

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

PART 105  
APPEALS OF FINAL DECISIONS OF STATE AGENCIES

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105.APPENDIX A Agency LUST Final Decisions that are Reviewable (Repealed)

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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 5, 39, 39.5, 40, 40.1, 40.2, and 57 of the Act [415 ILCS 5/5, 39, 39.5, 40, 40.1, 40.2 and 57].

SOURCE: Filed with Secretary of State January 1, 1978; amended 4 Ill. Reg. 52, page 41, effective December 11, 1980; codified 6 Ill. Reg. 8357; amended in R93-24 at 18 Ill. Reg. 4244, effective March 8, 1994; amended in R94-11 at 18 Ill. Reg. 16594, effective November 1, 1994; old Part repealed, new Part adopted in R00-20 at 25 Ill. Reg. 406, effective January 1, 2001; amended in R04-24 at 29 Ill. Reg. 8811, effective June 8, 2005; amended in R14-21 at 39 Ill. Reg. 2369, effective January 27, 2015; amended in R16-17 at 40 Ill. Reg. 7980, effective May 20, 2016; amended in R17-18 at 41 Ill. Reg. 9930, effective July 5, 2017.

#### SUBPART A: GENERAL PROVISIONS

**Section 105.100      Applicability**

- a) This Part applies to appeals of final decisions of the Agency and the OSFM to the Board as described in this Part.
- 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.

### **Section 105.102 Severability**

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

### **Section 105.104 Definitions**

- a) Nonattainment New Source Review (NANSR) means Illinois' rules for Major Stationary Sources Construction and Modification (MSSCAM) at 35 Ill. Adm. Code Part 203.
- ~~a)~~
- b) ~~For the purpose of this Part, Other~~ words and terms will have the meanings as defined in 35 Ill. Adm. Code 101.Subpart B unless otherwise provided, or unless the context clearly indicates otherwise.

### **Section 105.106 Computation of Time, Filing and Service Requirements**

Unless this Part provides otherwise, service, filing, and computation of time must be in accordance with 35 Ill. Adm. Code 101.Subpart C.

### **Section 105.108 Dismissal of Petition**

A petition is subject to dismissal if the Board determines that:

- a) The petition does not contain the informational requirements set forth in Section 105.210, 105.304, 105.408, ~~or~~ 105.506 or 105.608;
- b) The petition is untimely under Section 105.206, 105.302, 105.404, ~~or~~ 105.504 or 105.606;
- c) The petitioner fails to timely comply with any order issued by the Board or the hearing officer, including an order requiring additional information;
- d) The petitioner does not have standing under applicable law to petition the Board for review of the State agency's final decision; or
- e) Other grounds exist that bar the petitioner from proceeding.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### **Section 105.110 Hearing Process**

Hearings will be conducted under 35 Ill. Adm. Code 101.Subpart F, including any hearing held by videoconference (see 35 Ill. Adm. Code 101.600(b)).

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### **Section 105.112 Burden of Proof**

Unless this Part provides otherwise:

- a) *The burden of proof shall be on the petitioner except as provided in subsection (b) of this Section [415 ILCS 5/40(a)(1), 40(b) and (e)(3), ~~and~~ 40.2(a) and 40.3(a)(2)]-*
- b) *The burden of proof is on the Agency if ~~the Agency issues an NPDES permit that imposes limits which are based upon a criterion or denies a permit based upon application of a criterion, then the Agency shall have the burden of going forward with the basis for the derivation of those limits or criterion which were derived under the Board's rules.~~ [415 ILCS 5/40(a)(1)]*

### **Section 105.114 Calculation of Decision Deadline**

The Board will render its final decision on the petition within any applicable decision period (which commences when the petition is filed in accordance with 35 Ill. Adm. Code 101.300(b)(4)), except:

