ILLINOIS POLLUTION CONTROL BOARD
December 3, 1998

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

Proposed Rule. Second Notice.

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. The proposal that the Board adopts today for second notice establishes those procedures for determining proportionate share. In the opinion that follows, the Board provides a summary of the proposed rules for second notice and a summary of the changes made to each section of the proposed rules since first notice, as well as a discussion of the issues resolved by this second-notice proposal.

Proportionate share raises many difficult and complex issues. Developing rules to implement the proportionate share provisions of Section 58.9 of the Act has been further complicated because no model exists to assist in developing procedures for determining proportionate share. The Board has intended throughout this proceeding, however, to resolve the issues involved in proportionate share in a manner consistent with the Act and its mandate, and that provides clear and workable rules. The Board has made some difficult decisions regarding many of the issues. Fortunately, the time and thought that the participants devoted to this rulemaking gave the Board a well-developed record upon which to rely to resolve many of the legal issues and to provide clear and concise rules to be used in determining proportionate share.

BACKGROUND

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 Illinois Environmental Protection Agency (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. Moreover, the Director of the Agency is authorized to enter into such contracts and agreements as may be necessary to carry out the Agency's duties and responsibilities under Section 58.9 as expeditiously as possible. See 415 ILCS 5/58.9(e) (1998). 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 directed that the Board adopt, within 18 months of the effective date of the amendatory act, rules and procedures for determining proportionate share. This statutory deadline was later extended to January 1, 1999. See Pub. Act 90-484, eff. August 17, 1997 (amended 415 ILCS 5/58.9 (1996)). The last regularly scheduled Board meeting before this date is December 17, 1998. 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).

Accordingly, 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 Agency filed a rulemaking proposal with the Board to implement the provisions of Section 58.9. The proposal was accompanied by a motion for acceptance, a "Statement of Reasons," and an Agency Analysis of Economic and Budgetary Effects of Proposed Rulemaking.[1] 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).[2] On February 5, 1998, the Board accepted this matter for hearing. See Proportionate Share Liability (35 Ill. Adm. Code 741) (February 5, 1998), R97-16.

Prior to adopting rules for first notice, the Board held four public hearings. At the close of the fourth hearing, the hearing officer established a deadline for interested persons to file public

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[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 SRAC was established by Section 58.11 of the Act, adopted as part of the SRP 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, 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).

comments before the Board proceeded to first notice in this rulemaking. Fifteen public comments were received before the Board adopted rules for first notice.[3]

On September 3, 1998, the Board proposed rules for first notice. See Proportionate Share Liability (35 Ill. Adm. Code 741) (September 3, 1998), R97-16. The proposal adopted was a modified version of the Agency's proposal. 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 that publication, a 45-day public comment period began.

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 Reiser on behalf of the SRAC; and Whitney Rosen on behalf of the IERG. During those hearings, the Board also accepted the following exhibits into the record:

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.

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 public comments from the following:

PC 16: The Community Bankers Association of Illinois (10/8/98).

PC 17: The Agency (11/4/98).

PC 18: The United State Environmental Protection Agency (USEPA) (11/4/98).

PC 19: Karaganis & White, Ltd (Karaganis & White) (11/4/98).

PC 20: The AGO (11/4/98).

PC 21: The City of Chicago (City) (11/4/98).

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 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 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 was sent to the persons on the notice list and was 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 the following public comments:

[3] For public comments received during first notice and the exhibits submitted at the first four hearings, please refer to the Board's first-notice opinion and order.

PC 22: The Agency (11/23/98).

PC 23: The USEPA (11/23/98).

PC 24: The AGO (11/23/98).

PC 25: The SRAC, the Illinois Steel Group (ISG), and the Chemical Industry Council of Illinois (CICI) (11/23/98).

PC 26: The Illinois Environmental Regulatory Group (IERG) (11/23/98).

PC 27: Michael Best & Friedrick (Illinois) (MBF) (11/23/98).

PC 28: Karaganis & White (11/24/98).[4]

After considering all matters of record, including all testimony, public comments, and exhibits submitted by the Agency and other participants in this rulemaking, the Board has made changes to the rules as proposed at first notice. The Board believes that the rules adopted for second notice fulfill the Board's mandate under Section 58.9 of the Act and provide the concise procedural rules necessary for determining proportionate share in accordance with Title XVII of the Act.

SUMMARY OF THE PROPORTIONATE SHARE RULES[5]

Part 741 contains 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).

