

ILLINOIS POLLUTION CONTROL BOARD
November 12, 1998

IN THE MATTER OF:)
)
PROPORTIONATE SHARE LIABILITY:) R97-16
35 Ill. ADM. CODE 741) (Rulemaking - Land)

Proposed Rule. Proposed Second Notice.

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

On December 21, 1995, Governor Jim Edgar signed into law House Bill 901 as Public Act 89-443, effective July 1, 1996. This amendatory legislation added Section 58.9 to Title XVII of the Environmental Protection Act (Act). This new section repealed joint and several liability in environmental actions and replaced it with proportionate share liability. Today, the Board sends out for public comment the rules as the Board anticipates they will appear at second notice. The Board has made several changes to the rules since first notice and is taking this action today in order to receive comment on the changes before proceeding to second notice under the Administrative Procedure Act (5 ILCS 100/1-*let seq.* (1996)). By sending these rules out for public comment today, the Board will be able to make any changes necessitated by any comments before proceeding to second notice. In the sections that follow, the Board will provide some background for this rulemaking and a brief summary of the more substantive changes made to the proposed rules after first-notice publication.

BACKGROUND

Before adopting a proposal for first-notice publication in this rulemaking, the Board held four public hearings in this matter.¹ Those hearings were held on May 4, 1998, in Springfield, May 12, 1998, in Chicago, and May 27 and June 10, 1998, in Springfield. On September 3, 1998, the Board adopted procedures for determining proportionate share for first-notice publication. See Proportionate Share Liability (35 Ill. Adm. Code 741) (September 3, 1998), R97-16. Following the adoption of the proposal for first notice, the Board held two more public hearings in Springfield on October 19 and 20, 1998. The purpose of those hearings was to allow the Board to receive testimony from interested persons on the merits of the Board's first-notice proposal. Subsequent to those hearings, the Board received the following public comments²:

PC 17: First-notice Comments of the Illinois Environmental Protection Agency (Agency) (11/4/98).

PC 18: First-notice Comments of the United States Environmental Protection Agency (11/4/98).

PC 19: First-notice Comments of Karaganis & White (11/4/98).

¹ References to the Agency's proposal will be cited to as "Prop. at ___." References to the Agency's Statement of Reasons will be cited to as "Stat. at ___." References to the hearing transcripts will be cited to by volume as "Tr. _ at ___." References to exhibits will be cited to by number as "Exh. ___." Finally, references to public comments will be cited to by number as "PC ___."

² The Board has received in total 21 public comments in this proceedings. In this opinion, however, the Board only cites those comments received after the October hearings. For a list of the other comments received, please refer to the Board's first-notice opinion and order.

PC 20: First-notice Comments of the Illinois Attorney General's Office (AGO) (11/4/98).

PC 21: First-notice Comments of the City of Chicago (11/4/98).

Based on the comments at the October hearings and the public comments received following the adoption of the first-notice opinion and order, the Board has made several changes to the rules since first notice. In order to receive public input on these changes before they are adopted for second notice, the Board is extending the first-notice comment period and is sending the proposed rules out for public comment and review prior to adopting them for second notice. Given the statutory timeframe governing the Board in this proceeding, the public comment must unfortunately be limited. Despite the shortness of time, the Board believes that it is the better course of action to have a limited pre-second notice review than none at all. Accordingly, public comments must be received by the Clerk of the Board no later than 4:30 p.m. on November 23, 1998, to ensure that the comments will be considered by the Board in its deliberations as to how the regulations should read at second notice. The "mailbox rule" as set forth in 35 Ill. Adm. Code 101.102(d) does not apply to this filing. Telefax filings will be allowed. See 35 Ill. Adm. Code 101.102(c). The Board expects to move to second notice at the Board's December 3, 1998 meeting.

Anyone may file a public comment. If a person filing a public comment is on the service list, however, that person must also simultaneously send a copy of the public comment to all persons on the service list. As the service list may be updated from time to time, you should contact the hearing officer or the Clerk's Office to confirm that you have a copy of the current service list. All comments should reference the docket number in this proceeding, R97-16, as well as the name, address, and affiliation, if any, of the commentor.

A copy of the Board's opinion and order adopted today, as well as the Board's first-notice opinion and order, is available from the Clerk's Office and the hearing officer. The Board's opinions and orders are also available from the Board's web site at <http://www.ipcb.state.il.us>. Transcripts from all the hearings in this matter are also available from the Clerk's Office and from the Board's web site.

As the Board and other participants have noted, proportionate share is a new concept, and it therefore raises some difficult and complex issues. As a result, throughout the course of this proceeding, approximately 1,350 pages of testimony, questions, public comments, responses, and exhibits have been gathered. In adopting the proposed rules for pre-second notice publication, the Board has reviewed and considered all matters of record, including the testimony, exhibits, and public comments submitted by the Agency and other participants in this rulemaking. The Board commends the Agency, the AGO, the Site Remediation Advisory Committee (SRAC), and all others who participated in this proceeding. The time and thought that the participants devoted to this rulemaking gave the Board a well-developed record upon which to resolve those issues. The Board looks forward to the continued participation of these and other participants in this rulemaking.

In the section that follows, the Board summarizes the more substantive changes that were made to the first-notice proposal. Those wanting to review all the changes should consult the order portion of this document which shows all the changes made since the first notice proposal. The Board will provide a more detailed explanation of the changes when the Board adopts the proposal for second notice. However, in order to allow for a pre-second notice review by the participants, the Board could not provide the detailed explanation at this time. Again, the proposed rules are how the Board anticipates they will read at second notice. Based on any comments received on these draft rules, the Board may incorporate suggested changes into the rules before they are officially adopted for second notice. Readers seeking an overview of the first-notice proposal should consult the first-notice opinion and order. See Proportionate Share Liability (35 Ill. Adm. Code 741) (September 3, 1998), R97-16.

SUMMARY

Subpart A

Section 741.105 Applicability

At first notice, the Board declined to accept that part of the Agency's proposal that excluded certain sites or persons from Part 741 based on the limits contained in Section 58.1(a)(2) of Title XVII of the Act. Rather, as the Board interpreted Section 58.9, it was not limited by the provisions of Section 58.1(a)(2). The Board's interpretation rested primarily on the first phrase of Section 58.9, "[n]otwithstanding any other provisions of this Act to the contrary." The Board found that the "notwithstanding" language was clear and that Section 58.9 should therefore apply to all actions brought pursuant to the Act or the Groundwater Protection Act that seek a response or response costs.

