order, without further discussion.

Section 106.900 General

Agency's Second First Notice Comments (PC4)

Section 106.900(b) as proposed at Second First Notice reads:

> 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).

In Section 106.900(b), the Agency suggested the citation to the Act should be "415 ILCS 21(q)(3)(A)" rather than "415 ILCS 21(q)". PC4 at 1. Similarly, JCAR's First Notice Version for use in creating Second Notice Changes for Part 106 used the reference to "415 ILCS 5/21(q)(3)(A)" in Section 106.900(b).

Board Discussion and Resolution

The statutory language "*that the site's soil characteristics or crop needs require a higher rate*" appears both under Section 21(q)(3)(A) and later under Section 21(q) generally as follows:

> 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 may allow a higher rate for individual sites where the owner or operator has demonstrated to the Board that the site's soil characteristics or crop needs require a higher rate. 415 ILCS 5/21(q).

The "Demonstration" under proposed Section 106.900(b) is for either the option to apply landscape waste or composted landscape waste at rates greater than "agronomic rates" under the Section 21(q) and (q)(2) or the option to increase the total acreage of the on-farm composting facility under Section 21(q)(3)(A). The Board agrees that a citation to Section 21(q)(3)(A) is appropriate for the increased acreage demonstration. But, a citation to Section 21(q) generally regarding the definition of "agronomic rates" and Board's authority to allow higher "agronomic rates" is also necessary for the increased agronomic rate demonstration. To account for both places in which the statutory language appears, the Board will replace the general reference to "415 ILCS 21(q)" with "415 ILCS 5/21(q) and (q)(3)(A)" to proposed Section 106.900(b), as reflected in today's order.

Section 106.904 Petition Content Requirements

In the Board's February 2, 2012 second first notice order, Section 106.904 read, in its entirety, as follows:

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 and 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 that 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 or litter.

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

Regarding the proposed petition content requirements in Section 106.004 (b), the Agency suggested including several additional elements. The Board is making numerous changes to the Section, in response to some but not all of the Agency's comments. *See, infra,* pp. 27-28.

Agency's Second First Notice Comments (PC4): Cross reference

The Agency noted a typographical error in proposed Section 106.904(a), referring to a citation to Section 106.910 that should be "Section 106.914".

Board Discussion and Resolution

The Board will make the suggested correction.

Agency's Second First Notice Comments (PC4): Setback Consideration and Reference to Part 391 Agency Rules.

For the demonstration under Section 21(q)(3)(A) to increase the acreage of the on-farm composting facility, the Agency suggested the Board require consideration of setbacks from wells, water pathways, residences, and property lines. To this end, the Agency suggested the Board follow the provisions for land application of sludge for agronomic benefit under 35 Ill. Adm. Code 391. PC 4 at 4.

Board Discussion and Resolution

Section 21(q)(3)(D) of the Act requires On-Farm Landscape Waste Compost Facilities to satisfy, in part, the following criteria:

> 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 1/4 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 1/2 mile of the boundaries of the site on the date of application, and was placed more than 5 feet above the water table. 415 ILCS 5/21(q)(3)(D) (2010); *see also* the current language of Section 830.106(a)(4).

Section 21(q)(3)(D) addresses, then, all of the setback elements the Agency listed (wells, water pathways, residences, and property lines), except for setbacks from property lines. While the Board's compost rule at 35 Ill. Adm. Code Section 830.203 "Location Standards for Landscape Waste Compost Facilities", does address setbacks from property lines, the setback specifically does <u>not</u> apply to on-farm landscape waste compost facilities. The setback provisions for land application of sludge under 35 Ill. Adm. Code Part 391 referenced by the Agency are different than those for on-farm landscape waste compost facilities and also address

other types of setbacks, such as those from occupied dwellings, public roads, potable water supplies, and surface waters. *See* 35 Ill. Adm. Code 391.403.

The Board points out that the Act differentiates between the application of sludge on farm land [415 ILCS 5/22.56] and the application of landscape waste or composted landscape waste or the operation of a landscape waste compost facility on a farm [415 ILCS 5/21(q)(2) and (3)]. While the setback requirements for on-farm landscape waste compost facilities are specifically provided for in the Act, the setback requirements for application of sludge on farm land are only specified in the Act for occupied dwellings. *See* 415 ILCS 5/22.56(a)(4). Consistent with the Act, the Board declines to implement the Agency's suggestion to import Part 391 setback provisions into this procedure. In implementing Section 21(q))(3)(D), the Board will rely on the setback requirements of Section 21(q)(3)(D), also found at 35 Ill. Adm. Code 830.106(a)(4) in considering petitions for increased acreage for on-farm landscape waste compost facilities.

