

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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5 IN THE MATTER OF:

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7 PROPORTIONATE SHARE LIABILITY No. R97-16

8 (35 ILL. ADM. CODE 741) (Rulemaking-Land)

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14 Proceedings held on October 20, 1998, at 10:00

15 a.m., at the Illinois Pollution Control Board, 600

16 South Second Street, Springfield, Illinois, before the

17 Honorable Cynthia I. Ervin, Hearing Officer.

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1 APPEARANCES

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3 Claire A. Manning, Chairman

4 Board Member Kathleen M. Hennessey

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

6 BY: Mark Wight

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8 On behalf of the Illinois EPA.

9 ILLINOIS ENVIRONMENTAL REGULATORY GROUP

BY: Whitney Wagner Rosen

10 Legal Counsel

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11 Springfield, Illinois 62701

On behalf of IERG.

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1 EXHIBITS

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3 NUMBER ENTERED

4 (No exhibits were marked.)

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1 PROCEEDINGS

2 (October 20, 1998; 10:00 a.m.)

3 HEARING OFFICER ERVIN: Good morning. My name is

4 Cynthia Ervin. I am the Hearing Officer in this

5 proceeding originally entitled, In the Matter of:

6 Proportionate Share Liability, 35 Illinois

7 Administrative Code, Part 741, Docketed as R97-16.

8 Present today on behalf of the Board is the

9 presiding Board Member in this rulemaking, Chairman

10 Claire Manning.

11 CHAIRMAN MANNING: Good morning.

12 HEARING OFFICER ERVIN: And Board Member Kathleen

13 Hennessey.

14 BOARD MEMBER HENNESSEY: Good morning.

15 HEARING OFFICER ERVIN: Just as a short

16 background, on September 3rd the Board adopted rules

17 to implement the Proportionate Share Liability

18 provisions of Section 58.9 of the Environmental

19 Protection Act for First Notice. Pursuant to Hearing

20 Officer order, dated September 8th, two hearings were

21 scheduled for yesterday and today for the purpose of

22 allowing the Board to receive testimony from the

23 Agency and other interested persons on the merits of

24 the Board's First Notice proposal.

25 At the hearing yesterday the Board heard testimony

162

1 from Gary King, of the Illinois Environmental
2 Protection Agency; Matthew Dunn and Elizabeth Wallace,
3 of the Attorney General's Office; and David Rieser, on
4 behalf of the Site Remediation Advisory Committee.

5 This hearing today will be governed by the Board's
6 procedural rules for regulatory proceedings. All
7 information which is relevant and not repetitious or
8 privileged will be admitted. All witnesses will be
9 sworn and subject to cross-questioning. Please note
10 that any questions asked by a Board Member or staff
11 are intended to help build a complete record for the
12 Board's decision, and does not express any
13 preconceived opinion on the matter.

14 Are there any questions regarding the procedures
15 we will be following today?

16 Seeing none, I will then ask Chairman Manning or
17 Board Member Hennessey if they have any comments.

18 CHAIRMAN MANNING: Nothing.

19 BOARD MEMBER HENNESSEY: No thank you.

20 HEARING OFFICER ERVIN: Thank you. At this time
21 is there anyone who would like to testify today?

22 MS. ROSEN: Yes.

23 HEARING OFFICER ERVIN: Would the court reporter
24 please swear in the witness.

25 (Whereupon Ms. Whitney Wagner Rosen was sworn by

1 the Notary Public.)

2 MS. ROSEN: Good morning. My name is Whitney

3 Rosen. I am General Counsel for the Illinois

4 Environmental Regulatory Group. While I do not intend

5 to submit testimony -- present testimony today, I do

6 want to make a brief statement. And to the extent

7 that it be treated as testimony, I guess feel free.

8 Generally IERG supports the testimony provided by

9 David Rieser, representing the Site Remediation

10 Advisory Committee yesterday, as we have throughout

11 the proceeding. I just would like to state today that

12 IERG very much appreciates the Board's efforts in

13 grappling with a very, very difficult issue. The

14 prefiled testimony that had been provided by many of

15 the participants in this matter indicated a certain

16 degree of, you know -- there was disagreement and

17 agreement with the way the Board had handled some

18 issues. There was also some questions regarding how

19 they intended the First Notice proposal to work.

