

BOARD PROPOSAL FOR PUBLIC COMMENT OCTOBER 3, 1996

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE A: GENERAL PROVISIONS
CHAPTER 1: POLLUTION CONTROL BOARD
PART 106

PETITION TO REVIEW POLLUTION CONTROL FACILITY SITING DECISIONS

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AUTHORITY: Authorized by Sections 26 and 27 of the Environmental Protection Act (Act) [415 ILCS 5/26 and 27] and Implementing Sections 39.2, and 40.1 of the Act [415 ILCS 5/39.2 and 40.1].

SOURCE: Adopted in R97-8 at 18 Ill. Reg. _____, effective _____.

SUBPART A: GENERAL PROVISIONS

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Section 106.100 Applicability

- a) This Part applies to adjudicatory proceedings before the Illinois Pollution Control Board (Board) concerning petitions to review a pollution control facility siting decision made by local government pursuant to Sections 39.2 and 40.1 of the Environmental Protection Act (Act). [415 ILCS 5/39.2 and 40.1].
- b) This Part shall be read in conjunction with 35 Ill. Adm. Code 101, which contains procedures generally applicable to all adjudicatory Board proceedings. In the event of a conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Part, the provisions of this Part apply.

Section 106.102 Severability

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

Section 106.104 Definitions

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

Section 106.106 Description

Pursuant to Section 39(c) of the Act, any new pollution control facility, prior to receiving a permit from the Illinois Environmental Protection Agency (Agency) to construct and operate, must first receive siting authority from the *county board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is located.* [415 ILCS 5/39(c).] Such siting authority can only be given pursuant to Section 39.2 of the Act and only after the local unit of government conducts a public hearing which comports with general standards of fundamental fairness. [415 ILCS 5/39.2.] Pursuant to Section 40.1 of the Act, a decision of local government to site or deny siting of a new pollution control facility is reviewable by the Board. In reviewing the siting decision the Board will apply the factors and standards set forth in Section 40.1 of the Act and in Section 106.Subpart D of this Part. The decision of the Board is appealable to the Illinois appellate court. [415 ILCS 5/41.]

SUBPART B: PETITION FOR REVIEW

Section 106.200 Who May File Petition

The following persons may file a petition for review of a decision concerning siting of a new pollution control facility:

- a) Siting applicants. Any person who has properly applied to one or more units of local government, pursuant to Section 39.2 of the Act, for siting authority of a new pollution control facility and has been denied siting authority under Section 39.2 of the Act, may file a petition for review of the decision to deny siting. The siting applicant may also appeal conditions imposed in a decision granting siting. [415 ILCS 5/39.2.]
- b) Other persons. Any person who was physically present and has participated in the public hearing conducted by the unit of local government and is adversely affected by

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a decision to approve siting may file a petition for review the decision to grant siting. Associations who wish to file petitions to review must have been physically present at the local government siting hearing as an association and be adversely affected by the decision in order to appear before the Board as a petitioning association. Associations who file a petition before the Board must be represented by an attorney in accordance with 35 Ill. Adm. Code 101.400.

Section 106.202 Parties

- a) In a petition to review local government's decision concerning a new pollution control facility, the following are proper parties to the proceeding:
 - 1) The petitioner or petitioners are the persons described in Section 106.200 of this Part. If there is more than one petitioner, they shall be referred to as co-petitioners; and
 - 2) The unit(s) of local government whose decision is being reviewed shall be named the respondent(s). In an appeal pursuant to Section 106.200(b) the siting applicant must also be named as a respondent.
- b) Where the interests of the public would be served, the Board or hearing officer may allow intervention by the Attorney General or the State's Attorney of the county in which the facility will be located.

Section 106.204 Time For Filing Petition

A petition for review must be filed *within 35 days of the local siting authority's action to approve or disapprove siting*. [415 ILCS 5/40.1.] Action means the local government's official written decision or ordinance granting or denying local siting authority. [415 ILCS 5/39.2(e).] Pursuant to Section 39.2(e) of the Act, action may also mean failure of the governing body to act within 180 of a request for siting approval. . [415 ILCS 5/39.2(e).]

Section 106.206 Filing and Service Requirements

- a) Filing. The petition for review must be filed with the Clerk of the Board in accordance with the filing requirements contained in the Board's general procedural rules, found at 35 Ill. Adm. Code 101.Subpart C and Section 106.208 of this Part.
- b) Service. The petition for review must be served upon all parties in accordance with the Board's service requirements contained in the Board's general procedural rules, found at 35 Ill. Adm. Code 101.Subpart C.

Section 106.208 Petition Content Requirements

- a) The petition for review must be accompanied by Board Form # - or reasonably similar format which contains all information required on the relevant form. Board Form # -- is electronically available on the Board's Home Page or may be obtained at the Board's Chicago or Springfield offices. Additionally, a copy of Board Form # ___ appears in 35 Ill. Adm. Code 101.Appendix G, Illustration G.
- b) In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C the petition must also include:

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- 1) A copy of the local siting authority's written decision or ordinance;
- 2) A statement, as to how the filing party is a proper petitioner under Section 106.200 of this Part. The statement may be included on Board Form # - or reasonably similar format which contains all information required on the relevant form. Board Form # -- is electronically available on the Board's Home Page or may be obtained at the Board's Chicago or Springfield offices. Additionally, a copy of Board Form # ___ appears in 35 Ill. Adm. Code 101.Appendix G, Illustration G; and
- 3) In accordance with Section 39.2 of the Act, a specification of the grounds for the appeal, including any allegations for fundamental unfairness or any manner in which the decision as to particular criteria is against the manifest weight of the evidence. [415 ILCS 5/39.2(a).]