Part 741 applies to two types of proceedings. First, it applies to enforcement actions in which the State or a private party files a complaint with the Board which seeks to require another person to perform, or seeks to recover the costs of, a response. Second, it applies 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

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[4] PC 28 was received after the deadline for filing comments. However, the comment was submitted with a motion to file the comments *instanter*. Because the Board would like the most complete record on which to move to second notice, the Board will grant Karaganis and White's motion to file its public comment *instanter*, and the Board accepts the public comment.

[5] This is a general summary and broadly describes the proposed rules. Not all aspects of the proposed rules are addressed. Refer to the rule text and the discussion section of this opinion for specifics on the operation of the rules.

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 (FOIA) (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 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.

DISCUSSION

In this section of the opinion, the Board addresses the changes made to each section since first notice along with a discussion of the Board's resolution of any issues that have arisen with respect to the Board's first-notice proposal.[6] These changes are, in part, the result of a two-step

[6] Readers seeking an in-depth analysis of the issues raised before first notice should consult the Board's first-notice opinion and order. See Proportionate Share Liability (35 Ill. Adm. Code 741) (September 3, 1998), R97-16.

comment period during first notice. Again, after issuing our first-notice opinion and order on September 3, 1998, the Board held two public hearings and received 15 public comments. On November 12, 1998, the Board adopted a proposed second-notice order which contained changes from its first-notice order based on the record developed at and after the additional hearings. Although not required by the Administrative Procedure Act, the Board adopted those proposed rules and provided an additional period for public comment. The Board did so, in part, because the Board cannot make any changes during second notice, except for changes advocated by the Joint Committee on Administrative Rules. During that second public comment period, the Board received seven additional comments. In the second-notice order adopted today, additional changes are made to the proposed regulations in response to those comments. Thus, the changes described in this portion of our opinion are the result of the two-step process used by the Board during first notice to ensure that the public could comment to the fullest extent possible on the rules that will be adopted as final to govern the procedures for determining proportionate share.

Subpart A

Summary

Since first notice, issues have been raised regarding many of the sections contained in Subpart A, including issues regarding applicability (Section 741.105 Applicability), discovery before an action is filed (Section 741.115 Discovery Before an Action is Filed), notice under Section 58.9(b) of the Act (Section 741.120 Section 58.9(b) Notice), and adjustment of allocation determinations (Section 741.145 Relief from Final Orders). These issues, along with the Board's resolution of the same issues, are discussed below.

Section 741.100 Purpose

Section 741.100 sets forth the purpose of the Part 741 rules. The Agency originally proposed the purpose of Part 741 was to:

> define applicability and establish procedures under Section 58.9 of the Act for the determination of liability and the allocation of proportionate share for the performance or cost of *removal* or remedial action resulting from the release *or substantial threat of a release* of regulated substances or *pesticides*. (Emphasis added.) Prop. at 22.

At first notice, the Board made several changes to the Agency's proposed language. First, the Board changed the language from "removal or remedial action" to "response" because the definitions of Part 741 made clear that the term response encompassed both removal and remedial action. For that reason, the Board chose to use the term response throughout the rules, instead of the phrase "removal or remedial action."

Nevertheless, because Section 58.9 only mentions "remedial action," the Board asked for comment on whether removal actions should even be included in the Part 741 rules. Similarly, the Board also questioned whether "substantial threats" of a release should be covered by the rules. The Agency commented that the rules should encompass removal actions and substantial threats of a release because Section 58.9 should be read in the context of Title XVII. See Exh. 17 at 1. The Board agrees and therefore has retained the definition of removal, but has continued to use the more encompassing term "response," in place of removal or remedial action, throughout the rules. The Board has also retained the phrase "substantial threat" of a release where appropriate.

At first notice, the Board also removed any reference to pesticides in the rules. The Board determined that regulated substances, which are covered by the rules, include hazardous

substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), and pesticides is included under CERCLA as a category of hazardous wastes. Thus, the Board reasoned that a separate definition of pesticides was not needed, as pesticides were included in the definition of regulated substances. Based upon that reasoning, the Board deleted the term "pesticides" throughout the proposed rule when coupled with the term "regulated substances." At hearing, the Board questioned whether these deletions were proper. The Agency responded that various pesticides "have come along over the years" that have not been included within the CERCLA definition of hazardous substances. Accordingly, the Agency recommended that a definition of pesticides be included in the rules. See Tr.5 at 22.