20 To a certain degree the feedback and the

21 questioning and answering that took place yesterday

22 served to resolve some of the questions. It also

23 helped to clarify, in our mind, rightly or wrongly,

24 what we feel the Board's intentions might be, and it

25 was concerning to us. So I thought a brief statement

1 is necessary.

2 Firstly, as I understand the proposal or the
3 discussions that came forth yesterday, I would say
4 that the process that is included in the First Notice
5 proposal works as this. One, the State or some other
6 party establishes -- presents a complaint and
7 establishes liability of another person based on
8 contamination that is caused or, you know, there is a
9 proximate cause element there that they caused or
10 contributed to a release of contamination into the
11 environment. After that showing of liability a burden
12 and affirmative defense then shifts to the defendant.

13 From the -- when we initially read the proposal,
14 we were uncertain as to what sort of burden that was
15 that the defendant would bear at that stage. But it
16 became very clear from yesterday's questioning that it
17 was fully intended by the Board that the defendant
18 bear the obligation to basically disprove his
19 responsibility for all of the contamination at the
20 site or be forced to bear the costs of cleaning it up
21 or repay the costs that may already have been spent in
22 cleaning up the contamination.

23 If this is true, it is our position that that is
24 completely contrary to the intent of the statute that
25 these rules are supposed to be implementing. The

1 statute was intended to replace a joint and several
2 liability scheme with the Proportionate Share
3 Liability scheme. Under a joint and several liability
4 scheme, the defendant was placed in a situation of
5 basically disproving his responsibility for cleaning
6 up contamination at a site, which is -- appears to be
7 the same situation that the Board's proposal -- an
8 obligation that the Board's proposal is putting on the
9 defendant in the current matter.

10 That may or may not be the Board's intent. That's
11 the reading we came away with from yesterday's
12 hearing. We are very concerned that it is contrary to
13 the statute. And at a minimum we would ask that the
14 Board maybe continue in the process of clarification,
15 and as time allows issue some sort of pre Second
16 Notice document to help clarify this issue and others
17 so that the participants here can fully understand how
18 the proposal is intended to work prior to going on to
19 an actual Second Notice. We recognize that there are
20 timing constraints, and I just hope that as you are
21 able to do so you can complete the preparation of a
22 document.

23 Thank you very much. I guess I will answer any
24 questions.

25 HEARING OFFICER ERVIN: Are there any questions

1 for Ms. Rosen?

2 BOARD MEMBER HENNESSEY: I have a question.

3 CHAIRMAN MANNING: Go ahead and go first. It is
4 probably the same question that I have.

5 BOARD MEMBER HENNESSEY: Well, I guess I am not
6 sure, speaking for myself, that your discussion of the
7 way you think the Board is going on this is an
8 accurate reflection of the way that the Board is
9 going.

10 MS. ROSEN: Inaccurate or accurate?

11 BOARD MEMBER HENNESSEY: I don't -- inaccurate.
12 It is not accurate, what you are suggesting, at least
13 in my reading of the rules. I, obviously, cannot
14 speak for the Board. But I certainly appreciate your
15 making comments to the extent that there is some
16 confusion. We do need to clarify that. And this is
17 an important issue that needs to be addressed.

18 Certainly, to the extent we have various different
19 types of contamination at a site and if the State
20 comes forward and we know the one party has
21 contributed benzene to a site and another party has
22 contributed some other chemical to the site, the party
23 that has only contributed benzene is certainly not
24 going to be held liable, as I understand the Board's
25 rules, for the entire clean up of all of the hazard

1 substances at the site. It is still part of the
2 State's burden to prove that the defendant has
3 contributed to the site the chemical that is causing
4 the response costs to be incurred.

5 I think that there is -- that some of the
6 confusion may come from the situations in which you
7 have only one chemical at the site and you have
8 several different parties and there is a disagreement
9 between the State and the respondent as to whether
10 more than one respondent is liable for that
11 contamination. But even in that situation I don't
12 necessarily see it going to 100 percent liability.

13 I guess I am not really asking -- perhaps it would
14 help if you would give me a hypothetical or explain
15 what it was that kind of gave rise to this reading.