The Agency, the AGO, and the SRAC continue to maintain that Section 58.1(a)(2) limits the applicability of Section 58.9. Based on the testimony and comments provided since first notice, the Board is persuaded that Section 58.1(a)(2) itself is ambiguous on the question of whether it limits Section 58.9. This ambiguity requires the Board to consider the legislative history of Title XVII, which favors the position espoused by the Agency, the AGO, and SRAC. In addition, the Board has considered the Act as a whole, including such provisions as Section 20(a)(8), in which the General Assembly found that "it is in the interest of the People of the State of Illinois to authorize such a hazardous waste management program and secure federal approval thereof, and thereby to avoid the existence of duplicative, overlapping or conflicting state and federal programs." See 415 ILCS 5/20(a)(8) (1996); see also Tr.5 at 94-95. Accordingly, in this draft proposal, the Board finds that the limitations in Section 58.1(a)(2) do apply to Section 58.9, thereby limiting the applicability of the Section 58.9. Section 741.105(f) reflects this change.

The Board has also made some other organizational and language changes in Section 741.105. Specifically, the Board has added a provision that the Board's procedures rules apply, unless there is a conflict between the procedural rules and the rules contained in Part 741. See Section 741.105(b). The Board has also included a provision which sets forth the proceedings which Part 741 applies to. See Section 741.105(a)(1), (2). The language is taken substantially from the statutory language of Section 58.9(a)(1) of the Act.

In the Board's first-notice opinion and order, the Board concluded that the regulations for determining proportionate share should apply to private enforcement actions that seek to recover costs. The Agency, the AGO, and the SRAC continue to raise concerns regarding this issue. The Board continues to believe that the statutory language covers private enforcement actions seeking cost recovery, and we therefore continue to include them in these rules. See Section 741.105(a)(1). The Board nonetheless recognizes that the inclusion of private enforcement actions seeking cost recovery presents complicated issues that cannot be fully examined in this rulemaking. At hearing, the Board raised a potential solution to these issues by linking private cost recovery actions to the Site Remediation Program. See Tr.5 at 30. The Board remains interested in attempting to resolve procedural difficulties inherent in private costs recovery actions, and if any participant would like this issue to be explored more fully in a separate docket, the Board would welcome comments on the merits of opening a separate docket.

Section 741.110 Definitions

Because the term proportionate share is used throughout the rules, the Board has included in this draft proposal a definition of "proportionate share." The language of the definition is based on the statutory language of Section 58.9. "Proportionate share," as proposed, "means a person's liability to perform or pay for a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in or under a site, based on the degree to which the performance or costs of a response result from the person's proximate causation of or contribution to the release or substantial threat of a release."

³ For those readers who would like a more in-depth analysis of the issues regarding applicability, please consult the Board's first-notice opinion and order.

Section 741.115 Discovery Before an Action is Filed

The Board has made several organizational changes to Section 741.115. The Board has also included some additional limitations on a petition brought under Section 741.115 to identify persons who may have proximately caused or contributed to a release or substantial threat of a release. These changes include: (1) the standard that the Board will use in determining whether to grant such a petition (see Section 741.115 (g)); (2) that the Board's order will automatically expire within 60 days after its issuance (see Section 741.115(h)); (3) that the petitioner must bear the reasonable expenses of providing the discovery (see Section 741.115(i)); and (4) that a petition under Section 741.115 may not be brought to obtain information from an agency subject to the Freedom of Information Act (5 ILCS 140 (1996)) or for information privileged under 35 Ill. Adm. Code 101 and 103 (see Section 741.115(k)). These changes were made in response to comments from several of the participants. See Exh. 19.

Section 741.120 Section 58.9(b) Notice

In the Board's first-notice proposal, Section 741.120 addressed Section 58.9(b) of the Act. Specifically, Section 741.120 in the Board's first-notice proposal related to the requirement of Section 58.9(b) of the Act that the Agency provide notice to a person of the need to perform a cleanup and an opportunity for the person to perform the cleanup. Section 741.120 also had procedures for the Agency to meet with the recipient of the notice.

Because the proposed rules address only Board procedures, the Board has deleted most of Section 741.120 as it was contained in the Board's first-notice proposal. The Board has retained that portion of the rule, however, that repeats the requirements as set forth in the statute and continues to require that notice be provided whenever the Agency seeks to require a person to perform a response. This provision will put the public on notice of the statutory requirements. Of course, the Agency may adopt whatever procedures it deems necessary to implement its responsibilities under Section 58.9.

Section 741.125 Notice to Agency

Concerns were raised regarding whether the Agency should receive notice of all actions seeking an allocation of proportionate share. Based on the comments received, the Board has retained the provision requiring that any person seeking an allocation of proportionate share serve a copy of the complaint or Subpart C petition on the Agency. After receiving the notice, the Agency may choose, but is not required, to participate in the proceeding. The Board has made clear, however, that if the Agency wishes to participate in the proceeding, it would need to file a petition to intervene under the Board's procedural rules. Once the petition was granted, the Agency would then have all the rights of an original party. The provisions on intervention were added to clarify the Agency's role in a proportionate share proceeding.

Section 741.130 Discovery After an Action is Filed

The Board has included language, suggested by the Agency, that documents must be compiled and made available for review that pertain to not only the release or threatened release, but also to a person's proportionate share. The Board has also included a provision that would protect from disclosure under this section privileged documents.

Section 741.135 Allocation Factors

In the Board's first-notice proposal, Section 741.135 contained provisions regarding the conduct of hearings. However, after further reflection, the Board believes that hearings where a response or response costs are sought will proceed like any other enforcement action. Therefore, the Board has included a provision in the applicability section that provides that the Board's procedural rules apply unless otherwise noted. As a result, the

Board has determined that a specific section on the conduct of hearings is unnecessary and has deleted it from the proposal.

In the proposal adopted today, Section 741.135 now deals with allocation factors. The Board has made several changes to this section based on the statutory language of Section 58.9.