- a) ~~When the petitioner waives its right to a decision within the prescribed decision period in accordance with 35 Ill. Adm. Code 101.Subpart C; or~~
- b) ~~When the petitioner files an amended petition, the decision period recommences when the amended petition is filed in accordance with 35 Ill. Adm. Code 101.300(b)(4).~~

### **Section 105.116 Agency or OSFM Record Filing**

- a) ~~The State agency must file with the Board the entire record of ~~its~~ the Agency's or OSFM's decision, as applicable, within 30 days after the filing of the petition for review, unless this Part provides otherwise, or the Board or hearing officer orders a different filing date. If the ~~State agency~~ Agency or OSFM wishes to seek additional time to file ~~its~~ the record, it must file a request for extension before the date on which ~~its~~ the record is due to be filed. Under 35 Ill. Adm. Code 101.302(h)(2), ~~each~~ the State agency must file ~~its~~ the record through COOL or on compact disk or other portable electronic data storage device and, to the extent~~

technically feasible, in text-searchable Adobe PDF. The record also must meet the requirements of 35 Ill. Adm. Code 101. Subpart J.

- b) The Agency record or OSFM record, as applicable, must be arranged in chronological sequence, or by category of material and chronologically within each category, and must be sequentially numbered with the letter "R" placed before the number of each page. This page number must appear in the top right corner of each page. The Agency record or OSFM record must be certified by the applicable State agency. The certification must be entitled "Certificate of Record on Appeal". The Certificate must contain an index that lists the documents comprising the Agency record or OSFM record and shows the page numbers upon which each document starts and ends. The Certificate of Record must be served on all parties by the State agency.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### **Section 105.118 Sanctions for Untimely Filing of the Record**

If the ~~State agency~~ Agency or OSFM unreasonably fails to timely file ~~its~~ the record on or before the date required under this Part, or unreasonably fails to prepare the record in accordance with this Part and 35 Ill. Adm. Code 101 Subpart J, the Board may sanction the relevant State agency in accordance with 35 Ill. Adm. Code 101. Subpart H.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

## **SUBPART B: APPEAL OF AGENCY PERMIT DECISIONS AND OTHER FINAL DECISIONS OF THE AGENCY**

### **Section 105.200 Applicability**

This Subpart applies to any appeal to the Board of the Agency's final permit decisions and other final decisions of the Agency, except:

- a) When the appeal is of a final CAAPP decision of the Agency, which is addressed in Subpart C of this Part; ~~and~~
- b) When the appeal is of a final leaking underground storage tank decision of the Agency, which is addressed in Subpart D of this Part; ~~and~~
- c) When the appeal is of a final PSD permit decision of the Agency, which is addressed in Subpart F of this Part.

### **Section 105.202 Parties**

- a) Petitioner. The person who files a petition for review of the Agency's final decision must be named the petitioner.

- b) Respondent. The Agency must be named the respondent. If a petition is filed under Section 105.204(b), (c) or (d) by a person other than the permit applicant, the permit applicant must be named as a respondent in addition to the Agency.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

#### **Section 105.204 Who May File a Petition for Review**

- a) General. *If the Agency refuses to grant or grants with conditions a permit under Section 39 of the Act, the applicant may petition for a hearing before the Board to contest the decision of the Agency.* [415 ILCS 5/40(a)(1)]
- b) National Pollutant Discharge Elimination System (NPDES) Permit. *If the Agency grants or denies a permit under subsection (b) of Section 39 of the Act, a third party, other than the permit applicant or Agency, may petition the Board for a hearing to contest the decision of the Agency.* [415 ILCS 5/40(e)(1)]
- c) Resource Conservation and Recovery Act (RCRA) Permit for a Hazardous Waste Disposal Site. *If the Agency grants a RCRA permit for a hazardous waste disposal site, a third party, other than the permit applicant or Agency, may petition the Board for a hearing to contest the issuance of the permit. This subsection does not apply to the granting of permits issued for the disposal or utilization of sludge from publicly-owned sewage works.* [415 ILCS 5/40(b)]
- d) Hazardous Waste Permit. *Any party to an Agency proceeding conducted pursuant to Section 39.3 of the Act may petition as of right to the Board for review of the Agency's decision.* [415 ILCS 5/40(c)]
- e) EMSAs. *If the Agency terminates an EMSA under Section 52.3-4(b) of the Act, the sponsor may petition the Board for review of the Agency's final decision.*
- f) Other Agency Final Decisions. *If the Agency's final decision is to deny or to conditionally grant or approve, the person who applied for or otherwise requested the Agency decision, or the person to whom the Agency directs its final decision, may petition the Board for review of the Agency's final decision. In addition, any third party authorized by law to appeal a final decision of the Agency to the Board may file a petition for review with the Clerk.*