So that Part 741 remains consistent with other regulations under Title XVII and Section 58.9(a)(1), the Board finds that the Part 741 rules should include the definition of and the word "pesticides" where appropriate. Moreover, the Board believes that the legislature did not intend to treat various pesticides differently under these allocation rules, but rather to deal with them consistently. Accordingly, the Board has included the definition and term "pesticides" where appropriate throughout the rules.

The Board has also added the phrase "on, in, under or from the site" at the end of Section 741.100. In the proposed second-notice rules, the Board did not add the word "from" to that phrase. In its comments after the proposed second notice, the Agency suggests that this word should be added when the phrase "on, in or under a site" is used in connection with a release or threat of a release. See PC 22 at 2. The Agency explains that "from" needs to be included so that it is clear that off-site effects of the release or threat of a release are covered by the rules. The Board agrees with the Agency and has added "from" to the phrase "on, in, or under a site."

The Board has also made editorial changes to the language of Section 741.110 since first notice for clarity.

Section 741.105 Applicability

Section 741.105(f) Exclusions from the Applicability of Part 741. The Board has reconsidered the position on the applicability of Part 741 that it took in its opinion at first notice. Specifically, the Board now agrees with the Agency, the AGO, SRAC, and USEPA that Section 58.1(a)(2) of the Act limits the applicability of Part 741 and thus Section 58.9. As described in greater detail below, the Board first finds that the language of Section 58.1(a)(2) is ambiguous on the question of whether it limits Section 58.9. Because of this ambiguity, the Board looks to the purposes and legislative history of the statute and concludes that they support applying the limits of Section 58.1(a)(2) to Section 58.9. Accordingly, the Board proposes for second notice a new Section 741.105(f) that sets forth, with minor modifications, the Agency's proposed language on exclusions from the applicability of Part 741.

The Agency proposed that Part 741 would not apply to certain sites or persons based on the limits in Section 58.1(a)(2) of the Act. The Agency reasoned that Section 58.1(a)(2) determined the applicability of all provisions of Title XVII, including Section 58.9, the proportionate share liability provision. Under this interpretation, Section 58.9 would not apply to situations excluded by Section 58.1(a)(2). PC 17 at 17. The AGO, USEPA, and SRAC agree that Section 58.1(a)(2) limits Section 58.9.

Looking primarily at the words in Section 58.9 "[n]otwithstanding any other provisions of this Act to the contrary," the Board opined at first notice that Section 58.1(a)(2) does not limit Section 58.9. See Proportionate Share Liability: 35 Ill. Adm. Code 741 (September 3, 1998), R97-16, slip op. at 12-17. The Board recognized that this interpretation may cause Illinois to lose federal

approvals to administer certain regulatory programs and, accordingly, sought further public comment on this issue.

Based on the testimony and comments provided during the first-notice period, the Board is persuaded that Section 58.1(a)(2) limits the applicability of Section 58.9. In construing Sections 58.1(a)(2) and 58.9, the Board is guided by the fundamental rules of statutory construction:

> In construing a statute, the court must give effect to the intent of the legislature. To ascertain the legislative intent, the court must look first to the language of the statute, examining the language of the statute as a whole, and considering each part or section in connection with every other part or section. Where the meaning of a statute is not clear from the statutory language itself, the court also properly considers the purpose of the enactment and the evils to be remedied. Further, where the statutory language is unclear, the legislative history of the statute may aid the court in determining the legislative intent. Antunes v. Sookhakitch, 146 Ill. 2d 477, 484, 588 N.E.2d 1111, 1114 (1992); see also *In Re* Petition to Annex Certain Territory to Village of North Barrington, 144 Ill. 2d 353, 362, 579 N.E.2d 880, 884 (1991).

Based on these principles, the Board must give effect to the legislature's intent. In doing so, the Board must look at the language of the Act as a whole and consider each section in relation to every other section. If, after that review, the meaning of the statute is unclear, the Board looks to the purposes of the statute and its legislative history.

The Language of the Act as a Whole. In reviewing the Act as a whole, the Board looks not only at Section 58.9 in relation to Section 58.1(a)(2), but also to other provisions of the Act, including Sections 4, 20, 22.12, and 57 of the Act. See 415 ILCS 5/4, 20, 22.12, 57 (1996).