16 MS. ROSEN: It was basically your hypotheticals
17 yesterday that centered around benzene at a site with
18 one or more people that may have been responsible for
19 causing the benzene. The question appeared to focus
20 to a great deal as to why shouldn't individual A,
21 whose liability have been established, why shouldn't
22 he bear the burden of pointing out B's responsibility
23 at the site.

24 It will be helpful when we have the transcript,
25 because that might be -- the discourse focused a lot

1 on why shouldn't A point the finger at B, and did not
2 focus on that A could just as easily say, here are my
3 records of usage of benzene, what I brought into my
4 facility, and what I have used. Here are my records
5 showing where it went. All in all, that shows that
6 there is no way that the benzene that is at this
7 facility can all be attributed to me.

8 There are different types of evidence that a
9 defendant or a respondent in a proceeding is going to
10 be setting forth, rather than automatically -- and
11 then maybe we were jumping to conclusions --
12 automatically assuming that unless he pointed out that
13 B was another responsible party at the site that
14 Proportionate Share Liability did not trigger in terms
15 of the allocation.

16 Does that help you understand my thoughts at all?

17 BOARD MEMBER HENNESSEY: Yes.

18 MS. ROSEN: Okay.

19 HEARING OFFICER ERVIN: But would you agree that
20 someone should be able to do either?

21 MS. ROSEN: Absolutely. They should be able to do
22 either, and defendants in these situations, I am sure,
23 will do either. As I -- to latch on to something that
24 David said yesterday, that we believe quite strongly,
25 this is an adversarial proceeding. I am sure that

1 respondents or defendants, however they are couched,
2 are going to be doing everything they can to limit
3 their liability at the facility and to show that their
4 share, their allocation is as small as it can be.

5 Otherwise, they would have never entered into the
6 proceeding in the first place. They would have taken
7 steps to resolve it before it reached this level. I
8 don't know that just because they might want -- you
9 know, you want to leave the option open for them to do
10 either. I don't know that that necessarily means that
11 it becomes an affirmative defense for them to do so,
12 and that the only way that proportionate share -- that
13 their allocation is going to be based on proportionate
14 share is that they can point the finger to another
15 individual who might have responsibility.

16 HEARING OFFICER ERVIN: So just so I am clear, so
17 if they did want to point the responsibility to
18 someone else, is it SRAC's position or IERG's position
19 that that burden would still be placed on the State to
20 prove?

21 MS. ROSEN: It is -- I am speaking on behalf of
22 IERG. It is IERG's position that the State has an
23 obligation to prove, by a preponderance of the
24 evidence, both liability and allocation to the degree
25 that there is a distinction made between liability and

1 allocation.

2 HEARING OFFICER ERVIN: Are there any other
3 questions for Ms. Rosen?

4 CHAIRMAN MANNING: Let's go off the record for a
5 second.

6 HEARING OFFICER ERVIN: Okay. Off the record.

7 (Discussion off the record.)

8 HEARING OFFICER ERVIN: All right. Back on the
9 record.

10 Again, is there any additional questions for Ms.

11 Rosen at this time?

12 Seeing none, is there any --

13 BOARD MEMBER HENNESSEY: Well, let me just ask

14 this. What language would you like to see in the

15 rule? First of all, let me ask this. Do you want to

16 see an express allocation of burdens of proof in the

17 rule?

18 MS. ROSEN: Again, as this is intended, or in my

19 mind, we are focusing on Subpart B of the proposal

20 which is in an enforcement context. There needs to be

21 a clarification as to burdens of proof, because

22 burdens do -- should exist so that people know what

23 they are required to show.

24 CHAIRMAN MANNING: Well, my understanding of your

25 position here is that the burden is on the State and

1 there is no burden on the respondent.

2 MS. ROSEN: And you are correct in your

3 understanding.

4 CHAIRMAN MANNING: I mean, that has been

5 consistent throughout.

6 MS. ROSEN: Right.

7 CHAIRMAN MANNING: And part of the reason we ended

8 up doing what we did with the First Notice proposal is

9 the State's concern that putting the whole burden on

10 the State and not having any burden to come forward on

11 respondent, you have a silent respondent sitting there

12 with no information and then what would happen. That

13 is the position that we find ourselves in and continue

14 to find ourselves in. I think I understand fully what

15 it is that you are suggesting.