#### **Section 105.206 Time to File the Petition or Request for Extension**

- a) Except as provided in subsection (b), if a person who may petition the Board under Section 105.204 wishes to appeal the Agency's final decision, the person must file the petition with the Clerk within 35 days after the date of service of the Agency's final decision.

- b) If a person with standing as described in Section 105.204(d), or any third party who is authorized by law to appeal a final decision of the Agency to the Board, wishes to appeal the Agency's final decision, the person must file a petition for review with the Clerk within 35 days after the date of issuance of the Agency's final decision.
- c) Except as provided in subsection (d), if a person who may petition the Board under Section 105.204 of this Subpart wishes to request an extension of time to file a petition for review under Section 105.208(a), the person must file the request within 35 days after the date of service of the Agency's final decision.
- d) If a person with standing as described in Section 105.204(d), or any third party who is authorized by law to appeal a final decision of the Agency to the Board, wishes to request an extension of time to file a petition for review under Section 105.208(b), the person must file the request within 35 days after the date of issuance of the Agency's final decision.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

#### **Section 105.208      Extension of Time to File a Petition for Review**

- a) Permit or Other Agency Final Decision. For appeals under Section 40(a)(1) of the Act, *the 35-day period* described in Section 105.206(a) of this Subpart *for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period.* [415 ILCS 5/40(a)(1)]
  - 1) The applicant and the Agency must jointly file a request for extension within 35 days after the date of service of the Agency's final decision.
  - 2) The joint request may seek an appeal period not exceeding 125 days from the date of service of the Agency's final decision to file a petition for review under this Subpart.
- b) Hazardous Waste Permit. For appeals under Section 40(c) of the Act, *the 35-day period* described in Section 105.206(b) *for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period. If another person with standing to appeal a hazardous waste disposal permit wishes to obtain an extension, there must be a written notice provided to the Board by that person, the Agency, and the applicant, within the initial appeal period.* [415 ILCS 5/40(c)]
  - 1) If the applicant is the petitioner, the applicant and the Agency must jointly file a request for extension within 35 days after the date of issuance of the Agency's final decision.

- 2) If a person with standing other than the applicant is the petitioner, the Agency, the applicant and that person must jointly file a request for extension within 35 days after the date of issuance of the Agency's final decision.
  - 3) The joint request may seek an appeal period not exceeding 125 days from the date of issuance of the Agency's final decision to file a petition for review under this Subpart.
- c) Any request for extension of time under this Section must be accompanied by written evidence that the Agency joins in the request, e.g., affidavit of the petitioner or signature of the Agency's representative.
  - d) Extensions of time to file petitions under Section 105.204(b), (c), or (e) are not available.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

#### **Section 105.210      Petition Content Requirements**

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

- a) The Agency's final decision or issued permit;
- b) A statement specifying the date of issuance or service of the Agency's final decision or issued permit, as applicable under Section 105.206;
- c) A statement specifying the grounds of appeal; and
- d) For petitions under Section 105.204(b), *a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the Agency public hearing on the NPDES permit application, if an Agency public hearing was held, and a demonstration that the petitioner is so situated as to be affected by the permitted facility.* [415 ILCS 5/40(e)(2)]