Matthew Dunn of the AGO testified that the Board's interpretation at first notice conflicted with other provisions of the Act. Specifically, Dunn argued that in Section 20 of the Act, the General Assembly found that it was in Illinois' best interest to have USEPA authorize Illinois to administer the solid and hazardous waste management programs. Tr. at 94. In Section 20(a)(6), the General Assembly found that:

> it would be inappropriate for the State of Illinois to adopt a hazardous waste management program that is less stringent than or conflicts with federal law. 415 ILCS 5/20(a)(6) (1996).

The General Assembly also found that Subtitle C of the Resource Conservation and Recovery Act (RCRA) required USEPA to implement its hazardous waste management program in Illinois unless the State authorized its own hazardous waste management program and USEPA found the State program to be equivalent to the federal program. See 415 ILCS 5/20(a)(7) (1996). In addition, the General Assembly found that:

> it is in the interest of the people of the State of Illinois to authorize such a hazardous waste 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).

The General Assembly made these findings regarding the solid waste management program under Subtitle D of RCRA as well. See 415 ILCS 5/20(a)(12)-(14) (1996); see also 415 ILCS 5/20(b) (1996). The General Assembly also expressed its wishes that Illinois implement the underground storage tank (UST) program under Subtitle I of RCRA. See 415 ILCS 5/22.12 and 57 (1996).

Dunn argues that in light of these very specific findings of the General Assembly, the Board should not interpret Section 58.9 so as to jeopardize the federal approvals. Tr.1 at 94-95. SRAC makes a similar argument and points to Section 4(l) of the Act , which designates the Agency to administer various federal programs, including RCRA. Exh. 19 at 2-3.

The Board finds that the language of the Act as a whole reveals that Illinois should administer the federal solid waste, hazardous waste, and UST programs. Nevertheless, the language of Section 58.1(a)(2) is ambiguous on whether its exclusions apply to all of Title XVII (including proportionate share liability) or only to the Site Remediation Program (SRP) and the Tiered Approach to Corrective Action Objectives (TACO). Given this ambiguity, the Board, pursuant to the Illinois Supreme Court's decision in Antunes, looks to the purposes of the statute and its legislative history.

Purposes of the Act. One of the purposes of the Act, as evidenced by the provisions discussed above, is to have Illinois administer the various federal programs mentioned in the exclusions of Section 58.1(a)(2), *i.e.*, the solid waste, hazardous waste, and UST programs. Neither Section 58.9 nor any other provision of Title XVII contains language expressly providing that the General Assembly no longer wished for Illinois to administer these programs.

USEPA maintains that interpreting Section 58.9 so that it applies proportionate share liability to those situations that Section 58.1(a)(2) may make Illinois' programs less stringent than the federal programs under Subtitles C, D, and I of RCRA and make Illinois' enforcement authority inadequate. USEPA states that this may jeopardize the federal approvals that allow Illinois to administer these programs. PC 23 at 1-2, 5-6. The Board finds that such an outcome would be contrary to the General Assembly's specific wishes.

In fact, at the time the General Assembly was adopting Title XVII, it was also adopting legislation to address USEPA concerns with Illinois' UST program. See Pub. Act 89-428, eff. Jan. 1, 1996; see also 89th Ill. Gen. Assem., House Proceedings, Nov. 16, 1995, at 37-38, 50-51. As SRAC stated, it would be extraordinary for the General Assembly to adopt legislation to address USEPA concerns with Illinois' administration of the UST program and, at the same time, adopt legislation that would result in USEPA revoking Illinois' authorization to administer the same program. Exh. 19 at 3.

While the language of Section 58.1(a)(2) is ambiguous on whether it applies to Section 58.9 or only to SRP and TACO, it does reflect the General Assembly's concern over jeopardizing federal approvals that allow Illinois to administer the programs for solid and hazardous waste management and USTs. It would be illogical for the legislature to include the detailed exclusions of Section 58.1(a)(2) to ensure that the requirements of these respective federal regulatory programs are followed, only for Illinois to lose its ability to administer the programs by applying proportionate share liability in those situations.

The Board finds that by applying the Section 58.1(a)(2) limits to Section 58.9, both of the overarching goals of the General Assembly are served: (1) apply proportionate share liability; and (2) preserve Illinois' ability to administer the various federal programs. See Dow Chemical Co. v. Department of Revenue, 224 Ill. App. 3d 263, 266, 586 N.E.2d 516, 519 (1st Dist. 1991) ("each part of a statute should be interpreted in light of every other provision, and the entire statute should be construed to produce a harmonious whole").