Subpart B

Sections 741.205 and 741.210

In the Board's first-notice proposal, the Board had various sections in Subpart B dealing with the initiation of an allocation determination, proportionate share as a defense, necessary parties, pleading, proof of liability, and settlements. As the Board viewed the procedure at that time, there would be a proceeding to determine liability under the Act. Then, once liability under the Act had been established, a separate non-adversarial proceeding would commence to allocate shares of the response or response costs. In order to ensure that all the information regarding a person's proportionate share was disclosed, the Board included procedures regarding necessary parties, how to raise proportionate share as an affirmative defense, and how to plead proportionate share.

Following the first-notice proposal, the Board received several comments and heard testimony questioning the procedures set forth in the Board's first-notice proposal. Based upon those comments, the Board has made several changes to Subpart B. Besides a general introductory provision, the rules that the Board proposes today for Subpart B only contain provisions on the burden and standard of proof and final orders. All other provisions contained in Subpart B at first notice have been removed.

With Subpart B, the Board must once again look to the statutory language and meaning of Section 58.9 of the Act. In essence, Section 58.9 places a limit on the remedies that can be obtained from a person in an action seeking response costs or to require a response. With this in mind, the Board views a proceeding under Section 58.9 to be similar to an enforcement action, where the complainant has the burden of proving the violation of the Act and, to some extent, the remedy it seeks. While a complainant does not have to plead a specific percentage of liability for the performance or costs of a response, it does have to put forth sufficient evidence for the Board to determine the degree to which the performance or costs of a response resulted from the respondent's proximate cause of or contribution to a release or substantial threat of a release. Accordingly, the Board has included in Section 741.205 that the burden is on the complainant to prove by a preponderance of the evidence that the respondent proximately caused or contributed to a release or substantial threat of a release and the degree to which the performance or costs of a response resulted from the respondent's proximate cause of or contribution to the release or substantial threat of a release. The board has also included a provision in the rules that any defense raised in the action must be proved, as usual, by the person asserting the defense.

Subpart C

Section 741.300 General

In the Board's first-notice proposal, a Subpart C proceeding was limited to persons who sought to allocate among themselves the entire costs of the response. The Board has made changes to Subpart C to make clear that the participants can seek to allocate among themselves 100 percent of the performance or costs of a response, whether or not the response has been performed.

Section 741.320 Mediation

At first notice, the Board proposed a voluntary allocation proceeding under Subpart C where the participants could choose to engage in mediation or to proceed with the Board's allocation procedure. The Board

requested comment on whether the mediation provisions would be useful. Because the Board received no comment on the propriety of these provisions, the Board is hesitant to proceed with the procedural rules governing the mediation proceeding at this time without comment from the participants. Accordingly, the Board has deleted many of the procedural provisions concerning mediation at this time. The Board understands that the participants have placed more of the focus on other subparts. However, the Board would appreciate some comment on whether the mediation provisions should be retained or changed at second notice. If participants believe that mediation would be useful, the Board would also appreciate comment on whether more specific mediation provisions should be developed through a separate rulemaking.

Other Matters

The Board asked at the final hearing in this rulemaking what the various participants' positions were on the Board missing its statutory deadline in order to allow for further discussion of the rules. Tr.5 at 176-178. Some of the participants supported the approach in order to examine the changes before the rules were adopted for second notice. See PC 19; PC 20. However, because the Board intends to meet its statutory deadline, the Board has, at this point, provided for a short time period for review prior to adopting the rules for second notice.

ORDER

The Board adopts the proposed rules set forth below for public comment. Additions from first notice are underlined. Deletions from first notice are denoted by strike-through marks.

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE G: WASTE DISPOSAL
CHAPTER I: POLLUTION CONTROL BOARD

PART 741
PROPORTIONATE SHARE LIABILITY

SUBPART A: GENERAL

Section

741.100 Purpose

741.105 Applicability

741.110 Definitions

741.115 Discovery Before an Action is Filed

741.120 ~~Resolution of Issues in~~ Section 58.9(b) Notice

741.125 Notice to Agency

741.130 ~~Mandatory Disclosures and~~ Discovery After an Action is Filed

~~741.135 Conduct of Hearings~~

741.135~~40~~ Allocation Factors

741.140~~45~~ Relief from Final Orders

741.145~~50~~ Severability

SUBPART B: ALLOCATION OF PROPORTIONATE SHARES ~~DETERMINATION~~ WHEN A COMPLAINT
HAS BEEN FILED

741.200 General

741.205 Burden and Standard of Proof ~~Initiation of Allocation Determination~~

741.210 Final Orders ~~Proportionate Share Liability as a Defense~~

~~741.215 Necessary Parties~~

~~741.220 Pleading~~

741.225 ~~Proof of Liability~~
 741.230 ~~Settlements~~
 741.235 ~~Final Orders~~

SUBPART C: VOLUNTARY ALLOCATION PROCEEDINGS

741.300 General
 741.305 Initiation of Voluntary Allocation Proceeding
 741.310 Allocation Proposals and Hearing Requests
 741.315 Settlements
 741.320 ~~Mediation~~ Appointment of Mediator
 741.325 ~~Scheduling of Mediation and Mediation Conference~~
 741.325~~30~~ Settlement Through Mediation
 741.330~~35~~ Board Review and Final Orders

AUTHORITY: Implementing Section 58.9 and authorized by Section 58.9(d) of the Environmental Protection Act [415 ILCS 5/58.9]

ADOPTED: Adopted in R97-16 at ___ Ill. Reg. _____, effective _____, 19__.

SUBPART A: GENERAL

Section 741.100 Purpose

The purpose of this Part is to ~~define applicability and~~ establish procedures under ~~Section 58.9 of the Act for the~~ which the Board will allocation of proportionate shares of liability to perform or pay for ~~for the performance or cost of~~ a response resulting from the release or substantial threat of a release of regulated substances or pesticides on, in or under a site.