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

#### **Section 105.212      Agency Record**

- a) The Agency must file its entire Agency record of ~~its~~ decision with the Clerk in accordance with Section 105.116.
- b) The Agency record must include:

- 1) Any permit application or other request that resulted in the Agency's final decision;
- 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;
- 3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;
- 4) The Agency public hearing record file of any Agency public hearing that may have been held before the Agency, including any transcripts and exhibits; and
- 5) Any other information the Agency relied upon in making its final decision.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

#### **Section 105.214 Board Hearing**

- a) Except as provided in subsections (b), (c) and (d), the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F, upon an appropriately filed petition for review. The hearing will be based exclusively on the Agency record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the Agency record under Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact.
- b) The Board will not hold a hearing on a petition for review under this Subpart if the Board disposes of the petition on a motion for summary judgment brought under 35 Ill. Adm. Code 101.516.
- c) The Board will not hold a hearing on a petition for review under Section 105.204(c) if the Board determines that:
  - 1) The petition is duplicative or frivolous; or
  - 2) The petitioner is so located as to not be affected by the permitted facility.
- d) The Board will not hold a hearing on a petition for review under Section 105.204(b) or (d) if the Board determines that the petition is duplicative or frivolous.
- e) If the Board determines to hold a hearing, the Clerk will give notice of the hearing under 35 Ill. Adm. Code 101.602.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

## SUBPART C: CAAPP PERMIT APPEALS

### **Section 105.300      Applicability**

This Subpart applies to proceedings before the Board concerning appeals from CAAPP final determinations made under Section 39.5 of the Act.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### **Section 105.302      General Requirements**

- a) The definitions of 35 Ill. Adm. Code 101.202 and Section 39.5 of the Act will apply to this Subpart unless otherwise provided, or unless the context clearly indicates otherwise.
- b) If the Agency denies a CAAPP permit, permit modification, or permit renewal it must provide to USEPA, the permit applicant and, upon request, affected states, any person who participated in the public comment process and any other person who could obtain judicial review under Section 41(a) of the Act [415 ILCS 5/41(a)] a copy of each notification of denial pertaining to the permit applicant.
- c) The applicant, any person who participated in the public comment process under Section 39.5(8) of the Act, or any other person who could obtain judicial review under Section 41(a) of the Act may contest the decisions of the Agency enumerated in this subsection (c) by filing with the Clerk a petition for review of the Agency's action in accordance with this Section:
  - 1) Denial of a CAAPP permit, including a permit revision or permit renewal, or a determination of incompleteness regarding a submitted CAAPP application;
  - 2) Issuance of a CAAPP permit with one or more conditions or limitations;
  - 3) Failure of the Agency to act on an application for a CAAPP permit, permit renewal, administrative permit amendment or significant permit modification within the time frames specified in Section 39.5(5)(j) or Section 39.5(13) of the Act, as applicable; or
  - 4) Failure of the Agency to take final action within 90 days after receipt of an application requesting minor permit modification procedures (or 180 days for modifications subject to group processing requirements) under Section 39.5(14) of the Act.

- d) For purposes of this Subpart, a person who participated in the Agency public comment process is someone who, during the Agency public comment period, either commented on the draft permit, submitted written comments, or requested notice of the final action on a specific permit application.
- e) The petition filed under subsection (c) must be filed within 35 days after the Agency's final permit action unless:
  - 1) The petition is based solely on grounds arising after the 35 day period expires, in which case the petition may be filed within 35 days after the new grounds for review arise.
  - 2) The applicant is challenging the Agency's failure to timely take final action under Section 39.5 of the Act, in which case the petition must be filed before the Agency takes the final action.
  - 3) However, under no circumstances may a petition challenging the final permit action on a Phase II acid rain permit be filed more than 90 days subsequent to the final permit action.
- f) The Agency must appear as respondent at the hearing and must file within 30 days after service of the petition, an answer consisting of the entire Agency record of the application including the CAAPP permit application, the Agency public hearing record, the CAAPP permit denial or issuance letter, and correspondence with the applicant concerning the CAAPP permit application.
- g) The Clerk will give notice of the petition and hearing in accordance with 35 Ill. Adm. Code 101.
- h) The proceeding will be conducted in accordance with 35 Ill. Adm. Code 101.
- i) *The Agency shall notify USEPA, in writing, of any petition for hearing brought under this Part involving a provision or denial of a Phase II acid rain permit within 30 days of the filing of the petition. USEPA may intervene as a matter of right in any such hearing. The Agency shall notify USEPA, in writing, of any determination or order in a hearing brought under this Section that interprets, voids, or otherwise relates to any portion of a Phase II acid rain permit. [415 ILCS 5/40.2(e)]*