Legislative History. The Agency and the AGO quote various legislative debates that they maintain supports applying the Section 58.1(a)(2) limits to Section 58.9. The Agency refers to an exchange between Representative Persico, Chairman of the House Energy and Environment

Committee and House sponsor of House Bill 544 (the underlying bill for Title XVII), and Representative Mautino:

> Rep. Mautino: "What effect will this have on the 'RCRA' enforcement on Superfund qualifying sites?"
>
> Rep. Persico: "These superfund sites have been excluded in this Bill." Prop. at 6, n.3; 89th Ill. Gen. Assem., House Proceedings, May 19, 1995, at 12.

The Agency asserts that while Representative Mautino seems to be mixing RCRA and CERCLA (Superfund) sites, the thrust of his question concerns enforcement at sites subject to these federal standards. Whether it is RCRA or Superfund that he meant, the Agency contends that the only exclusion to which Representative Persico could have been referring is Section 58.1(a)(2). Prop. at 6, n.3. The Board also notes that Representative Mautino's question related to enforcement, not to the voluntary SRP or TACO.

The Agency also quotes a later exchange between Representative Scott and Representative Persico:

> Rep. Scott: "And do we exempt anybody out from liability, even under a proportionate share scheme in this statute? Financial institutions, governments, is anybody exempted out from proportionate share liability here?"
>
> Rep. Persico: "We exempt out of this particular Bill any federal or superfund site if that is what your question is . . . . " Prop. at 6, n.3; 89th Ill. Gen. Assem., House Proceedings, May 19, 1995, at 47.

Again, the Agency contends that Section 58.1(a)(2) is the only provision to which Representative Persico could be referring because there is no other provision in Title XVII exempting these federal sites. Prop. at 6, n.3. Thus, the Agency argues that these remarks can only be interpreted as excluding from Title XVII sites subject to these federal standards or authority. The Agency also notes that the record contains no legislative history that would support the argument that the legislature intended to impose proportionate share liability on sites subject to these federal standards. PC 6 at 9. The Board notes again that Representative Scott's question related to liability, not to the voluntary SRP or TACO.

The AGO quotes Senator Mahar, Chairman of the Senate Environmental Committee and the Senate sponsor of House Bill 544:

> [T]he legislation applies to all remedial activities, excluding specifically noted activities governed by federal law, the LUST program and remedial actions where the owner or operator wishes to complete the remediation of a site presently enrolled in the IEPA's pre-notice clean-up program. Exh. 9 at 3-4; 89th Ill. Gen. Assem., Senate Proceedings, May 19, 1995, at 64.
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> [T]he underground storage tank program is not involved in . . . the brownfields legislation, as are other entities that are not exempt under federal law." Exh. 9 at 4; 89th Ill. Gen. Assem., Senate Proceedings, November 16, 1995, at 21.

The AGO also quotes Representative Persico:

> [S]uperfund cleanup sites are excluded from House Bill 544. Exh. 9 at 4; 89th Ill. Gen. Assem., House Proceedings, May 24, 1995, at 7.

The Board notes that in these passages, both Senator Mahar and Representative Persico refer generally to the "legislation" or the "bill" (which included Section 58.9) and not merely the voluntary SRP or TACO.

The Board finds that the legislative history supports the position of the Agency, the AGO, SRAC, and USEPA.

Board Conclusion on Exclusions from Applicability. Based on the purposes of the Act and the legislative history of Title XVII, the Board concludes that it must apply the limits of Section 58.1(a)(2) to Section 58.9 to effectuate the General Assembly's intent. The "notwithstanding" language of Section 58.9 is given its full meaning because it applies to those situations that Section 58.1(a)(2) does not exclude.

The Agency's proposed language on exclusions from the applicability of Part 741 interprets the limits of Section 58.1(a)(2) and is supported by the AGO and USEPA, among others. SRAC also supports the Agency's position, but suggests that the Board change part of the language to specify that proportionate share liability applies unless the State specifically alleges violations of hazardous or solid waste regulations. SRAC is concerned about the potential range of sites that could be "subject to closure or corrective actions requirements." See Section 741.105(f)(4)(B). The Board believes that any further modification of the Agency's proposal would be contrary to the language of the Act. Accordingly, with minor changes, the Board proposes the Agency's language for second notice. This limiting language is found at Section 741.105(f) of the Board's rules.[7]

Section 741.105(a). Besides adding a list of sites excluded from the purview of Section 58.9 and the Part 741 rules, the Board has made several other organizational changes. First, the Board has included a new Subsection (a). That subsection now specifies the proceedings to which Part 741 applies. Specifically, Subsection (a) states that Part 741 applies to proceedings before the Board in which: (1) any person seeks, under the Act or the Groundwater Protection Act (415 ILCS 55.1 *et seq* (1998)), 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% 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 language is based on the statutory language of Section 58.9(a)(1).

