

ILLINOIS POLLUTION CONTROL BOARD  
December 17, 1998

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

Adopted Rule. Final Order.

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

In 1995, the Illinois General Assembly adopted legislation repealing joint and several liability in actions involving environmental remediation and replaced it with proportionate share liability. See Pub. Act 89-443, eff. July 1, 1996. This new proportionate share scheme is contained in Section 58.9 of the Environmental Protection Act (Act) (415 ILCS 5/58.9 (1996)). In the same piece of legislation, the Board was charged with adopting rules and procedures to determine proportionate share. These rules and procedures must be adopted before January 1, 1999. See Pub. Act 90-484, eff. August 17, 1997 (Amended 415 ILCS 5/58.9(d) (1996)). The Board today adopts those procedures for determining proportionate share.

In this final opinion and order, the Board adopts the rules proposed at second notice with minor modification. The Board also discusses the procedural history of this rulemaking, including the Board's major findings at first and second notice, and a summary of rules adopted today. Readers seeking a detailed discussion of the issues that the Board decided at first or second notice should consult the Board's opinions and orders at first and second notice. See Proportionate Share Liability (35 Ill. Adm. Code 741) (September 3, 1998), R97-16; Proportionate Share Liability (December 3, 1998), R97-16.

PROCEDURAL HISTORY

On December 5, 1996, the Board on its own motion opened a docket to solicit public comments and/or proposals to assist in the promulgation of rules and procedures implementing the proportionate share provisions of Section 58.9 of the Act. See Proportionate Share Liability (December 5, 1996), R97-16. On February 2, 1998, the Illinois Environmental Protection Agency (Agency) filed a rulemaking proposal with the Board to implement the provisions of Section 58.9. The Agency's proposal was the result of a coordinated effort between the Agency, the Illinois Attorney General's Office (AGO), and the Site Remediation Advisory Committee (SRAC).<sup>1</sup> On February 5, 1998, the Board accepted this matter for hearing. See Proportionate Share Liability (February 5, 1998), R97-16. Prior to adopting rules for first notice, the Board held four public

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<sup>1</sup> The SRAC was established by Section 58.11 of the Act, adopted as part of the Site Remediation Program legislation, to advise the Agency in developing regulatory proposals to implement Title XVII. See 415 ILCS 5/58.11 (1996). The SRAC consists of one member from each of the following organizations: the Illinois State Chamber of Commerce, the Illinois Manufacturers Association, the Chemical Industry Council of Illinois (CICI), the Consulting Engineers Council of Illinois, the Illinois Bankers Association, the Community Bankers Association of Illinois, and the National Solid Waste Management Association. See 415 ILCS 5/58.11(a) (1996).

hearings.<sup>2</sup> Those hearings were held on May 4, 1998, in Springfield; May 12, 1998, in Chicago; and May 27 and June 10, 1998, in Springfield.

At the May 4, 1998 hearing, Gary P. King, manager of the Division of Remediation Management within the Agency's Bureau of Land, and John S. Sherrill, an Agency employee in the Remedial Project Management Section of the Division of Remediation Management within the Agency's Bureau of Land, testified and responded to prefiled questions. At the May 12, 1998 hearing, the Agency's witnesses again testified, along with Matthew J. Dunn, Chief of the State-wide Environmental Enforcement/Asbestos Litigation Division of the AGO. At the May 27, 1998 hearing, the Agency's witnesses again testified, along with several other witnesses: Sidney M. Marder, Executive Director of the Illinois Environmental Regulatory Group (IERG); David L. Rieser, a partner at Ross & Hardies, representing the Illinois Steel Group (ISG) and the CICI; David E. Howe, Senior Attorney at Caterpillar, Inc.; and Laurel O'Sullivan, Staff Attorney for Business and Professional People for the Public Interest (BPI). At the fourth hearing on June 10, 1998, Carey Rosemarin, an attorney with Jenner & Block, testified on behalf of Commonwealth Edison (Com Ed), and the Agency provided additional testimony in response to the other testimony presented at the hearings.