Section 741.105 Applicability

- a) This Part applies to proceedings before the Board in which:
- 1) Any person seeks, under the Environmental Protection Act [415 ILCS 5] or the Groundwater Protection Act [415 ILCS 55], to require another person to perform, or to recover the costs of a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in or under a site or
 - 2) Two or more persons seek to allocate among themselves 100 percent of the performance or costs of a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in or under a site.
- b) The Board's procedural rules at 35 Ill. Adm. Code 101 and 103 apply to all proceedings under this Part. However, in the event of a conflict between the rules of 35 Ill. Adm. Code 101 and 103 and this Part, this Part applies.
- c) Subpart A of this Part also applies to all proceedings under this Part. However, in the event of a conflict between the rules of Subpart A and subsequent subpart of this Part, the subsequent subpart applies.
- d) Subpart B of this Part applies when a complaint is filed with the Board that seeks, under the Environmental Protection Act [415 ILCS 5] or the Groundwater Protection Act [415 ILCS 55]:

- 1) To require any person to perform a response that results from a release or substantial threat of a release of regulated substances or pesticides; or
 - 2) To recover the costs of a response that results from a release or substantial threat of a release of regulated substances or pesticides.
- e) Subpart C of this Part applies when a petition is filed with the Board under Section 741.305 of this Part to allocate among the participants 100 percent of the performance or costs of a response that results from a release or substantial threat of a release of regulated substances or pesticides. No person may file a petition under Subpart C of this Part when a complaint has been filed in any forum that addresses the same release or substantial threat of a release.
- f) This Part does not apply to:
- 1) Any cost recovery action brought by the State under Section 22.2 of the Act to recover costs incurred by the State prior to July 1, 1996 (Section 58.9(f) of the Act)
 - 2) Sites on the National Priorities List (Appendix B of 40 CFR 300);
 - 3) Sites where a federal court order or a United States Environmental Protection Agency order requires an investigation or response
 - 4) The owner or operator of a treatment, storage or disposal site:
 - A) For which a current permit has been issued or is required under federal or State solid or hazardous waste laws; or
 - B) That is subject to closure or corrective action requirements under federal or State solid or hazardous waste laws
 - 5) The owner or operator of an underground storage tank system subject to federal or State underground storage tank laws.
- g) This Part applies to any person or site described in subsections (f)(2) through (f)(5) of this Section to the extent allowed by federal law, federal authorization or other federal approval.

~~Subpart B applies whenever a complaint has been filed before the Board:~~

- 1) ~~Requesting that the Board allocate proportionate shares of liability for a release or threatened release of a regulated substance; or~~
 - 2) ~~To which proportionate share liability has been raised as an affirmative defense.~~
- b) ~~Subpart C applies whenever a petition has been filed under Section 741.305 of this Part requesting the Board to require any person to conduct a response or to seek recovery of costs and where the participants agree to allocate among themselves the entire costs of remediation at a site.~~

e) ~~This Part is not applicable to ANY COST RECOVERY ACTION BROUGHT BY THE STATE UNDER SECTION 22.2 of the Act TO RECOVER COSTS INCURRED BY THE STATE PRIOR TO JULY 1, 1996. (Section 58.9(f) of the Act)~~

Section 741.110 Definitions

Except as stated in this Section, or unless a different meaning of a word or term is clear from the context, the definition of words or terms in this Part is the same as that applied to the same words or terms in the Environmental Protection Act [415 ILCS 5].

“Act” means the Environmental Protection Act [415 ILCS 5].

“Agency” means the Illinois Environmental Protection Agency.

“Board” means the Pollution Control Board.

“Person” means individual, trust, firm, joint stock company, joint venture, consortium, commercial entity, corporation (including a government corporation), partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body including the United States government and each department, agency, and instrumentality of the United States. (Section 58.2 of the Act)

“Pesticide” means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest or any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant. (Section 3.71 of the Act)

“Proportionate share” means a person’s liability to perform or pay for a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in or under a site, based on the degree to which the performance or costs of a response result from the person’s proximate causation of or contribution to the release or substantial threat of a release.

“Regulated substance” means any hazardous substance as defined under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 P.L. 96-510) and petroleum products including crude oil or any fraction thereof, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). (Section 58.2 of the Act)

“Release” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, but excludes any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons; emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine; release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under Section 170 of such Act; and the normal application of fertilizer. (Section 3.33 of the Act)

“Remedial action” means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a regulated substance or pesticides into the environment, to prevent or minimize the release of regulated substances or pesticides so that they do not migrate to cause substantial danger to present or

future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches or ditches, clay cover, neutralization, cleanup of released regulated substances or pesticides or contaminated materials, recycling or reuse, diversion destruction, segregation of reactive substances, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the Governor and Director determine that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of regulated substances or pesticides, or may otherwise be necessary to protect the public health or welfare. The term includes offsite transport of regulated substances, or the storage, treatment, destruction, or secure disposition offsite of such regulated substances or pesticides or contaminated materials. Remedial action also includes activities associated with compliance with the provisions of Sections 58.6 and 58.7 of the Act, including, but not limited to, the conduct of site investigations, preparations of work plans and reports, removal or treatment of contaminants, construction and maintenance of engineered barriers, and/or implementation of institutional controls. (Sections 3.34 and 58.2 of the Act)

“Remove” or “removal” means the cleanup or removal of released regulated substances or pesticides from the environment, actions as may be necessary to take in the event of the threat of release of regulated substances or pesticides into the environment, actions as may be necessary to monitor, assess, and evaluate the release or threat of release of regulated substances or pesticides, the disposal of removed material, or the taking of other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare of the environment, that may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals, and any emergency assistance that may be provided under the Illinois Emergency Management Act or any other law. (Section 3.35 of the Act)

“Respond” or “Response” means remove, removal, remedy, and remedial action. (Section 3.40 of the Act)

“Site” means any single location, place, tract of land or parcel of property or portion thereof, including contiguous property separated by a public right-of-way. (Section 58.2 of the Act)
This term also includes, but is not limited to, all buildings and improvements present at that location, place or tract of land.

Section 741.115 Discovery Before an Action is Filed

- a) Any person who wishes to engage in discovery before filing an action seeking an allocation of proportionate shares of liability and for the sole purpose of ascertaining the identity of a person who may be liable (at least in part) for a release or substantial threat of a release of regulated substances may file a petition with the Board for discovery necessary to identify persons who may have proximately caused or contributed to a release or substantial threat of release of regulated substances or pesticide for such discovery with the Board
- b) The petition, which must be supported by affidavit(s), must be brought in the name of the petitioner and must name as respondents the person or persons from whom discovery is sought.

