

ILLINOIS POLLUTION CONTROL BOARD  
December 5, 1996

IN THE MATTER OF: )  
 )  
PROPORTIONATE SHARE ) R97-16  
LIABILITY ) (Rulemaking - Land)

Request for Public Comments.

ORDER OF THE BOARD (by C.A. Manning, K.M. Hennessey, and M. McFawn):

The Board on its own motion today opens a docket to solicit public comments and/or proposals to assist in our promulgation of rules and procedures implementing the proportionate share provisions of Section 58.9 of the Environmental Protection Act (Act) (415 ILCS 5/58.9 (1996)).

On December 21, 1995 Governor Edgar signed into law House Bill 901 as Public Act 89-443, effective July 1, 1996. This amendatory legislation added a new liability section to Title XVII of the Act. This new liability section, Section 58.9, repealed the concept of joint and several liability in environmental actions and replaced it with the concept of proportionate share liability. Specifically, Section 58.9 mandated that liability for remedial action or the recovery of costs for remedial action was limited to a "person's proportionate degree of responsibility for costs of the remedial action of releases of regulated substances that were proximately caused or contributed to by 2 or more persons." (415 ILCS 5/58.9(a)(1) (1996).) This section further exempted from liability any person who neither caused nor contributed, in any material respect, to the release of regulated substances. (415 ILCS 5/58.9(a)(2)(A) (1996).)

In addition to establishing proportionate share liability in environmental actions, Section 58.9 also directed that the Board adopt, within 18 months of the effective date of the amendatory act, rules and procedures for determining proportionate share. Such rules are to provide, at a minimum, "criteria for the determination of apportioned responsibility based upon the degree to which a person directly caused or contributed to a release of regulated substances on, in, or under the site identified and addressed in the remedial action; procedures to establish how and when such persons may file a petition for determination of such apportionment; and any other standards or procedures which the Board may adopt pursuant to this Section." (415 ILCS 5/58.10(d) (1996).)

Application of proportionate share liability in the environmental regulatory context is a new concept in Illinois, as well as the nation. For this reason, the Board today opens a docket to receive public comments or recommendations on the substance and structure of the procedures needed to effectuate the proportionate share liability principles of Section 58.9. By opening a docket for public comments, the Board is complying with the directive that, in

developing such rules, the Board take into consideration the recommendations and proposals of the Illinois Environmental Protection Agency (Agency), the Site Remediation Advisory Committee, and any other interested participants. (See 415 ILCS 5/58.9(d) ( 1996).) The Board will evaluate and consider each public comment and/or proposal received as a result of this order in formulating our own proposal. We also note that the Agency has proposed to the Board rules to implement the Site Remediation Program (Brownfields) and the Tiered Approaches to Corrective Action Objectives (TACO). Because proportionate share liability is related to these rulemakings, the Board believes that it is appropriate to begin consideration of the rules needed to determine proportionate share in conjunction with these other rulemakings.

In developing rules and regulations implementing the new proportionate share liability provisions of the Act, the traditional functions of the Board and the Agency must be kept in mind. Within the framework of the Act, the General Assembly created two bodies to implement the Act's comprehensive, statewide pollution control provisions: the Board and the Agency. (415 ILCS 5/4, 5 (1994); see also National Marine, Inc. v. IEPA, 159 Ill. 2d 381, 386, 639 N.E.2d 571, 573 (1994).) The Board serves both quasi-legislative and the quasi-judicial functions. (415 ILCS 5/5 (1994); see also National Marine, 159 Ill. 2d at 386, 639 N.E.2d at 573; IEPA v. PCB, 86 Ill. 2d 390, 399, 427 N.E.2d 162, 166 (1981).) It establishes environmental standards and regulations and also adjudicates, among other things, enforcement matters. (City of Elgin v. County of Cook, 169 Ill. 2d 53, 60, 660 N.E.2d 875, 880 (1995).) In contrast, the Agency serves investigative, permitting and/or enforcement functions. (415 ILCS 5/4 (1994); see also National Marine, 159 Ill. 2d at 386, 639 N.E.2d at 573.) The Agency is charged with investigating potential violations of the Act and prosecuting, in conjunction with the Attorney General's Office, alleged violators of the Act before the Board (415 ILCS 5/30, 31(a) (1994)) or the circuit court. The Agency has the burden of proving violations of the Act and liability before the Board (415 ILCS 5/32, 33 (1994)) or the circuit court. (National Marine, 159 Ill. 2d at 386, 639 N.E.2d at 573.) Moreover, while mindful of these established roles in drafting regulations, the Board makes clear that this statutory framework will not impede its consideration of creative approaches to proportionate share, including incorporating such concepts as arbitration and mediation into the rules, as long as these methods do not contravene the statutory framework of environmental law in Illinois.

We have already begun to internally discuss and research the rules and procedures needed to implement the proportionate share provisions of the Act and will continue to conduct such research during the comment period. To assist the public in preparing comments, the Board lists below some of the general background information, as well as various models containing allocation of liability provisions, that the Board is reviewing. This is by no means an exhaustive list of the materials the Board has begun to review. Moreover, we are fully aware that not all of these materials specifically discuss proportionate share liability and that some of these materials discuss methods of allocating liability that may not be consistent with Section 58.9 of the Act. However, the various approaches regarding allocation of liability are instructive and may be useful in drafting the regulations needed here. The following is a partial list of materials that the Board is reviewing:

1. P.A. 89-443, eff. July 1, 1996;
2. 89<sup>th</sup> Ill. Gen. Assem, House Proceedings, November 15, 1995 at 71-79;
3. 89<sup>th</sup> Ill. Gen. Assem. Senate Proceedings, November 16, 1995 at 19-27;
4. The Board's Procedural Rules, 35 Ill. Adm. Code 101-120;
5. The Uniform Comparative Fault Act (UCFA);
6. The Uniform Contribution Among Tortfeasors Act (UCATA);
7. The Restatement (Second) of Torts § 875-886B;
8. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601-9629 (1994); and
9. Other states' statutes apportioning liability, i.e., La. Rev. Stat. Ann. § 2271 *et. seq.* (1996).

The Board anticipates that we will adopt a proposal for first notice publication in the *Illinois Register* in the spring of 1997. The Board will also assign a hearing officer to this matter. The Board will leave to its hearing officer the establishment of a rulemaking schedule, as well as the scheduling of written comments, a pre-hearing conference, and hearings as necessary.

Interested parties may file comments/proposals/recommendations with the Board until 4:30 p.m. on March 31, 1997. Such filings should be directed to the Clerk of the Board, Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, Illinois 60601. All comments should reference the docket number, R97-16, as well as the name, address, and affiliation, if any, of the commentator. Any questions may be directed to the Board's Springfield office at (217) 524-8509.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above and order was adopted on the \_\_\_\_\_ day of \_\_\_\_\_, 1996 by a vote of \_\_\_\_\_.

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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board