At the close of the fourth hearing, the hearing officer established a deadline for interested persons to file public comments before the Board proceeded to first notice in this rulemaking. Fifteen public comments were received before the Board adopted rules for first notice.<sup>3</sup>

On September 3, 1998, the Board proposed rules for first notice. See Proportionate Share Liability (September 3, 1998), R97-16. The proposal adopted was a modified version of the Agency's proposal. Specifically, at first notice, the Board adopted rules: (1) providing for limited discovery before an action had been filed; (2) requiring that the Agency be notified of all actions seeking allocations of proportionate share; (3) providing for the mandatory disclosure and discovery of all documents pertaining to the release at a site; (4) listing allocation factors the Board could consider in making an allocation determination; (5) providing for reallocation in certain circumstances following a final determination; (6) governing how proportionate share could be raised as an affirmative defense, rather than adopting rules governing which party had the burden to prove proportionate share; and (7) governing voluntary allocation proceedings where all participants agree to allocate 100% of the performance or costs of a response.

The Board also determined at first notice that the limitations contained in Section 58.1(a)(2) of the Act did not apply to Section 58.9, and thus the proportionate share rules. The Board reached this decision by looking primarily at the words in Section 58.9 "[n]otwithstanding any other provisions of this Act to the contrary." The Board additionally concluded at first notice that Section 58.9 applied to private enforcement actions seeking cost recovery. In making this determination, the Board relied again on the language of Section 58.9. Finally, the Board also concluded at first notice that rather than assigning a particular party the burden to prove another's proportionate share, the Board would make that determination based on all evidence presented by the parties. See Proportionate Share Liability (September 3, 1998), R97-16.

The first-notice rules were published in the *Illinois Register* on September 18, 1998. See 22 Ill. Reg. 16425-16440. They were also posted on the Board's Web site and sent to the persons on the notice list. Upon publication in the *Illinois Register*, a 45-day public comment period began.

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<sup>2</sup> A prehearing conference was also held on October 28, 1997, in Springfield, Illinois.

<sup>3</sup> For a complete list of all the public comments filed with the Board and all exhibits entered into the record in this proceeding, please refer to Attachments A and B, respectively.

During the first-notice period, the Board held two more public hearings on October 19 and 20, 1998, in Springfield. 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. At the October hearings, the following persons testified: Gary King of the Agency; Matthew Dunn and Elizabeth Wallace of the AGO; David Rieser on behalf of the SRAC; and Whitney Rosen on behalf of the IERG. To ensure that all public comments would be received and considered by the Board prior to second notice, the Board established November 9, 1998, as the deadline for receiving public comments. During this public comment period, the Board received six public comments.

Based on the testimony at the October hearings and the public comments received following the adoption of the first-notice opinion and order, the Board made substantial revisions to the rules adopted at first notice. To receive public input on these changes before they were officially adopted for second notice, the Board adopted an opinion and order with proposed changes for second notice and solicited public comment on the changes by extending the first-notice comment period to November 23, 1998. The proposed second notice rules were sent to the persons on the notice list and were also posted on the Board's Web site. See Proportionate Share Liability: 35 Ill. Adm. Code 741 (November 12, 1998), R97-16. During the extended first-notice period, the Board received seven additional public comments.

On December 3, 1998, the Board adopted proposed rules, with amendments based on the comments received after first notice, for second notice. See Proportionate Share Liability: 35 Ill. Adm. Code 741 (December 3, 1998), R97-16. The two major changes the Board made concerned the applicability of the proportionate share rules and the burden to prove a respondent's proportionate share. Regarding applicability, the Board reconsidered its position, taken at first notice, on the applicability of the proportionate share rules. Upon reconsideration, the Board found, at second notice, that Section 58.1(a)(2) was ambiguous as to whether the limits in Section 58.1(a)(2) applied to Section 58.9, and thus the proportionate share rules. Therefore, the Board looked to the legislative history of the Act and other aids to determine the legislative intent of Section 58.1(a)(2). The Board found that the language of the Act as a whole, the purposes of the Act, and the legislative history of the Act, supported a finding that the limits of Section 58.1(a)(2) applied to Section 58.9 and thus the proportionate share rules. Based on this conclusion, the Board amended the applicability section of the proportionate share rules at second notice to reflect the limitations on the sites and persons subject to Title XVII in Section 58.1(a)(2). See Proportionate Share Liability (December 3, 1998), slip op. at 9-13.