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

#### **Section 105.304      Petition Content Requirements**

- a) The petition must include:

- 1) ~~A~~a concise description of the CAAPP source for which the permit is sought;
  - 2) ~~A~~a statement of the Agency's decision or part thereof to be reviewed;
  - 3) ~~A~~a justification as to why the Agency's decision or part thereof was in error; and
  - 4) ~~T~~he other materials upon which the petitioner relies in its petition.
- b) The petition may include a request to stay the effectiveness of a denial of the CAAPP permit until final action is taken by the Board under Section 40.2 of the Act.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

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

##### **Section 105.400 Parties**

- a) Petitioner. The person who files a petition for review of the Agency's final decision made under Title XVI of the Act [415 ILCS 5/57 through 57.19] (or under the former Section 22.18b(g) of the Act) must be named as petitioner.
- b) Respondent. The Agency must be named as the respondent.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

##### **Section 105.402 Who May File a Petition for Review**

Any owner or operator may file a petition for review under Section 40 of the Act of an Agency final determination made under Title XVI of the Act [415 ILCS 5/57-57.19] (or under the former Section 22.18b(g) of the Act). There are several Agency determinations that may be appealed under Section 40 of the Act.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

##### **Section 105.404 Time for Filing the Petition**

Petitions must be filed in accordance with this Section or the Board does not have the authority to review the Agency's decision and will dismiss the proceeding on its own motion or on the motion of any party. Within 35 days after the date of service of the Agency's final decision the petitioner may file with the Clerk:

- a) A petition for review that contains the requirements of Section 105.408; or

- b) A request for an extension of time to file a petition for hearing under Section 105.406.

Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### **Section 105.406 Extension of Time to File a Petition for Review**

Under Section 40(a)(1) of the Act, *the 35-day period for petitioning for a hearing may be extended by the applicant for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period.* [415 ILCS 5/40(c)] The applicant and the Agency must jointly file a request for extension with the Board within 35 days after the date of service of the Agency's final decision. Upon an appropriately filed request for an extension, the applicant has a period not exceeding 125 days after the date of service of the Agency's final decision to file a petition for review before the Board under Section 105.408.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### **Section 105.408 Petition Content Requirements**

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

- a) The Agency's final decision;
- b) A statement specifying the date of service of the Agency's final decision; and
- c) A statement specifying the grounds of appeal.

### **Section 105.410 Agency Record**

- a) The Agency must file the entire Agency record of its decision with the Board in accordance with Section 105.116.
- b) The Agency record must include:
  - 1) The plan or budget submittal or other request that requires an Agency decision;
  - 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the plan or budget submittal or other request;
  - 3) The final determination letter; and
  - 4) Any other information the Agency relied upon in making its determination.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### **Section 105.412 Board Hearing**

The Board will conduct a public hearing in accordance with 35 Ill. Adm. Code 101.Subpart F including any hearing held by videoconference (see 35 Ill. Adm. Code 101.600 (b)) upon an appropriately filed petition for review, unless a petition is disposed of by a motion for summary judgment brought under 35 Ill. Adm. Code 101.516. The hearing will be based exclusively on the Agency record before the Agency at the time the permit or decision was issued.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