A brief or memorandum and other supporting documents may be filed with the petition. The petition must include:

- 1) The name and address of the respondent(s);
- 2) The reason the proposed discovery is necessary including why the petitioner could not obtain the information sought by any other reasonable means
- 3) A copy of the proposed discovery request(s). The nature of the discovery sought
- 4) A statement, ~~supported by affidavit(s)~~, of the petitioner's basis for belief that there is a release or substantial threat of a release and that the respondent has or may have the information sought;
- 5) The petitioner's proposed time for compliance with the order (not less than 30 days from the date of issuance of the order) ~~and~~
- 6) A request that the Board enter an order authorizing petitioner to obtain such discovery and
- 7) A notice informing the respondent of the opportunity to respond to the petition within 14 days.

~~c) — A brief or memorandum and other supporting documents may be filed with the petition.~~

~~d) — The petition must be accompanied by an affidavit attesting that the petitioner could not obtain the information sought by any other reasonable means.~~

ce) The petitioner must ~~shall~~ serve a notice of filing and a copy of the petition and any supporting documents upon the person(s) to whom the order is to be directed whom must ~~shall~~ be designated the respondent(s). ~~The notice of filing must inform the respondent of the filing of the accompanying petition and of the respondent's opportunity to respond to the petition within 14 days after the date of service.~~

df) Within 14 days from the date of service of the petition, the respondent may file a response to the petition supported by affidavit(s) as necessary. The respondent may file a brief or memorandum and other supporting documents with the response. If no response is filed, the respondent is deemed to have waived objection to the discovery sought.

eg) The petitioner may reply to the response within 7 days after the date of service of the response.

fh) Petitioner must serve and file the petition. ~~Service and filing must be~~ in accordance with 35 Ill. Adm. Code 101.Subpart C, except that petitioner must ~~initially~~ ~~serve~~ ~~ee~~ of the petition ~~must be made~~ personally, by registered or certified mail, or by messenger service.

gi) The Board will review the petition, response, affidavit(s), and any other supporting documents on file and grant ~~or deny~~ the petition if the Board finds that the requested discovery, or a portion of the requested discovery that the Board specifies, is necessary to identify persons who may have proximately caused or contributed to a release or a substantial threat of a release of regulated substances or pesticides and that the information could not be obtained by any other reasonable means. ~~The order granting the petition will require the respondent to respond to authorized discovery, and will limit discovery to the identification of potentially liable persons.~~

~~Where a deposition is authorized the order will specify the time and place of the deposition and the name and address of each person to be examined, if known, or, if unknown, information sufficient to identify each person. The order will specify a reasonable time for compliance and the method of compliance.~~

~~h) Unless extended for causes shown, the Board's order automatically expires 60 days after issuance.~~

~~If any respondent fails to comply with a discovery request authorized under this Section, the petitioner may seek penalties under Section 42 of the Act.~~

~~i) The petitioner must bear the respondent's reasonable expenses of providing the discovery (excluding attorney fees).~~

~~j) Nothing in this Section limits the ability of any person to obtain information in any other lawful manner.~~

~~k) No petition under this Section may be brought:~~

~~1) Against agencies subject to the Freedom of Information Act [5 ILCS 140]; or~~

~~2) For information privileged under 35 Ill. Adm. Code 101 and 103.~~

Section 741.120 ~~Resolution of Issues in~~ Section 58.9(b) Notice

~~a) IN THE EVENT THE STATE OF ILLINOIS SEEKS TO REQUIRE A PERSON WHO MAY BE LIABLE PURSUANT TO THE ACT TO CONDUCT a response FOR A RELEASE OR THREATENED RELEASE OF A REGULATED SUBSTANCE, THE AGENCY SHALL PROVIDE NOTICE TO SUCH PERSON. (Section 58.9(b) of the Act) This notice may be combined with a notice under Section 4(q) of the Act.~~

~~b) The notice under subsection (a) of this Section must include:~~

~~1) Identification of a basis for liability;~~

~~2) Identification of the response to be performed; and~~

~~3) The opportunity for the person to perform the identified response.~~

~~c) At the time of notification pursuant to Section 58.9(b) of the Act or at any time subsequent thereto, the Agency may offer the person to whom the notice is sent an opportunity to meet with the Agency to resolve outstanding issues and to determine the costs of conducting the response that are attributable to the release or substantial threat of a release that such person or any other person caused or to which that person or any other person contributed.~~

~~d) The meeting described in subsection (c) of this Section must be held within 30 days after receipt of written notification of the opportunity unless the Agency agrees to a postponement.~~

~~e) In determining the proportionate share liability allocation, the allocation factors set forth in Section 741.140 of this Part may be considered.~~

Section 741.125 Notice to Agency

~~A person seeking allocation of proportionate shares must serve a copy of the complaint, or the petition under Subpart C of this Part, on the Agency within 30 days after the filing of the complaint or petition. Such person must serve the Agency pursuant to 35 Ill. Adm. Code 101.141. The Agency may file an application with the Board to intervene in the proceeding under 35 Ill. Adm. Code 103.142. The person initiating a proceeding seeking allocation shall give notice to the Agency, and the Agency may participate in any proceeding seeking allocation of proportionate shares of liability.~~

Section 741.130 ~~Mandatory Disclosures and~~ Discovery After an Action is Filed

- a) ~~Within time limits set by the Hearing Officer, each party is to a proceeding in which allocation of proportionate shares is sought must shall compile any and all documents within its their possession or control pertaining to the release or threatened release and the party's proportionate share and shall make the records available for review and copying by the parties. Documents protected from disclosure under 35 Ill. Adm. Code 101 and 103 are not subject to this Section.~~
- b) ~~Discovery is governed by 35 Ill. Adm. Code 101 and 103, and all discovery devices identified in 35 Ill. Adm. Code 101 and 103 are available to all parties in a proceeding to allocate proportionate shares of liability. Sanctions for failure to comply with procedural rules, subpoenas, or order of the Board or Hearing Officer shall be as set forth therein and as otherwise available under the Act.~~
- c) ~~Discovery pursuant to this Section is not applicable to mediation proceedings under this Part.~~