Further, based on the comments received after first notice, the Board was persuaded that Section 58.9 was a limitation on the remedy for an action seeking costs for a response or the performance of a response. Therefore, the Board deleted the sections contained in the rules at first notice concerning how proportionate share could be raised as an affirmative defense and replaced those sections with provisions on the burden of proof and final orders. Specifically, the Board determined that the burden to prove a respondent's proportionate share should be placed on the complainant, *i.e.*, the complainant must prove 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 causation of or contribution to the release or substantial threat of a release. The Board based this conclusion on the language of Section 58.9. The Board also found that the arguments that the burden should be on the respondent were without merit and that the burden to prove a respondent's proportionate share should be on the complainant, just as the remainder of the Act places the burden of proving any other violation of the Act on the complainant. See Proportionate Share Liability (December 3, 1998), slip op. at 30-34.

Following the adoption of the rules for second notice, the Joint Committee on Administrative Rules (JCAR)<sup>4</sup> requested a few minor changes to the rules proposed at second notice. These changes are not substantive and do not merit discussion. With these minor modifications, JCAR considered the proposed rules at its December 15, 1998 meeting and voted an objection to Section 741.105(f)(2) through (5) of the proposed rules. These subsections exclude from the proportionate share rules sites involving federal cleanups or federal regulatory programs that Illinois implements. These limitations are based on the limitations contained in Section 58.1(a)(2) of the Act, which is the applicability section for Title XVII. Specifically, JCAR stated that it objected to Section 741.105(f)(2) through (5) because “by creating exemptions from this Part, the rule contravenes Section 58.9(a)(1) of the Environmental Protection Act that broadly applies the concept of proportionate share liability to all remediation actions brought after the effective date of that Section.”

The Board respectfully disagrees with JCAR’s conclusion. As the Board explained at second notice, Section 58.9(a)(1) is ambiguous as to whether the limitations contained in that section apply to Section 58.9 and thus the proportionate share rules. However, after considering the legislative history of Section 58.9 and the purposes of the Act, the Board concluded that the limitations in Section 58.1(a)(2), which exclude sites involving federal cleanups or federal regulatory programs that Illinois implements under Title XVII, applies to Section 58.9. Thus, the Board found at second notice that Section 58.9 or proportionate share liability applies only to the remaining universe of sites. See Proportionate Share Liability (December 3, 1998), slip op. at 9-13.

The Board continues to believe that this interpretation is correct and is consistent both with the General Assembly’s intent and the language of the Act as a whole. The legislative debates on Title XVII certainly show that the General Assembly intended the various federal sites listed in Section 58.1(a)(2) to be excluded from the proportionate share scheme. For example, in response to a question about proportionate share liability, Representative Persico, Chairman of the House Energy and Environment Committee and the House sponsor of the underlying bill for Title XVII, stated:

We exempt out of this particular Bill any federal or superfund site . . . . 89th Ill. Gen. Assem., House Proceedings, May 19, 1995, at 47.

Similarly, Senator Mahar, Chairman of the Senate Environmental Committee and the Senate sponsor of House Bill 544 stated:

[T]he legislation applies to all remedial activities, excluding specifically noted activities governed by federal law . . . . 89th Ill. Gen. Assem., Senate Proceedings, May 19, 1995, at 64.