Agency's Second First Notice Comments (PC4): Land application rate.

The Agency suggested that, in determining the land application rate, the following methods of land application should be considered: "1) whether the landscape waste is incorporated; 2) if any landscape waste will be applied to frozen ground or during rainy conditions; and 3) maximum time before incorporation will occur." PC 4 at 4. The Agency explained that these considerations are intended to address possible issues with water runoff, odors, vectors, and dust. *Id*.

Board Discussion and Resolution

The second first notice proposed language at Section 106.904(c) called only for information concerning "the method and timeframe for incorporating the landscape waste or compost into the soil, the method of minimizing stormwater/snowmelt runoff, . . . and the method of preventing nuisance conditions such as vectors, odors or liter." To add more specificity, the Board will incorporate the Agency's suggestions in proposed Section 106.904(c) as set forth in the order below.

Agency's Second First Notice Comments (PC4): Removal of Material that is Not Landscape Waste:

The Agency expressed concern with the proposed language at Section 106.904(c) regarding the petition content requirements for "the measures for removal of noncompostable wastes from incoming loads." PC 4 at 2. The Agency contends that this could be read to imply the approval of "acceptance of waste other than landscape waste," which would require a permit under Section 21d of the Act. *Id*. The Agency also contends that removing waste that is not landscape waste from incoming loads would be considered "waste treatment." *Id*.
The Agency suggested the following alternate language:

> a contingency plan that describes methods for dealing with emergency situations and methods for the removal of material that is not landscape waste from incoming loads, and

a screening plan to ensure materials accepted do not contain materials other than landscape waste *Id.*

Board Discussion and Resolution

In drafting its proposed language concerning required information about removal of non-compostable material, the Board intended to recognize the real world possibility of the arrival at sites of wasteloads containing noncompliant material, whether purposeful or by accident or inadvertence. In light of the Agency's concern, in Section 106.904(c) the Board will delete the phrase "the measures for removal of noncompostable waste from the incoming loads", and replace it with "a screening plan to ensure materials accepted do not contain materials other than landscape waste."

The Board will make changes to proposed Section 106.904(c) based on the Agency's comments as follows:

c) Any other applicable information that 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 soil sampling analysis for samples taken within one year prior to the filing of the petition in accordance with the sampling protocols of 35 Ill. Adm. Code 106.904(e) and (f); the intended crop or planting; a description of any additives to the landscape waste; the method for incorporating the landscape waste or compost into the soil; the maximum time between acceptance of landscape waste or compost and its incorporation into soil; the weather conditions under which incorporation will occur; the method of minimizing stormwater/snowmelt runoff; a screening plan to ensure materials accepted do not contain materials other than landscape waste; a contingency plan that describes methods for dealing with emergency situations and methods for the removal of material that is not landscape waste from incoming loads; and the method of preventing nuisance conditions such as vectors, odors, litter or dust.

Agency's Second First Notice Comments (PC4): Nutrient Calculations

The Agency stated that "agronomic rate" is usually determined by nitrogen-phosphorus calculations, and that such calculations are appropriate when determining the application rate for fertilizer. PC 4 at 3. With composted landscape waste, however, the Agency stated that compost is generally used to increase the organic matter of the soil, not to act as a fertilizer. *Id.*. The Agency explained that landscape waste provides little nutrient value to crops:

> Nitrogen-phosphorous calculations, by themselves, may demonstrate an inappropriately large agronomic rate. Using solely Nitrogen-phosphorus calculations, an appropriate rate can easily be in the hundreds of tons of landscape waste applied per acre." PC 4 at 3-4.

The Agency recommends that a petition should be required to provide nitrogen-phosphorus calculations. But, the Agency suggests that the petition should also include a demonstration "that the increased organic content in the soil resulting from the addition of landscape waste will be beneficial to the crops being grown." PC 4 at 4.

The Agency also stated that continual application of landscape waste will have diminishing benefits at some future time. The Agency suggested that any increase in the agronomic rate be approved only for a limited amount of time, such as five years. According to the Agency, the petitioner should then be required to provide additional soil testing to demonstrate that continued application at the increased agronomic rate is warranted. PC 4 at 4.