16 MS. ROSEN: Okay. Just if I could respond briefly

17 to that, you are correct in your assumptions. I do

18 believe, though, that to the degree that you are

19 including information orders and whatnot and requiring

20 the production of lots of information, that you are

21 curing the State's inability to be able to prove its

22 case as it should in these matters.

23 BOARD MEMBER HENNESSEY: I am not sure that I

24 understood. Are you saying in the rules themselves

25 you want there to be the issue of burden of proof

1 addressed? Or are you saying in the opinion --

2 MS. ROSEN: I would have to give it some more
3 thought.

4 BOARD MEMBER HENNESSEY: Okay.

5 MS. ROSEN: But I think at a minimum it should be
6 in the opinion so that people understand their
7 responsibilities under these regulations. I can -- we
8 can think about that further and put something more in
9 our comments if that would be helpful.

10 BOARD MEMBER HENNESSEY: Okay. I would just
11 suggest that if you would like us to put the language
12 in the rule, that you propose --

13 MS. ROSEN: We can propose some language.

14 BOARD MEMBER HENNESSEY: -- the language. That is
15 always much more helpful to us.

16 MS. ROSEN: I understand.

17 BOARD MEMBER HENNESSEY: It is a lot harder to sit
18 down and do it.

19 CHAIRMAN MANNING: Well, at this point, I don't
20 know if --

21 MS. ROSEN: I think that --

22 CHAIRMAN MANNING: We are so late in the process
23 of it, I don't know how much it is going to be helpful
24 to give us language at the end of the game anyway. We
25 are going to take what he have heard -- as I said at

1 the beginning of this proceeding yesterday, we are
2 going to take what we have heard, go back with open
3 minds, and look at all of the concerns that have been
4 raised on the First Notice Opinion.

5 This has been a very difficult proceeding. Very
6 difficult in that we didn't enjoy the benefit of all
7 of the stuff that went in prior to you presenting the
8 First Notice proposal. I think when the Board first
9 looked at it, as I tried to say yesterday, there were
10 some stones that we thought needed to be turned that
11 were not turned that we thought needed to be dealt
12 with. And we will rethink all of that, obviously.

13 We have also been kicking around the idea of
14 trying to get something out to the public in advance
15 of the Second Notice opinion. I don't know that we
16 can do that. We will certainly try, but I can't make
17 any promises that we can do that. I know that was
18 always helpful when we did the Underground Storage
19 Tank case several years ago. We did a post Second
20 Notice.

21 There is no time to do a full blown Proposed
22 Second Notice, not unless we blow our deadline, and I
23 don't think we want to do that. We are looking at
24 doing what we can based on all of what we heard
25 yesterday, and in the short amount of time we have

1 left.

2 BOARD MEMBER HENNESSEY: I do have one more
3 question, just to clarify. Yesterday I think what I
4 was trying to get at with some of my questions was is
5 it SRAC's position, and I understand you are not
6 speaking here on behalf of SRAC, that the State is
7 ever going to have to prove a negative, is the State
8 ever going to have to prove that someone -- that no
9 one else contributed to the site besides the
10 respondents themselves that have been identified.

11 And as I understand what you are simply saying
12 today, that's not your position. Your position is
13 simply that for the respondents that have been
14 identified, the State must prove that response costs
15 have been incurred because of those respondents' acts,
16 and the costs and the acts have to be linked.

17 MS. ROSEN: Correct. That's correct.

18 BOARD MEMBER HENNESSEY: That is rather
19 inarticulately put, but is that a fair statement of
20 your position?

21 MS. ROSEN: I would agree with your
22 characterization.

23 BOARD MEMBER HENNESSEY: Okay. That's helpful.

24 Thank you.

25 MS. ROSEN: Thank you.

1 HEARING OFFICER ERVIN: Maybe this is more
2 appropriate for comment, but I would be curious to
3 know if you would be more comfortable with us doing a
4 full-fledged pre Second Notice proposal and blow the
5 deadline by a month?