~~Section 741.135 Conduct of Hearings~~

- a) ~~In any proceeding initiated under Subpart B or C of this Part, the Board will hold a hearing on allocation of proportionate shares of liability, unless the parties have stipulated to allocation of all shares of liability.~~
- b) ~~Unless otherwise provided, hearings will be conducted pursuant to the procedures at 35 Ill. Adm. Code 101 and 103. Sanctions for failure to comply with procedural rules, subpoenas, or orders of the Board or Hearing Officer are as set forth therein and as otherwise available under the Act.~~
- c) ~~All parties and the Agency may present evidence relevant to allocation of proportionate shares of liability at the hearing.~~
- d) ~~If proportionate share liability is raised in an enforcement complaint or as an affirmative defense, the hearing on proportionate share liability may be combined with the hearing on the case in chief.~~

Section 741.13540 Allocation Factors

In determining ~~allocations~~ proportionate shares under this Part, the Board ~~will~~ may consider any or all factors ~~related to the cause of, or contribution to, a release or substantial threat of a release of regulated substances on, in or under the site, related to the degree to which the performance or costs of a response result from a person's proximate causation of or contribution to the release or substantial threat of a release. These factors include the following including but not limited to:~~

- a) The volume of regulated substances or pesticides for which each ~~liable~~ person is responsible;

- b) Consistent with the provisions of 35 Ill. Adm. Code 742 and the remediation of the site in a manner consistent with its current and reasonably foreseeable future use, the degree of risk or hazard posed by the regulated substances or pesticides contributed by each liable person;
- c) The degree of each liable person's involvement in any activity that proximately caused or contributed to the release or substantial threat of a release of regulated substances or pesticides at the site; and
- d) Any other factors relevant to liable person's proportionate share of liability.

Section 741.14045 Relief from Final Orders

- a) On written motion by any party ~~person participating in an allocation proceeding~~ the Board, for any of the reasons set forth in 35 Ill. Adm. Code 101.301(b), may provide relief from a final order in which the Board allocated proportionate shares, ~~entered in an allocation proceeding for any of the following reasons:~~
 - 1) ~~Newly discovered evidence that existed at the time of hearing and that by due diligence could not have been timely discovered;~~
 - 2) ~~Fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of a party; or~~
 - 3) ~~Void order, such as an order based on jurisdictional defects.~~
- b) Relief under subsection (a) of this Section may include reallocation of proportionate shares liability.
- c) The Board may decline to reopen an allocation determination if the motion and any supporting materials do not demonstrate that the reopening would result in significant changes in proportionate shares of liability.
- d) A motion under subsection (a) of this Section ~~does not affect the finality of a Board order or suspend the operation of a Board order. The motion must be filed in the same proceeding in which the order was entered but is not a continuation of that proceeding. The motion must be supported by affidavit or other appropriate showing as to matters not of record. The movant shall notify all parties or participants in the proceeding as provided by 35 Ill. Adm. Code 101.141(a).~~
- e) ~~A motion under subsection (a) must be filed with the Board within one year after entry of the order, except that when the response begins during where remediation of a site has begun before expiration of this one-year period, a motion under subsection (a) of this Section must be filed with the Board within three years after entry of the order. Upon written motion, the Board may extend either of these periods for cause shown.~~
- e~~f~~) Any response to a motion under this Section must be filed within 30 days after the filing of the motion.

Section 741.1450 Severability

If any Section, subsection, sentence or clause of this Part is judged invalid, such adjudication does not affect the validity of this Part as a whole or any Section, subsection, sentence or clause thereof not judged invalid.

SUBPART B: ALLOCATION ~~OF PROPORTIONATE SHARES DETERMINATION~~ WHEN
A COMPLAINT HAS BEEN FILED

Section 741.200 General

This Subpart sets forth the procedures that apply when a complaint is filed with the Board that seeks, under the Act or the Groundwater Protection Act [415 ILCS 55], to require any person to perform a response that results from a release or substantial threat of a release of regulated substances or pesticides or to recover the costs of a response. This Subpart also sets forth the burden and standard of proof for such actions, requirements for asserting proportionate share liability either in a complaint or as an affirmative defense to an enforcement complaint and sets forth provisions concerning necessary parties, pleading requirements, and procedures for the filing of stipulations and settlements.

Section 741.205 Burden and Standard of Proof ~~Initiation of Allocation Determination~~

- a) To establish a respondent's proportionate share, the complainant must prove the following by a preponderance of the evidence:
 - 1) That the respondent proximately caused or contributed to the release or substantial threat of a release of regulated substances or pesticides on, in or under a site; and
 - 2) The degree to which the performance or costs of a response result from the respondent's proximate causation of or contribution to the release of substantial threat of a release as established under subsection (a)(1) of this Section.
- b) Liability to perform or pay for a response that results from the release or substantial threat of a release of regulated substances or pesticides on, in or under a site is subject to all defenses allowed by law, including the defenses set forth in Sections 22.2(j) and 58.9(a)(2) of the Act. The respondent raising the defense must prove the defense by a preponderance of the evidence.
- c) A complainant is not required to plead a specific alleged percentage of liability for the performance or cost of a response in a complaint that seeks to require a respondent to perform or pay for a response that results from a release or substantial threat of a release of regulated substances or pesticides.

A complaint filed by the Agency, the State of Illinois, or any person to initiate an enforcement action may include a request for allocation of proportionate shares of liability.

Section 741.210 Final Orders ~~Proportionate Share Liability as a Defense~~

- a) Based on the evidence presented at hearing or in a stipulation, the Board will enter a final order that determines whether respondent proximately caused or contributed to a release or a substantial threat of a release.
- b) If the Board determines, under subsection (a) of this section, that respondent proximately caused or contributed to a release or a substantial threat of a release, the Board may, in its final order, order respondent to pay or perform a response. The Board may order respondent to pay or perform a response only to the degree to which a preponderance of the evidence shows that the performance or costs of a

response result from respondent's proximate causation of or contribution to a release or substantial threat of a release. In making this decision, the Board will consider the allocation factors of Section 741.135 of this Part.