SUBPART C: FILING OF THE LOCAL RECORD

Section 106.300 Record

Pursuant to Section 39.2 of the Act, the siting authority is obligated to keep a complete record of its proceedings. [415 ILCS 5/39.2(e).]

Section 106.302 Filing of the Record

The siting authority shall file the record of its proceedings with the Board as directed by Board or hearing officer order. As the Board is under a tight decision deadline time frame in petitions to appeal new pollution control facility siting decisions, failure to file the entire record on the date directed by the Board or hearing officer may subject the respondent to a sanctions as may be ordered by the Board or hearing officer in accordance with 35 Ill. Adm. Code 101.Subpart H.

Section 106.304 Record Contents

- a) The record should contain all information or evidence presented to the local siting authority or relied upon by the local siting authority during its hearing process including, but not limited to:
 - 1) The siting application;
 - 2) Any and all transcripts of local hearings;
 - 3) All briefs and other arguments and statements of parties and participants;
 - 4) All exhibits relied upon by the local siting authority in making its decision;
 - 5) All written public comments relevant to the local government proceeding;
 - 6) Minutes of all relevant open meetings of the siting authority;
 - 7) Notices of hearing and/or all relevant meetings of the siting authority;
 - 8) The written decision of the siting authority made pursuant to Section 39.2 of the Act; and

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- 9) Certificate of Record as described in Section 106.308 of this Part.
- b) The record shall contain the originals or legible copies of all documents, shall be arranged in chronological sequence, and shall be sequentially numbered, placing the letter "C" before the number of such page.
- c) Seven copies of the transcript and four copies of all other documents in the record shall be filed with the Board.

Section 106.306 Preparing of the Record

Unless petitioner is a citizen or citizen's group, the petitioner shall pay the costs of preparing and certifying the record to the Board. If the petitioner is a citizen or citizen's group, *such petitioner shall be exempt from paying the costs of preparing and certifying the record.* [415 ILCS 39/2(n).]

Section 106.308 Certification of Record

The record filed with the Board shall be certified by the county clerk, if the siting authority is a county, or the municipal clerk, if the siting authority is a municipality. The certification shall be entitled "Certificate of Record on Appeal". The Certificate shall contain an index that lists the documents comprising the record and shows the page number upon which they start and end. The Certificate of Record shall be served on all parties.

SUBPART D: HEARING

Section 106.400 General

Hearings and discovery will be conducted in accordance with the provisions set forth in the Board's general procedural rules found at 35 Ill. Adm. Code 101.Subpart F.

Section 106.402 Authority and Duties of Hearing Officer

The authority and duties of the hearing officer are set forth in the Board's general procedural rules found at 35 Ill. Adm. Code 101.Subpart F.

Section 106.404 Public Participation

Parties to the proceeding shall have all rights of examination and cross-examination relevant in any judicial proceeding. Persons who are not parties as set forth in Section 106.202 of this Part are considered non-party participants and will have such hearing participation rights as determined by the hearing officer in accordance with 35 Ill. Adm. Code 101.628. As a general rule, non-party participants may offer comment at a specifically determined time in the proceeding, but may not examine or cross-examine witnesses for either party. In accordance with this Section and 35 Ill. Adm. Code 101.628, public comment will not be considered testimony unless sworn and subject to cross examination.

SUBPART E: BOARD REVIEW AND DECISION

Section 106.500 Preliminary Board Determination/Set for hearing

Upon proper filing of the petition, the Board shall set the matter for hearing unless it determines that the matter is frivolous or duplicitous as required by Section 40.1(b) of the Act. [415 ILCS 40.1(b).]

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Section 106.502 Dismissal of Petition

- a) The Board on its own motion or motion by any party, may dismiss any petition:
 - 1) Which is untimely filed pursuant to Section 106.204 of the Part;
 - 2) Which fails to name all parties as required by Section 39.2 of the Act [415 ILCS 39.2];
 - 3) Which fails to include the required fee and all information as required by Section 106.206 of this Part; or
 - 4) Which fails to meet the requirements in 35 Ill. Adm. Code 101.Subpart C.
- b) Upon motion by any unit of local government which is required to prepare and certify its record alleging that the applicant has failed to pay the costs of doing so, the Board may enter a dismissal or other order as allowed by Section 39.2(n) of the Act. [415 ILCS 39.2(n).]

Section 106.504 Decision Deadline

In accordance with Section 40.1 of the Act only the applicant for siting may waive the decision deadline. [415 ILCS 5/40.1.] Unless the applicant for siting waives the decision deadline in accordance with 35 Ill. Adm. Code 101.308 of the Board's general procedural rules, the Board shall issue its decision within 120 days of the proper filing and service of a petition for review.

Section 106.506 Burden of Proof/Standard of Review

- a) The petitioner bears the burden of proof in accordance with Section 40.1(a) of the Act. [415 ILCS 5/40.1(a) and (d) .]
- b) The Board may reverse the siting decision of the local siting authority only:
 - 1) If the decision is against the manifest weight of the evidence presented in the local siting authority's record;
 - 2) If the proceeding of the local siting authority did not comport with general standards of fundamental fairness [415 ILCS 5/40.1]; or
 - 3) If the local siting authority did not have jurisdiction.
- c) Where the Board determines that the hearing of the local siting authority did not comport with general standards of fundamental fairness it may, in its discretion, remand the decision to the siting authority as an alternative to reversal. Any Board order allowing for such remand will clearly set forth the reasons for the remand order and set a time frame for the local siting authority to cure the defect upon remand.