Board Discussion and Resolution

The five year term that the Agency suggests for Section 21(q) authorizations is equivalent to the five year term limit for variances and many permits. This would require the petitioner to repeatedly appear before the Board. In the absence of any expressed legislative intent to limit the term of Section 21(q) authorizations, the Board declines to set a limit at this time, or to require that the recipient of any authorization submit soil testing results obtained during the authorization period to either the Board or the Agency. If experience under these rules demonstrates that term limitation is appropriate, the Board will revisit the issue upon request.

However, in recognition of the Agency's concerns, the Board is proposing to add a new subsection (d) to Section 106.904 requiring the petitioner to present information relevant to a determination as to the continued benefit, over time, of the authorization. The provision requires the petitioner to develop a plan for soil testing, on a schedule of no less than every five years, on which application of landscape waste or composted landscape waste would be based. Using the information received under proposed Section 106.904(d), the Agency could recommend and the Board could include requirements pertinent to the plan as conditions of the authorization.

Proposed new Section 106.904(d) would read as follows:

d) For demonstrations under 35 Ill. Adm. Code 106.914(a), a plan, based on soil testing no less than once every five years, to demonstrate how the petitioner will determine when application of landscape waste or composted landscape waste at rates greater than an agronomic rate of 20 tons per acre per year will be beneficial to the crops or plantings being grown. Such a plan may specify limits on soil organic content and nutrients.

Agency's Second First Notice Comments (PC4): Soil sampling.

The Agency suggested that the petition content requirements include soil samples collected for every two acres within one year prior to the filing of the petition and "in accordance with good agricultural practices". PC 4 at 3.

Board Discussion and Resolution

The Board agrees with the Agency's suggestion that more specificity would improve the requirements for soil sampling and analyses that will be used to establish the site's baseline soil characteristics and to determine the needs of the site's soil and particular crops. Such information would assist the Board in its review of the petition for authorization and determination as to whether the petitioner has met its burden of proof under Section 21(q) of the Act. However, the Board believes a requirement "in accordance with good agricultural practices" is too vague for the regulatory purposes of soil sampling and analyses.

The Board notes that the soil sampling and analyses requirements under the Agency rules (35 Ill. Adm. Code 391) for land application of sludge are more specific: Section 391.510 Collection of Soil Samples and Section 391.511 Analyses of Soil Samples. Additionally, Section 391.510 only requires one soil sample (comprised of 10 subsamples) per 8 acres of the application site instead of the 2 acres the Agency recommended for the proposed rule. Although land application of sludge is specifically distinguished from the land application of landscape waste or composted landscape waste as discussed above under "setbacks", the Board finds the soil sampling and analysis provisions of Part 391 to be appropriate information sources for creation of requirements for landscape waste or composted landscape waste application sites.

But, the Board also observes that, with very limited exceptions in older regulatory programs such as that for safe drinking water , Board rules do not routinely reference rules adopted by the Agency. If the Board decides to adopt suggestions based on Agency rules, the Board includes any applicable requirements in the Board's own rules to avoid unlawful subdelegation of rulemaking authority.

In drafting a soil sampling proposal, the Board has drawn upon Sections 391.510 and 391.511 of the Agency rules. The Board proposes to add new subsections 106.904(e) and (f) for soil sampling and analysis under new subsections 106.904(e) and (f). Proposed Section 106.904(e) sets forth the requirements for representative soil sample collection for soil plow zone and soil profiles. The rule allows for a modified sample collection procedure upon request by a petitioner. Proposed Section 106.904(f) requires soil analyses to be performed in accordance with the most recent editions of "The Methods of Soil Analysis – Part 1 & Part 2" or an alternative method that produces equivalent results,[4] and incorporates by reference test methods for soil analysis.

The Board proposes the following provisions for soil sampling and analysis proposed new subsections 106.904(e) and (f) as follows:

[4] The latest editions of the "Methods for Soil Analysis" were found at https://www.agronomy.org/files/publications/publications-catalog.pdf (last visited May 23, 2012). The Board notes that the Agency's sludge rules rely on earlier editions of the Methods of Soil Analysis. *See* 35 Ill. Adm. Code 391.511(a)(2) and (b).

e) Soil samples collected so as to be representative of the entire landscape waste or composted landscape waste application site.