## **SUBPART E: APPEAL OF OSFM LUST DECISIONS**

### **Section 105.500 Applicability**

This Subpart applies to proceedings before the Board concerning appeals from OSFM final determinations made under Section 57.9(c) of the Act.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### **Section 105.502 General Overview**

OSFM final determinations are made either through the issuance of an “Eligibility and Deductibility Determination” letter or by the failure of OSFM to act upon receipt of an “Eligibility and Deductibility Determination” form within 60 days under Section 57.9(c)(2) of the Act. The process before the Board for review of final determinations by the OSFM includes the following steps. Upon receipt of a petition for review, unless the Board determines that the petition is insufficient, a hearing date and location will be assigned. Hearings will be publicly-noticed in the county where the underground storage tank site is located. If the parties enter into a settlement agreement prior to or during the hearing process, the parties may request that the Board accept and enter a final order adopting a proposed settlement agreement; the order may be requested with or without a hearing.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### **Section 105.504 General Requirements**

- a) **Who May File.** Any owner or operator of an underground storage tank who has been issued an "Eligibility and Deductibility Determination" letter or who has not received an "Eligibility and Deductibility Determination" letter from the OSFM within the time prescribed by Section 57.9(c)(2) of the Act, which is deemed to be a final decision appealable to the Board, may file a petition with the Board seeking review of that final decision. The owner/operator must be named as the petitioner, and the OSFM must be named as the respondent. Filing requirements are set forth at 35 Ill. Adm. Code 101.Subpart C.

- b) **Timely Petition.** The petition for review must be filed with the Board within 35 days after the date of the OSFM's "Eligibility and Deductibility Determination" letter or within 35 days from the OSFM's final decision due to its failure to act as required under Section 57.9(c)(3) of the Act. There will be a rebuttable presumption that petitioner received the OSFM's "Eligibility and Deductibility Final Determination" letter four days from the date indicated on the letter.
- c) **Service and Filing.** The petitioner must serve all filings upon the OSFM in accordance with 35 Ill. Adm. Code 101.304(c). All filings must be accompanied by a notice of filing. Methods and documentation of service, as well as the effective date of service, are governed by 35 Ill. Adm. Code 101.Subpart C.

(Source: Amended at 39 Ill. Reg. 2369, effective January 27, 2015)

### **Section 105.506      Petition Content Requirements**

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

- a) A copy of the OSFM's "Eligibility and Deductibility Final Determination" letter;
- b) A complete and precise description of the underground storage tank site, including the location of the site, including the county, the number of underground storage tanks on-site, the substance(s) stored in each tank, the date of the tank's registration; and the date of Illinois Emergency Management Agency notification;
- c) A statement specifying the date of service of the OSFM's final determination letter and documentation to demonstrate the petition's timely filing;
- d) A statement specifying the grounds of appeal; and
- e) If the owner or operator is represented by counsel, an appearance must be filed in conjunction with the petition.

### **Section 105.508      OSFM Record and Appearance**

- a) Within 14 days after a petition for review of an OSFM eligibility or deductibility determination, the attorney representing the OSFM must file an appearance with the Board.
- b) The OSFM must file the entire OSFM record of its decision with the Board in accordance with Section 105.116. The OSFM record must include:
  - 1) The request for OSFM determination of eligibility or deductibility;

- 2) Correspondence with the petitioner;
- 3) The denial letter; and
- 4) Any other information the OSFM relied upon in making its determination.

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### **Section 105.510 Location of Hearing**

The hearing will be held in Springfield, in Chicago, by videoconference (see 35 Ill. Adm. Code 101.600(b)), or in such other location as the hearing officer or the Board may designate to prevent material prejudice or undue delay. Upon the proceeding being set for hearing, the Clerk will cause notice of the hearing to be published. Public notice will be published at least 21 days before the hearing by public advertisement in a newspaper of general circulation in the county in which the LUST site in question is located. Nothing in this Section precludes holding the hearing by videoconference under 35 Ill. Adm. Code 101.600(b).