The language of the Act as a whole also makes it clear that the General Assembly intended Illinois to administer the federal solid waste, hazardous waste, and underground storage tank

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<sup>4</sup> JCAR is a legislative oversight committee that may “examine any proposed rule, amendment to a rule, and repeal of a rule to determine whether the proposed rule, amendment to a rule, or repeal of a rule is within the statutory authority upon which it is based; whether the rules, amendment to a rule, or repeal of a rule is in proper form; and whether the notice was given before its adoption, amendment, or repeal and was sufficient to give adequate notice of the purpose and effect of the rule, amendment, or repeal. In addition, [JCAR] may consider whether the agency has considered alternatives to the rule that are consistent with the stated objectives of both the applicable statutes and regulations and whether the rules is designed to minimize economic impact on small businesses.” 5 ILCS 100/5-110(a) (1996).

programs. See 415 ILCS 5/4, 20, 22.12, 57 (1996). The General Assembly did so because it wanted to avoid duplicative, overlapping, or conflicting State and federal programs. But, if proportionate share liability is applied to sites regulated under these programs, the United States Environmental Protection Agency (USEPA) has stated that it may withdraw Illinois' authority to administer these programs. See Public Comments 11 and 23. Illinois also could lose federal funding to implement these programs. The Board's interpretation of proportionate share liability therefore preserves Illinois' authority to administer the federal programs. Finally, the Board's interpretation is good public policy. Under the Board's approach, proportionate share liability will be applied without jeopardizing Illinois' regulatory programs.

Because the Board sees no reason to modify the provisions on applicability in the rules, the Board today adopts the proposed rules without substantive change from second notice.<sup>5</sup>

#### STATUTE IMPLEMENTED BY RULES

Section 58.9 of the Act provides that no action may be brought:

to require any person to conduct remedial action or to seek recovery of costs for remedial activity . . . beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act or omission or beyond such 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. See 415 ILCS 5/58.9(a)(1) (1996).

Section 58.9 further exempts from performing remedial action any person who neither caused nor contributed to, in any material respect, the release of regulated substances. See 415 ILCS 5/58.9(a)(2)(A) (1996). Section 58.9 also provides that if the State of Illinois seeks to require a person to conduct remedial activities, the Agency must provide notice to such person. The notice must include "the necessity to conduct remedial action pursuant to this Title and an opportunity for the person to perform the remedial action." 415 ILCS 5/58.9(b) (1998). If the Agency has issued the statutorily-required notice, Section 58.9 provides that the Agency and person to whom such notice was directed may attempt to determine the costs of conducting the remedial action that are attributable to the releases to which such person or any other person caused or contributed. See 415 ILCS 5/58.9(c) (1996).

Nothing in Section 58.9, however, limits the authority of the Agency to provide notice under Section 4(q) of the Act or to undertake investigative, preventive, or corrective action under any other applicable provisions of the Act. Section 58.9 also does not apply to any cost recovery action brought by the State under Section 22.2 of the Act (415 ILCS 5/22.2 (1996)) to recover costs incurred by the State prior to July 1, 1996. See 415 ILCS 5/58.9(f) (1996).

In addition to establishing proportionate share in environmental actions, Section 58.9 also directs the Board to adopt rules and procedures for determining proportionate share before January

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<sup>5</sup> Section 5-100(g) of the Illinois Administrative Procedure Act allows an agency to refuse to modify or withdraw a proposed rule to remedy an objection by JCAR. The agency must notify JCAR in writing of its refusal and submit a notice of refusal to the Secretary of State. The notice must be published in the next available issue of the *Illinois Register*. If JCAR decides to recommend legislative action in response to an agency refusal, then JCAR "shall have drafted and introduced into either house of the General Assembly appropriate legislation to implement the recommendations of the Joint Committee." 5 ILCS 100/5-110(g) (1996).

1, 1999. See Pub. Act 90-484, eff. August 17, 1997 (amended 415 ILCS 5/58.9 (1996)). The regulations adopted by the Board to implement Section 58.9 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).

The rules and procedures adopted by the Board today fulfill the statutory mandates of Section 58.9.

### SUMMARY OF THE PROPORTIONATE SHARE RULES<sup>6</sup>

The rules adopted today contain procedures and conditions under which the Board will allocate proportionate shares of the performance or cost of a response resulting from the release or substantial threat of a release of regulated substances or pesticides on, in, under, or from a site. See 415 ILCS 5/58.9(d) (1996).