- c) If any party fails to comply with the Board's order under this Section, any party may seek penalties under Section 42 of the Act. The Board may order a party that fails to comply with the Board's order under this Section to pay penalties under Section 42 of the Act.
- ~~a) When a complaint seeks to compel a response or recover costs of a response, it is an affirmative defense that the complaint seeks remediation or recovery of costs of a response beyond that which may be attributed to being PROXIMATELY CAUSED BY THE RESPONDENT'S ACT OR OMISSION OR BEYOND SUCH PERSON'S PROPORTIONATE DEGREE OF RESPONSIBILITY FOR COSTS OF THE response of RELEASES OF REGULATED SUBSTANCES THAT WERE PROXIMATELY CAUSED OR CONTRIBUTED TO BY 2 OR MORE PERSONS. (Section 58.1(a)(1) of the Act)~~
- ~~b) A respondent asserting the affirmative defense of proportionate share liability must allege facts establishing that two or more persons caused or contributed to a release of regulated substances.~~
- ~~c) Assertion of proportionate share liability as an affirmative defense does not initiate an allocation determination.~~

~~Section 741.215 Necessary Parties~~

~~All known parties that may have proximately caused or contributed to a release or threatened release subject to this Part, and that can be located through a diligent search, must be made parties to any action seeking allocation of proportionate shares of liability.~~

~~Section 741.220 Pleading~~

- ~~a) A complaint seeking an allocation of proportionate shares of liability, or a defense raising proportionate share liability, must allege facts establishing that two or more persons caused or contributed to a release of regulated substances from a site.~~
- ~~b) It is not necessary to plead a specific alleged percentage of liability of any party in order to initiate a determination of proportionate shares of liability.~~
- ~~c) If a respondent asserts proportionate share liability as a defense, a complainant may, within 30 days after service of the pleading raising the defense, amend the complaint to add a request for allocation of proportionate shares of liability. If the complaint is so amended, the complainant must add any additional parties required under Section 741.215 of this Part as respondents.~~

~~Section 741.225 Proof of Liability~~

~~The petitioner must prove by a preponderance of the evidence that the respondent caused or contributed to the release or substantial threat of a release in one or more of the following ways:~~

- ~~a) By act or omission that is a proximate cause of a release or a substantial threat of a release of regulated substances.~~

- b) ~~By act or omission that has aggravated or failed to mitigate a release or substantial threat of a release of regulated substances such that an additional response is necessary or additional costs of a response have been incurred.~~

~~Section 741.230 Settlements~~

- a) ~~At any time, all parties may agree to assign a certain percentage of liability to a particular party. Parties agreeing to such a settlement agree to assume any liability beyond the agreed percentage allocated to that party in a final Board order.~~
- b) ~~At any time, any number of parties may stipulate to entry of an order allocating 100 percent of liability for the payment of costs or performance of a response.~~

~~Section 741.235 Final Orders~~

- a) ~~Based on the evidence presented at hearing or a stipulation, the Board will enter a final order determining liability and allocating shares of liability for the payment of costs or performance of a response for each party.~~
- b) ~~If any party fails to comply with the Board's order, any party may seek penalties under Section 42 of the Act. Penalties may be imposed under Section 42 of the Act if the party fails to comply with a Board order.~~

SUBPART C: VOLUNTARY ALLOCATION PROCEEDINGS

Section 741.300 General

This Subpart sets forth the procedures that apply when two or more persons seek to allocate among themselves 100 percent of the performance or costs of a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in or under a site, circumstances under which an allocation proceeding may be initiated by participants who agree to allocate the entire costs of a response among themselves and when no complaint has been filed with the Board. This Subpart also includes provides procedures for mediation and settlements and the requirements and standards that the Board will use to issue final orders to be used by the Board in issuing final orders allocating proportionate shares of liability.

Section 741.305 Initiation of Voluntary Allocation Proceeding

- a) Participants that agree to accept 100 percent of liability to perform or pay for a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in or under a site, whether or not they stipulate to specific shares of such liability, agreeing to accept 100 percent of liability for a release and stipulating to specific shares of liability may initiate a voluntary allocation proceeding by filing a petition with the Board~~f~~:-
- b) ~~Participants agreeing to accept 100 percent of liability for a release but not stipulating to specific shares of liability, or stipulating to less than all shares, may initiate a voluntary allocation proceeding by filing a petition with the Board if:~~
- 1) There is an Agency-approved Remedial Action Plan for the site under 35 Ill. Adm. Code 740; or

- 2) There is a written agreement with the Agency ~~regarding with regard to~~ the performance of a ~~response remedial action~~ at the site following the issuance of a notice under Section 4(q) or Section 58.9(b) of the Act.
- be) The petition under subsections (a) ~~and (b)~~ of this Section ~~must~~ shall include the following information, ~~at a minimum~~:
- 1) The location and identity of the site for which an allocation of proportionate shares ~~of liability~~ is requested;
 - 2) The identity of all participants;
 - 3) The stipulated shares of specific participants, if any;
 - 4) Certification that the participants ~~agree have agreed~~ to allocate among themselves 100 percent of the performance or costs of the response ~~the entire cost of the response as provided in~~ under the Remedial Action Plan or written agreement with the Agency; and
 - 5) A statement that the participants choose to engage in ~~either~~ mediation under Sections 741.320 ~~and through~~ 741.325 ~~30~~ of this Subpart or to proceed with the Board's allocation proceeding ~~under~~ Sections 741.310 ~~and through~~ 741.315 of this Subpart.
- cd) Upon determination that the petition contains the required information, the Board ~~will~~ shall issue an order accepting the petition and assigning a ~~H~~ Hearing ~~O~~ fficer ~~as necessary~~.
- de) The nature of any response agreed to as part of a Remedial Action Plan or written agreement with the Agency cannot be contested during the allocation proceeding.
- ef) No person may file a petition under Subpart C when a complaint has been filed in any forum that addresses the same release or substantial threat of a release. ~~If a proceeding is initiated by the Agency, the State, or any person under Subpart B of this Part files a complaint in any forum against participants to a proceeding under this Subpart C that involves~~ the same release or substantial threat of a release, the Board may, upon motion by any participant or at its discretion, stay the Subpart C proceeding under this Subpart pending the outcome of the ~~other~~ Subpart B proceeding.

Section 741.310 Allocation Proposals and Hearing Requests

- a) Within 60 days following the close of discovery, the participants ~~must~~ shall submit a joint proposal to the Board that must include either or both of the following, as applicable:
- 1) For any or all of the participants, An agreed allocation of ~~the~~ proportionate shares ~~of responsibility for any or all of the participants~~
 - 2) A ~~request~~ proposal for hearing on all allocations of proportionate shares for which the participants have not ~~agreed~~ reached an agreed allocation
- b) If agreed allocations are reached for all participants, the allocated shares must total 100 percent of the performance or costs of the response ~~to be implemented~~ under the Remedial Action Plan or written agreement with the Agency.