(Source: Amended at 41 Ill. Reg. 10084, effective July 5, 2017)

### SUBPART F: PSD PERMIT APPEALS

#### Section 105.600 Applicability

This Subpart applies to proceedings before the Board concerning appeals from final PSD permit determinations made under Section 9.1(d) of the Act and 35 Ill. Adm. Code Part 204.

#### Section 105.602 Parties

- a) Petitioner. The person who files a petition for review of the Agency's final decision must be named the petitioner.
- b) Respondent. The Agency must be named the respondent. If a petition is filed under Section 105.604(c) of this Subpart by a person other than the permit applicant, the permit applicant must be named as a respondent in addition to the Agency.

#### Section 105.604 Who May File a Petition for Review

- a) If the Agency refused to grant or grants with conditions a PSD permit under Section 9.1(d) of the Act and 35 Ill. Adm. Code Part 204, the applicant may petition for a hearing before the Board to contest the decision of the Agency. [415 ILCS 5/40.3(a)(1)]
- b) If the Agency fails to act on an application for a PSD permit within the time frame specified in Section 39(f)(3) of the Act, the applicant may petition for a hearing

before the Board to compel the Agency to act on the application in a time that is deemed reasonable by the Board. [415 ILCS 5/40.3(a)(1)]

- c) Any person who participated in the Agency public comment process for a PSD permit and is either aggrieved or has an interest that is or may be adversely affected by the PSD permit may petition for a hearing before the Board to contest the decision of the Agency. If the petitioner failed to participate in the Agency's public comment process, the person may still petition for hearing, but only upon issues where the final permit conditions reflect changes from the draft permit that was made available during the Agency public comment process. [415 ILCS 5/40.3(a)(2)]

Section 105.606 Time to File Petition for Review

- a) Except as provided in subsection (b), if a person who may petition the Board under Section 105.604 of this Subpart wishes to appeal the Agency's final decision to the Board under this Subpart, the person must file the petition with the Clerk within 35 days after the date of the Agency's final permit action.
- b) If the permit applicant wishes to appeal the Agency's failure to act on an application for a PSD permit within the time frame specified in Section 39(f)(3) of the Act, the person must file a petition for review with the Clerk before the Agency denies or issues the final permit.

Section 105.608 Petition Content Requirements

- a) For petitions under Section 105.604(a) or (c) of this Subpart, all pertinent information in support of each issue raised for review shall be contained within the body of the petition. The Board will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C, the petition must include:
- i) The Agency's final decision or issued PSD permit;
- ii) A statement as to how the petitioner participated in the Agency public comment process;
- iii) All facts necessary to demonstrate that the petitioner is aggrieved or has an interest that is or may be adversely affected;
- iv) The issues proposed for review, citing to a specific permit term or condition where applicable and to the Agency record where those issues were raised with reasonable specificity during the public comment period, citing to any relevant page numbers in the public comments submitted to the Agency and attaching this public comment to the petition. If the issues

proposed for review were not raised with reasonable specificity during the public comment period, the petition must explain why such issues were not required to be raised during the Agency public comment process; and

v) An explanation why the Agency's previous response to the issues proposed for review, if any, was:

1. Clearly erroneous; or

2. An exercise of discretion or an important policy consideration that the Board should, in its discretion, review. [415 ILCS 5/40.3(a)(2)]

b) For petitions under Section 105.604(b) of this Subpart, in addition to the requirements of 35 Ill. Adm. Code 101, Subpart C, the petition must also include the date that a complete permit application for a PSD permit was submitted to the Agency and an explanation as to why the submittal made on such date made the application complete.

c) For petitions under Section 105.604(a) or (c) of this Subpart, the petition may include a request to stay the effectiveness of any final Agency action on a PSD permit application until final action is taken by the Board under Section 40.3 of the Act. Any stay request must include a clear delineation of all the contested conditions of the PSD permit. To the extent that a stay of any or all of the uncontested conditions of the permit is sought, any stay request must indicate how these uncontested conditions would be affected by the Board's review of the contested conditions.

d) For petitions under Section 105.604(c) of this Subpart, any stay request must also demonstrate:

i) That an immediate stay is required in order to preserve the status quo without endangering the public;

ii) That it is not contrary to public policy; and

iii) That there is a reasonable likelihood of success on the merits.