1) Soil Plow Zone - one soil sample shall be collected per 8 acres of application site area to a depth of 12 inches. Each soil sample taken shall be a homogeneous mixture composed of at least 10 subsamples randomly collected within the 8 acre area.

2) Soil Profiles - one soil core sample per 8 acres of land application site shall be obtained to a depth of 5 feet using a soil tube or soil auger type implement. Soil cores shall be divided into 5 - one foot subsamples and each subsample shall be analyzed separately.

3) Soil sample collection pursuant to 35 Ill. Adm. Code 106.904(a) and (b) may be modified by the Board upon request by the petitioner after considering the application rate of the landscape waste or composted landscape waste, and the continuity of soil types of the application site.

f) Soil analysis performed in accordance with the following references unless equivalent results can be obtained by other methods. The petitioner shall demonstrate that equivalent results are obtainable based on the nature of the test methodology, the nature of the parameter, and the level of statistical accuracy.

1) Physical Testing Methods

Methods of Soil Analysis - Part 1, Physical and Mineralogical Properties (1986), Soil Science Society of America (SSSA) and American Society of Agronomy, Inc. (ASA), 5585 Guilford Road, Madison, Wisconsin 53711.

2) Chemical Testing Methods

Methods of Soil Analysis - Part 3, Chemical Methods (1996), Soil Science Society of America (SSSA) and American Society of Agronomy, Inc. (ASA), 5585 Guilford Road, Madison, Wisconsin 53711.

3) For the purposes of 35 Ill. Adm. Code.Subpart I, the Board incorporates by reference the soil test methods listed in 35 Ill. Adm. Code 106.904(f)(1) and (f)(2). This incorporation includes no later amendments or editions.

Finally, the Board will also include a provision under Section 106.904(c) that requires soil samples to be taken within one year prior to filing of the petition, as suggested by the Agency.

Section 106.910 Response and Reply

Agency's Second First Notice Comments (PC4)

As previously proposed in Section 106.910(a), any Agency response to an authorization petition was due to be filed with 21 days of the filing of a petition. This was based on similar rules in Part 106. In its public comment, the Agency requested the Board allow 45 days for the Agency to file a response to any petition. The Agency suggested that the 45-day timeframe would be appropriate since the procedures under the proposed rule are similar to those for adjusted standards where 45 days is allowed is allowed under 35 Ill. Adm. Code 104.416(a). PC 4 at 2.

Now that the Agency has suggested that a 21 day time frame is too short, the Board has no objection to granting the Agency 45 days within which to make a response. The Board will propose this change.

Section 106.914 Burden of Proof

Agency's Second First Notice Comments (PC4)

The Agency commented that the opening sentence in proposed Section 106.914 appears to be missing language. PC 4 at 3. The language at first notice read: "The burden of proof for is on the petitioner."

The Agency also requested clarification regarding the standard for the burden of proof: "*that the site's soil characteristics or crop needs require a higher rate"* under both proposed Section 106.914(a) and (b). The Agency questioned whether "higher rate" meant higher "agronomic application rate" or "increase in acreage". For an increase in acreage, the Agency suggested the burden of proof should also take into consideration setbacks normally associated with land application. PC 4at 3.

Board Discussion and Resolution

Section 106.914 should read "The burden of proof is on the petitioner."

The Board notes that, as provided in the Act, the wording of the standard for the burden of proof "*that the site's soil characteristics or crop needs require a higher rate"* is the same for both demonstrations of increasing the agronomic rate (415 ILCS 5/21(q)(2) and later in 415 ILCS 5/21(q) generally) or increasing the acreage of the composting facility (415 ILCS 5/21(q)(3)(A)).

As to the Agency's suggestion to include setbacks normally associated with land application under the burden of proof, the Board noted above that on-farm landscape waste compost facilities already have location standards codified under 35 Ill. Adm. Code 830.106(a)(4) consistent with Section 21(q)(3)(D) the Act. 415 ILCS 5/21(q)(3)(D) (2010).

THE BOARD'S SECOND NOTICE PROPOSAL

The notice of withdrawal of the first and second first notice orders was published at 36 Ill. Reg. 10537 (July 13, 2012). The Board's June 21, 2012 third first notice was published at 36 Ill. Reg. 9924 on July 13, 2012. No public comments were received during the first notice period, which expired August 27, 2012, and no public comments have been received since then. On July 30, 2012, the Board received "JCAR's First Notice Version for Use in Creating Second Notice Changes for Part 106".