The rules apply to two types of proceedings. First, the rules apply to enforcement actions in which the State or a private party files a complaint with the Board that seeks to require another person to perform, or seeks to recover the costs of, a response. Second, the rules apply to proceedings in which two or more persons voluntarily seek to allocate 100% of the performance or cost of a response between themselves. In either type of proceeding, however, Part 741 does not apply to (a) actions to recover costs incurred by the State prior to July 1, 1996; (b) sites on the National Priorities List; (c) sites where a federal court order or a USEPA order requires an investigation or response; (d) the owner or operator of a site for which a permit has been issued or is required under federal or State solid or hazardous waste laws, or that is subject to closure or corrective action requirements under federal or State solid or hazardous waste laws; or (e) the owner or operator of an underground storage tank system subject to federal or State underground storage tank laws.

The corresponding applicability provisions, as well as definitions and other general information and procedures, are set forth in Subpart A. Subpart A also provides for discovery before an action is filed for the sole purpose of obtaining information necessary to identify persons who may have proximately caused or contributed to a release or threatened release. A party seeking to engage in such discovery must file a petition with the Board. The petitioner must support the petition with an affidavit stating the petitioner's basis for belief that there has been a release or substantial threat of a release, that the respondent may have discoverable information, and that the petitioner could not obtain the information by any other reasonable means. A respondent may oppose a petition for prefiling discovery. Prefiling discovery may not be obtained against entities subject to the Freedom of Information Act (5 ILCS 140/1 *et seq.* (1996)) and cannot require the production of privileged information.

Subpart B sets forth the burden and standard of proof and elements of final orders allocating proportionate shares where a complaint has been filed by any person under the Act or the

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<sup>6</sup> This is a general summary and broadly describes the rules. Not all aspects of the proposed rules are addressed. For an in-depth analysis of the provisions in the rules and the issues raised regarding each section of the rules, please refer to the Board's first- and second-notice opinions and orders.

Groundwater Protection Act (415 ILCS 55/1 *et seq.* (1996)) to require another person to perform a response or to recover the costs of a response. To establish a respondent's proportionate share, the complainant must prove that the respondent proximately caused or contributed to a release. The complainant must also provide evidence of the degree to which the response was the result of the respondent's proximate causation of or contribution to a release of a regulated substance or pesticide. At the conclusion of the action, the Board will enter a final order determining whether the respondent proximately caused or contributed to a release. If so, the Board will also determine the respondent's share of the response and order the respondent to perform or pay for its proportionate share of the response.

In the second type of proceeding, the rules contained in Subpart C govern. Two or more persons who agree to accept 100% of liability to perform or pay for a response may initiate a voluntary allocation proceeding before the Board by filing a joint petition. These voluntary allocation procedures are available only if there is an Agency-approved Remedial Action Plan for the site or if there is a written agreement with the Agency regarding the performance of a response at the site following the issuance of a notice under Section 4(q) or Section 58.9(b) of the Act. At any time, participants may suspend a Subpart C proceeding for up to 120 days to engage in mediation. If the participants reach an agreement on allocation of proportionate shares, the participants can either file a motion to dismiss the allocation proceeding before the Board or file a stipulated settlement agreement with the Board. Absent an agreement, the Board will allocate liability among the participants based on the evidence presented at a hearing and enter an order directing the participants to perform the response or pay costs.

Parties may obtain relief from final orders allocating proportionate shares, including reallocation, based on newly discovered evidence that existed at the time of hearing and could not have been discovered by due diligence. (Relief may also be obtained for fraud or a void order.) "Due diligence" in this context means diligence in performing studies common and appropriate to development of a remediation plan. A motion for relief must be filed within one year of entry of the order, unless the response begins within that year, in which case the time for filing a motion for relief is extended to three years. Either of these time periods may be extended by the Board for cause.

### CONCLUSION

Based upon the record in this proceeding, the Board finds that adoption of the proposed rules is warranted. The Board also finds that these rules will not have an adverse economic impact on the people of the State of Illinois. See 415 ILCS 5/27(b) (1996).