#### Section 105.610 Board Standards for Granting Stays

a) If requested by the permit applicant, the Board may stay the effectiveness of any final Agency action on a PSD permit application during the pendency of the review process. In such cases, the Board shall stay the effectiveness of all the contested conditions of the PSD permit and may stay the effectiveness of any or all uncontested conditions only if the Board determines that the uncontested conditions would be affected by its review of contested conditions. Any stays

granted by the Board shall be deemed effective upon the date of final Agency action appealed by the applicant. [415 ILCS 5/40.3(d)(2)]

- b) If requested by a party other than the permit applicant, the Board may stay the effectiveness of any final Agency action on a PSD permit application during the pendency of the review process. In such cases, the Board may stay the effectiveness of all the contested conditions of the PSD permit and may stay the effectiveness of any or all uncontested conditions only if the Board determines that the uncontested conditions would be affected by its review of contested conditions. The party requesting the stay has the burden of demonstrating that an immediate stay is required in order to preserve the status quo without endangering the public, that it is not contrary to public policy and that there is a reasonable likelihood of success on the merits. Any stays granted by the Board shall be deemed effective upon the date of final Agency action appealed under Section 105.606 of this Subpart and shall remain in effect until a decision is issued by the Board on the petition. [415 ILCS 5/40.3(d)(3)]

Section 105.612 The Agency Record

- a) The Agency must file a copy of its entire Agency record of its decision with the Clerk in accordance with Section 105.116.
- b) The Agency record must include:
- i) Any permit application or other request that resulted in the Agency's final decision;
  - ii) Correspondence with the applicant and any documents or material submitted by the applicant to the Agency related to the permit application;
  - iii) The project summary, statement of basis or fact sheet;
  - iv) The Agency public hearing record of any Agency public hearing held under 35 Ill. Adm. Code 252.205, including any transcripts and exhibits;
  - v) All written comments received during the Agency public comment period under 35 Ill. Adm. Code 252.201, including any extension or reopening under 35 Ill. Adm. Code 252.208;
  - vi) The response to comments required by 35 Ill. Adm. Code 252.210 and any new material placed in the Agency record under that Section;
  - vii) The final permit; and
  - viii) Any other information the Agency relied upon in making its final decision.

Section 105.614 Board Hearing

Except as provided in subsections (a) and (b), the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101, Subpart F, upon an appropriately filed petition for review under this Subpart. The hearing and decision of the Board will be based exclusively on the Agency record at the time the permit or decision was issued, unless the parties agree to supplement the Agency record. Any PSD permit issued by the Agency shall be upheld by the Board if the technical decisions contained therein reflect considered judgment by the Agency. [415 ILCS 5/40.3(d)(1)]

- a) The Board will not hold a hearing on a petition for review under this Subpart if the Board disposes of the petition on a motion for summary judgment brought under 35 Ill. Adm. Code 101.516.
- b) The Board will not hold a hearing on a petition for review under this Subpart if the Board determines that:
  - i) The petition is frivolous; or
  - ii) The petition lacks facially adequate factual statements as required by Section 105.608 of this Subpart.
- c) If the Board determines to hold a hearing, the Clerk will give notice of the hearing under 35 Ill. Adm. Code 101.602.

APPENDIX A Agency LUST Final Decisions that are Reviewable (Repealed)

(Source: Repealed at 41 Ill. Reg. 10084, effective July 5, 2017)

105.APPENDIX B Comparison of Former and Current Rules (Repealed)

(Source: Repealed at 29 Ill. Reg. 8811, effective June 8, 2005)