Finding that no changes to the rules are necessary, the Board proposes no substantive changes in the rules sent to JCAR for second notice review.

ORDER

The Board directs the Clerk to submit the following rules to the Joint Committee on Administrative Rules for their second notice review under the APA.. 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

SUBPART C: WATER WELL SETBACK EXCEPTION PROCEDURES

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

SUBPART E: MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY DETERMINATIONS

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

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

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

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

AUTHORITY: Implementing and authorized by Sections 5, 14.2(c), 21(q), 22.4, 26, 27, 28, 28.1, 28.5, 35, 36, 37, 38, 39.5 and 52.3 of the Environmental Protection Act (the Act) [415 ILCS 5/5, 14.2(c), 21(q), 21.622.4, 26, 27, 28, 28.1, 28.5, 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] and Section 95 of the Electronic Products Recycling and Reuse Act [415ILCS 150/95].

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 R12-21 at 36 Ill. Reg. 9236, effective June 17, 2012; 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], 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:

1) 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) and (q)(2) of the Act; or

2) 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 5/21(q) and (q)(3)(A)]

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 under 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 and the duration of, the reasons for, and the basis for the authorization sought, consistent with the burden of proof stated in Section 106.914;

b) The nature of the petitioner's operations;

c) Any other applicable information that 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 soil sampling analysis for samples taken within one year prior to the filing of the petition in accordance with the sampling protocols of subsections (e) and (f); the intended crop or planting; a description of any additives to the landscape waste; the method for incorporating the landscape waste or compost into the soil; the maximum time between acceptance of landscape waste or compost and its incorporation into soil; the weather conditions under which incorporation will occur; the method of minimizing stormwater/snowmelt runoff; a screening plan to ensure materials accepted do not contain materials other than landscape waste; a contingency plan that describes methods for dealing with emergency situations and methods for the removal of material that is not landscape waste from incoming loads; and the method of preventing nuisance conditions such as vectors, odors, litter or dust.

d) For demonstrations under Section 106.914(a), a plan, including soil testing, in accordance with subsections (e) and (f) and no less than once every five years, to show when application of landscape waste or composted landscape waste at rates greater than an agronomic rate of 20 tons per acre per year will be, or will continue to be, beneficial to the site′s soil characteristics or crop needs. Such a plan must specify any soil parameters to be analyzed, such as soil organic content and nutrients, and any limits on them.

e) Soil samples collected that will represent the entire landscape waste or composted landscape waste application site.

1) Soil Plow Zone–one soil sample shall be collected per 8 acres of application site area to a depth of 12 inches. Each soil sample taken shall be a homogeneous mixture composed of at least 10 subsamples randomly collected within the 8 acre area.

2) Soil Profiles–one soil core sample per 8 acres of land application site shall be obtained to a depth of 5 feet using a soil tube or soil auger type implement. Soil cores shall be divided into 5 - one foot subsamples and each subsample shall be analyzed separately.

3) Soil sample collection pursuant to subsections (a) and (b) may be modified by the Board upon request by the petitioner after considering the application rate of the landscape waste or composted landscape waste, and the continuity of soil types of the application site.

f) Soil analysis performed in accordance with the following references unless equivalent results can be obtained by other methods. The petitioner shall demonstrate that equivalent results are obtainable based on the nature of the test methodology, the nature of the parameter, and the level of statistical accuracy.

1) Physical Testing Methods

Methods of Soil Analysis–Part 1, Physical and Mineralogical Properties (1986), Soil Science Society of America (SSSA) and American Society of Agronomy, Inc. (ASA), 5585 Guilford Road, Madison, Wisconsin 53711.

2) Chemical Testing Methods

Methods of Soil Analysis–Part 3, Chemical Methods (1996), Soil Science Society of America (SSSA) and American Society of Agronomy, Inc. (ASA), 5585 Guilford Road, Madison, Wisconsin 53711.

3) For the purposes of this Subpart I, the Board incorporates by reference the soil test methods listed in subsections (f)(1) and (f)(2). This incorporation includes no later amendments or editions.

(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 petitioner′s activity that is the subject of the Section 21(q) petition.

b) The title of the notice must be in the following form: "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 the petitioner's 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 45 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) When 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 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 5/21(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 5/21(q)]

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 material 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.

(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 September 20, 2012, by a vote of 4-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board