6 CHAIRMAN MANNING: That's a question not just to
7 you.

8 MS. ROSEN: Right.

9 HEARING OFFICER ERVIN: And you can do that in --

10 MS. ROSEN: Can I respond to that in comment?

11 HEARING OFFICER ERVIN: Yes.

12 MS. ROSEN: Thank you.

13 CHAIRMAN MANNING: Do you want to respond now? Go
14 ahead.

15 MR. WIGHT: I just have a question. A
16 full-fledged pre Second Notice proposal which would
17 explain, as part of an opinion, how you think that the
18 proposal would work procedurally and some of those
19 issues perhaps?

20 HEARING OFFICER ERVIN: Yes, we would go over all
21 of these issues that have been raised, fix it to the
22 extent that, you know --

23 CHAIRMAN MANNING: That we can.

24 HEARING OFFICER ERVIN: -- that we believe that we
25 would resolve all of these issues that have been

1 raised, and send it out for pre Second Notice and have
2 comments come back. Now, we can't do that and still
3 meet the January 1st scheduling.

4 MR. WIGHT: I understand.

5 HEARING OFFICER ERVIN: But if we did that, we
6 would be behind by about a month.

7 CHAIRMAN MANNING: It would be a quick response
8 time. I mean, if we do a proposed Second Notice, we
9 would have to get comments on that before Second
10 Notice within like two weeks.

11 BOARD MEMBER HENNESSEY: Would there be a
12 hearing?

13 CHAIRMAN MANNING: Probably not. I don't think
14 there would be time.

15 HEARING OFFICER ERVIN: However, to the extent
16 that you want this deadline blown. I don't know if
17 you want four weeks and give you a chance to see a pre
18 Second Notice package, and then if you want hearings
19 it is going to just be delayed further. But to the
20 extent that you could comment and let us know if you
21 would prefer that. There doesn't seem to be any --

22 CHAIRMAN MANNING: And you understand that that is
23 not a promise either, because there is only two of
24 seven of us here. We don't like to blow our
25 deadlines.

1 HEARING OFFICER ERVIN: I would like to know how
2 you at least feel about that.

3 BOARD MEMBER HENNESSEY: It is the first I have
4 heard of it.

5 CHAIRMAN MANNING: There may be only one of seven.
6 I might be standing totally alone on this.

7 BOARD MEMBER HENNESSEY: No, I would certainly be
8 interested in seeing comments on that as well.

9 HEARING OFFICER ERVIN: Are there any additional
10 questions for Ms. Rosen?

11 Seeing none, I will just note that the Board has
12 requested expedited transcripts of both of these
13 hearings, yesterday and today. Those transcripts will
14 be available on Friday in the Clerk's office in
15 Chicago. They will also be available at our web
16 site. You can also contact Darlene, our nice court
17 reporter, if you would like to get one directly from
18 her.

19 The deadline for public comments in this
20 rulemaking has been set for November 4th. The mailbox
21 rule, as set forth in the Board's procedural rules,
22 does not apply. That means the public comments must
23 be received in the Board's office on November 4th.
24 Anyone may file a public comment. If you are on the
25 service list, however, you must serve everyone on the

1 service list with that public comment.

2 Are there any other matters that need to be

3 addressed today?

4 Seeing none, then this matter is hereby

5 adjourned. Thank you, again, for coming.

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1 STATE OF ILLINOIS)
) SS
2 COUNTY OF MONTGOMERY)

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4 C E R T I F I C A T E

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6 I, DARLENE M. NIEMEYER, a Notary Public in and for

7 the County of Montgomery, State of Illinois, DO HEREBY

8 CERTIFY that the foregoing pages comprise a true,

9 complete and correct transcript of the proceedings

10 held on the 20th of October A.D., 1998, at 600 South

11 Second Street, Springfield, Illinois, In the Matter

12 of: Proportionate Share Liability, in proceedings

13 held before the Honorable Cynthia I. Ervin, Hearing

14 Officer, and recorded in machine shorthand by me.

15 IN WITNESS WHEREOF I have hereunto set my hand and

16 affixed my Notarial Seal this 21st day of October

17 A.D., 1998.

18

19

Notary Public and
20 Certified Shorthand Reporter and
Registered Professional Reporter

21

CSR License No. 084-003677

22 My Commission Expires: 03-02-99

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