### ORDER

The Board hereby adopts the following rules as 35 Ill. Adm. Code 741. The Clerk of the Board is directed to cause the following rules to be filed with the Secretary of State for publication in the *Illinois Register*:

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	Section 58.9(b) Notice
741.125	Notice to Agency
741.130	Discovery After an Action is Filed
741.135	Allocation Factors
741.140	Relief from Final Orders
741.145	Severability

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

741.200	General
741.205	Burden and Standard of Proof
741.210	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
741.325	Settlement Through Mediation
741.330	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]

SOURCE: Adopted in R97-16 at 22 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_, 19\_\_\_\_.

#### SUBPART A: GENERAL

##### Section 741.100 Purpose

The purpose of this Part is to establish procedures under which the Board will allocate proportionate shares of the performance or costs of a response resulting from the release or substantial threat of a release of regulated substances or pesticides on, in, under or from 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, under or from 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, under or from 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 Subparts 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 or the Groundwater Protection Act:
    - 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.

#### 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 share of the performance or costs of a response based on the degree to which the performance or costs 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 pesticides, 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 proportionate shares may file a petition with the Board for discovery for the sole purpose of identifying persons who may have proximately caused or contributed to a release or substantial threat of release of regulated substances or pesticides.

- b) The petition, which must be supported by affidavits, 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 respondents;
  - 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 requests;
  - 4) A statement 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);
  - 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 30 days.
- c) The petitioner must serve a notice of filing and a copy of the petition and any supporting documents upon the persons to whom the order is to be directed who must be designated the respondents.
- d) Within 30 days from the date of service of the petition, the respondent may file a response to the petition supported by affidavits 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.
- e) The petitioner may reply to the response within 7 days after the date of service of the response.
- f) Petitioner must serve and file the petition in accordance with 35 Ill. Adm. Code 101.Subpart C, except that petitioner must initially serve the petition personally, by registered or certified mail, or by messenger service.
- g) The Board will review the petition, response, affidavits, and any other supporting documents on file and grant 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 will specify a reasonable time for compliance and the method of compliance.

- h) Unless extended for cause 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      Section 58.9(b) Notice

*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. Such notice shall include the necessity to conduct a response pursuant to Title XVII of the Act and an opportunity for the person to perform the response. (Section 58.9(b) of the Act)*

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.

Section 741.130      Discovery After an Action is Filed

- a) Within time limits set by the hearing officer, each party to a proceeding in which allocation of proportionate shares is sought must compile any and all documents within its 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. Sanctions for failure to comply with procedural rules, subpoenas, or order of the Board or hearing officer will be as set forth therein and as otherwise available under the Act.

Section 741.135      Allocation Factors

In determining proportionate shares under this Part, the Board will consider any or all factors 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:

- a) The volume of regulated substances or pesticides for which each 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 person;
- c) The degree of each 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; and
- d) Any other factors relevant to a person's proportionate share.

Section 741.140 Relief from Final Orders

- a) On written motion by any party, 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.
- b) Relief under subsection (a) of this Section may include reallocation of proportionate shares.
- 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.
- d) A motion under subsection (a) of this Section must be filed with the Board within one year after entry of the order, except that when the response begins during 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) Any response to a motion under this Section must be filed within 30 days after the filing of the motion.

Section 741.145 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 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.

**Section 741.205            Burden and Standard of Proof**

- 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 a release or substantial threat of a release of regulated substances or pesticides on, in, under or from 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 or 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, under or from a site is subject to all defenses allowed by law, including the defenses set forth in Section 22.2(j) of the Act, and the limitations set forth in Section 58.9(a)(2) of the Act. The respondent raising a defense set forth in Section 22.2(j) or a limitation set forth in Section 58.9(a)(2) of the Act must prove the defense or limitation by a preponderance of the evidence.
- c) A complainant is not required to plead a specific alleged percentage of liability for the performance or costs 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.

**Section 741.210            Final Orders**

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

**SUBPART C: VOLUNTARY ALLOCATION PROCEEDINGS**

Section 741.300            General

This Subpart sets forth the procedures that may 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, under or from a site. This Subpart also includes procedures for mediation and settlements and the requirements and standards that the Board will use to issue final orders.