- c) If a hearing is requested as part of the joint proposal under subsection (a) of this Section the ~~H~~hearing ~~O~~fficer will issue an order ~~for the scheduling to schedule~~ and conduct of the hearing and ~~address~~ any other matters ~~as deemed~~ necessary. The order ~~must require~~ include a requirement that, at least 30 days ~~before prior to~~ the date of hearing, ~~each the~~ participants shall submit a pre-hearing memorandum ~~and~~ setting forth the proportionate share that it accepts for which they accept responsibility and the issues to be resolved at the hearing.

Section 741.315 Settlements

Nothing in this Subpart shall prohibit the participants from entering at any time into a settlement for Board review if the settlement allocates among the settling participants agreed allocations among themselves at any time if the agreed allocations result in 100 percent of the performance or allocation of the costs of the response to be implemented under the Remedial Action Plan or written agreement with the Agency including any agreed allocations arising out of Section 741.310(a)(1) of this Part. Joint proposals shall be submitted to the Board for review under Section 741.335 of this Part

Section 741.320 Mediation Appointment of Mediator

- a) If the participants ~~have stated in the joint petition that they wish to engage in~~ engage in ~~hoese~~ mediation, the participants may file a joint notice ~~of that intent~~ with the Board designating a mediator whom the participants have mutually selected:
- 1) ~~Designating a mediator selected mutually by the participants; or~~
 - 2) ~~Requesting a list of qualified mediators maintained by the Board.~~
- b) ~~If the parties cannot agree upon a mediator within 14 days after the order accepting the case or 14 days after receipt of the Board's list of mediators, the parties shall so notify the Board within 7 days after the expiration of that period, and the Board will appoint a mediator from the Board's list.~~
- c) ~~The mediator must be compensated by the parties, and each party shall pay a pro rata share of the total costs of the mediator.~~
- bd) While mediation is proceeding, the time period ~~for~~ for the allocation proposal and hearing request under set forth in Section 741.310 of this Subpart, and all discovery proceedings under this Part and 35 Ill. Adm. Code 101 and 103 are suspended.

Section 741.325 ~~Scheduling of Mediation and Mediation Conference~~

- a) ~~The first mediation conference must be held within 30 days after the order appointing a mediator or within 30 days after the filing of the joint stipulation.~~
- b) ~~At least 10 days before the conference, the participants shall jointly present to the mediator any stipulations of facts or issues that have been agreed to and shall individually present to the mediator a confidential written summary of the case and statement of issues. The summary of the case should include the facts of the release, opinions on liability, statements on costs incurred or to be incurred, estimated costs of remediation, and any other relevant information.~~
- c) ~~Within 10 days after the order appointing the mediator or the filing of the joint stipulation, the mediator shall notify the participants in writing of the location, date and time of the mediation conference.~~

- d) ~~The mediator shall at all times be in control of the mediation process and the procedures to be followed in the mediation, and may extend the time periods contained in subsections (a), (b), and (c) above with the agreement of the participants.~~
- e) ~~The mediator may meet and consult privately with either participant and his/her representative during the mediation process.~~
- f) ~~All oral or written communications in a mediation conference, other than the executed settlement agreement, are inadmissible as evidence unless all participants agree otherwise. Evidence with respect to alleged agreements shall be admissible in proceedings to enforce the settlement. Subject to the foregoing, the mediator may not disclose any information obtained during the mediation process, unless authorized by the participants.~~
- g) ~~Discovery and discovery schedules will be at the discretion of the mediator.~~
- h) ~~If a participant fails to appear at a duly noticed mediation conference without good cause, the Board upon motion will impose sanctions against the participant failing to appear.~~
- ci) ~~Mediation must be completed within 12060 days after the participants have filed notice of their intent to mediate with the Board. Upon written motion, the Board may extend this period for cause shown.~~ First mediation conference unless extended by agreement of the participant

Section 741.32530 Settlement Through Mediation

- a) ~~If the participants reach an agreement is reached through mediation, it must be reduced to writing and signed by the participants and their counsel, if any. Within 14 days after execution of the agreement, the participants must shall file a joint motion to dismiss the Board action or a motion to accept the stipulated settlement agreement.~~
- b) ~~If the participants do not reach an agreement, the participants must shall report the lack of an agreement to the Board and file either:~~
- 1) ~~Aa joint motion to dismiss the Board action;~~ or
 - 2) ~~Aa joint motion to initiate or resume the Board allocation proceeding under Sections 741.310 and through 741.315 of this Subpart.~~
- c) ~~At any time, the participants may jointly file a motion to cease the mediation and begin or resume the Board's allocation proceedings under Sections 741.310 and through 741.315 of this Subpart.~~

Section 741.33035 Board Review and Final Orders

- a) ~~Based on the evidence presented at hearing or in a stipulation, the Board will enter a final order allocating a proportionate shares of liability for the payment of costs or performance of a response for to each participant.~~
- b) ~~The Board's final order will allocate 100 percent of the performance or costs of the response action to be implemented under the Remedial Action Plan or written agreement with the Agency. If the total of the agreed allocations under Section 741.310(a)(1) of this Subpart Part and the proportionate shares allocation of shares of responsibility demonstrated during the hearing~~

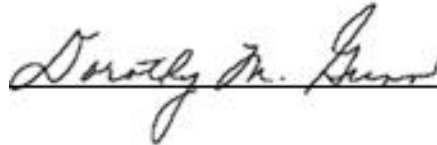
~~process by the remaining participants~~ do not equal 100 percent of the ~~performance or~~ costs of the response, ~~action to be implemented under the Remedial Action Plan or written agreement with the Agency,~~ the Board's order ~~will allocate must apportion~~ the remaining liability ~~for performance or costs~~ among all of the participants in the same ratio as the shares that have been agreed upon or demonstrated ~~for each participant~~ during the hearing.

- c) The Board's final order will include an order to perform or pay for the response based on the proportionate shares determined during the proceeding.
- d) The Board may impose Penalties may be imposed under Section 42 of the Act if a participant party fails to comply with a Board order under this Section.

IT IS SO ORDERED.

Board Member R.C. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 12th day of November 1998 by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board