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, under or from a site, whether or not they stipulate to specific shares of such liability, 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 the performance of a response at the site following the issuance of a notice under Section 4(q) or Section 58.9(b) of the Act.
- b) The petition under subsection (a) of this Section must include the following information:
  - 1) The location and identity of the site for which an allocation of proportionate shares is requested;
  - 2) The identity of all participants;
  - 3) The stipulated shares of specific participants, if any;
  - 4) Certification that the participants agree to allocate among themselves 100 percent of the performance or costs of the response 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 741.325 of this Subpart or to proceed with the Board's allocation proceedings under Sections 741.310 and 741.315 of this Subpart.
- c) Upon determination that the petition contains the required information, the Board will issue an order accepting the petition and assigning a hearing officer as necessary.
- d) 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.
- e) 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. If the Agency, the State, or any person files a complaint in any forum 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 proceedings under this Subpart pending the outcome of the other proceeding. The State, the Agency or any party to the other proceeding also may appear specially to move the Board to stay the proceedings under this Subpart.

Section 741.310 Allocation Proposals and Hearing Requests

- a) Within 60 days following the close of discovery, the participants must 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 proportionate shares;
  - 2) A request for hearing on all allocations of proportionate shares for which the participants have not agreed.
- b) If agreed allocations are reached for all participants, the allocated shares must total 100 percent of the performance or costs of the response 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 hearing officer will issue an order to schedule and conduct the hearing and address any other matters as necessary. The order must require that, at least 30 days before the date of hearing, each participant submit a pre-hearing memorandum setting forth the proportionate share that it accepts and the issues to be resolved at the hearing.

Section 741.315 Settlements

Nothing in this Subpart prohibits the participants from at any time entering into a settlement for Board review if the settlement allocates among the settling participants 100 percent of the performance or costs of the response under the Remedial Action Plan or written agreement with the Agency.

Section 741.320 Mediation

- a) If the participants wish to engage in mediation, the participants may file a joint notice of that intent with the Board designating a mediator whom the participants have mutually selected.
- b) While mediation is proceeding, the time period for the allocation proposal and hearing request under Section 741.310 of this Subpart and all discovery proceedings under this Part and 35 Ill. Adm. Code 101 and 103 are suspended.
- c) Mediation must be completed within 120 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.

Section 741.325 Settlement Through Mediation

- a) If the participants reach an agreement through mediation, it must be reduced to writing and signed by the participants. Within 14 days after execution of the

agreement, the participants must 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 report the lack of an agreement to the Board and file either:
  - 1) A joint motion to dismiss the Board action; or
  - 2) A joint motion to initiate or resume the Board allocation proceeding under Sections 741.310 and 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 741.315 of this Subpart.

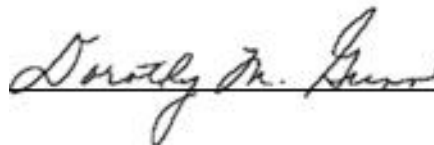
Section 741.330 Board Review and Final Orders

- a) Based on the evidence presented at hearing or in a stipulation, the Board will enter a final order allocating a proportionate share to each participant.
- b) The Board's final order will allocate 100 percent of the performance or costs of the response 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 and the proportionate shares demonstrated during the hearing do not equal 100 percent of the performance or costs of the response, the Board's order will allocate 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 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 under Section 42 of the Act if a participant fails to comply with a Board order under this Section.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 17th day of December 1998 by a vote of 6-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board



**ATTACHMENT A - R97-16**  
**PUBLIC COMMENTS (PC)**

- PC 1: Comments of the IERG, submitted by Whitney Rosen (3/21/97).
- PC 2: Comments of the National Association of Independent Insurers, submitted by Richard Hodyl, Jr., Insurance Services Counsel (3/28/97).
- PC 3: Supplemental comments of the IERG, submitted by Whitney Rosen (2/2/98).
- PC 4: Comments of Thomas A. Ryan on behalf of Browning-Ferris Industries of Illinois, Inc. (BFI) (4/20/98).
- PC 5: Comments of Laurel O'Sullivan on behalf of BPI (7/8/98).
- PC 6: The Agency's Posthearing Comments (7/14/98).
- PC 7: The AGO's Posthearing Comments (7/14/98).
- PC 8: Comments of Karaganis & White, Ltd. (Karaganis & White) (7/14/98).
- PC 9: Comments of the City of Chicago, Department of Environment (City) (7/14/98).
- PC 10: Comments of Carey Rosemarin on behalf of Com Ed (7/14/98).
- PC 11: Comments of the USEPA (7/14/98).
- PC 12: Public comments of Mohan, Alewelt, Prillaman & Adami (Mohan) (7/15/98).
- PC 13: Posthearing comments of David Rieser on behalf of the SRAC, the ISG, and the CICI (7/17/98).
- PC 14: Posthearing comments of Randy A. Muller on behalf of the Illinois Banker's Association (7/21/98).
- PC 15: Posthearing comments of Whitney Rosen on behalf of the IERG (7/23/98).
- PC 16: Comments of the Community Bankers Association of Illinois (10/8/98).
- PC 17: First-notice comments of the Agency (11/4/98).
- PC 18: First-notice comments of the USEPA (11/4/98).
- PC 19: First-notice comments of Karaganis & White (11/4/98).
- PC 20: First-notice comments of the AGO (11/4/98).
- PC 21: First-notice comments of the City (11/4/98).
- PC 22: Proposed second-notice comments of the Agency (11/23/98).

PC 23: Proposed second-notice comments of the USEPA (11/23/98).

PC 24: Proposed second-notice comments of the AGO (11/23/98).

PC 25: Proposed second-notice comments of the SRAC, the ISG, and the CICI (11/23/98).

PC 26: Proposed second-notice comments of the IERG (11/23/98).

PC 27: Proposed second-notice comments of Michael Best & Friedrich (Illinois) (MBF) (11/23/98).

PC 28: Proposed second-notice comments of Karaganis & White (11/24/98).

**ATTACHMENT B - R97-16**  
**EXHIBITS (Exh.)**

- Exh. 1: Photograph of the Steagall Landfill taken on November 6, 1985, by the Agency.
- Exh. 2: Photograph of the Steagall Landfill taken on November 6, 1985, by the Agency.
- Exh. 3: Enlarged photograph of open refuse at the Logan Landfill taken in August 1996 by the Agency before remedial action was conducted at the site.
- Exh. 4: Enlarged photograph of the Logan Landfill taken in September 1997 by the Agency after remedial action was conducted at the site.
- Exh. 5: Prefiled testimony of Gary King of the Agency.
- Exh. 6: Prefiled testimony of John Sherrill of the Agency.
- Exh. 7: Agency's document entitled "Allocation Scenarios Illustrating Approaches to Apportionment for Liable Parties."
- Exh. 8: Agency's document entitled "4(q) Notice Summary 1984 through 1997."
- Exh. 9: Prefiled testimony of Matthew Dunn of the AGO.
- Exh. 10: Prefiled testimony of Sidney Marder of the IERG.
- Exh. 11: Prefiled testimony of David Rieser on behalf of the ISG and CICI.
- Exh. 12: Prefiled testimony of David Howe of Caterpillar, Inc.
- Exh. 13: Testimony of Laurel O'Sullivan on behalf of BPI.
- Exh. 14: Agency's document entitled "Agency's Errata Sheet Number 1."
- Exh. 15: Agency's document entitled "Hazardous Waste Fund (HWF) Fiscal Years 1998 and 1999 Projections for Remedial Work."
- Exh. 16: Alternative language for Section 741.210(d) submitted by Carey Rosemarin on behalf of Com Ed.
- Exh. 17: Prefiled testimony of Gary King of the Agency.
- Exh. 18: Prefiled testimony of Matthew Dunn of the AGO.
- Exh. 19: Prefiled testimony of David Rieser on behalf of the SRAC.