Section 741.105(b). Next, the Board has added a new Subsection (b). This subsection now specifies that the Board's procedural rules at 35 Ill. Adm. Code 101 and 103 apply to all proceedings under Part 741, unless there is a conflict between the Board procedural rules and the Part 741 rules. In the event of a conflict, the Part 741 rules apply. Because, as will be explained more fully later, the Board has concluded that actions under which the Part 741 rules would apply should be treated

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[7] The Board notes that even with this proposed language, USEPA stated that it would be concerned because of two circuit court interpretations of Section 58.9 and the failure of Section 58.1(a)(2) to exclude other federally approved programs, such as under the Clean Water Act. USEPA also stated that a statutory amendment may be necessary to assure compliance with the legal requirements for federally approved programs in Illinois. PC 23 at 1-2, 5-6.

similarly to regular enforcement actions, the Board believes that a reference to the Board's procedural rules is appropriate.

Section 741.105(c). New Subsection (c) makes clear that the provisions in Subpart A apply to all proceedings under Part 741. However, in the event of a conflict between the rules of Subpart A and subsequent subparts, the rules in the subsequent subpart apply.

Section 741.105(d). Next, Section 741.105(d) contains the applicability provisions for Subpart B. This is different from what was proposed at first notice, but is substantially similar to what was contained in the Agency's proposal. At first notice, the Board attempted to establish a system whereby there would be a proceeding to determine liability under the Act. Once liability was established, a separate nonadversarial proceeding would commence to allocate shares of the response or response costs. Thus, the applicability provisions governing Subpart B at first notice provided that Subpart B applied whenever a complaint was filed with the Board requesting that the Board allocate proportionate share of liability or to which proportionate share was raised as an affirmative defense. As explained more fully later in this opinion, the Board believes that there does not need to be separate proceedings for liability and allocation. Thus, the applicability provisions for Subpart B reflect this change. Based on Section 741.105(d), Subpart B applies when a complaint is filed with the Board under the Act or the Groundwater Protection Act to require any person to perform a response or to recover the costs of a response that results from a release or substantial threat of a release of regulated substances or pesticides. Again, this language is substantially similar to that initially proposed by the Agency.

Section 741.105(e). Finally, Section 741.105(e) sets forth the applicability provisions for Subpart C. The language in this particular subsection is also new, but the content is similar to that proposed at first notice. Subpart C applies when a petition has been filed with the Board under Section 741.305 to allocate among the participants 100% of the performance or costs of a response. In the Agency's proposal, Subpart C was only applicable to actions when the parties agreed to allocate 100% of the costs of a response. At first notice, the Board expanded Subpart C to apply to actions seeking to allocate the performance of a response, as well as the costs of the response. The Board saw no reason to limit a Subpart C proceeding to actions seeking only an allocation of costs of a response, as was originally proposed by the Agency.

The Board has also included language in Section 741.105(e) that makes it clear that Subpart C is not applicable if a complaint has been filed in any forum that addresses the same release or substantial threat of a release as the Subpart C proceeding. At first notice, the Board had barred the filing of a Subpart C action only when another complaint had been filed with the Board against the participants to a Subpart C proceeding.

The Agency contends that a bar to initiating a Subpart C proceeding should apply if a complaint for cost recovery or a response has been filed in any other forum, not just when a complaint has been filed with the Board. See Exh. 17 at 11. The Agency explains that the filing of a duplicative action would be subject to involuntary dismissal upon motion by the defendant. See 735 ILCS 5/2-619(3) (1998). This relief could be granted when the parties and issues are substantially the same and arise out of the same transaction or occurrence. Because the participants initiating a Subpart C proceeding are likely to be respondents to a complaint that has been filed in another forum and because the complainant in that forum will not be a party in the Subpart C proceeding, the Agency asserts that the issue of duplicative litigation is not likely to be raised before the Board. In fact, the Agency contends that the Subpart C proceeding may be used to manipulate the litigation because the parties will be able to control the process, timing, and outcome of a Subpart C proceeding more easily than they would as respondent in a traditional complaint. For these reasons, the Agency urges the Board to provide that a Subpart C proceeding may not be initiated when a

complaint for cost recovery or for the performance of a response for the same release has been filed in another forum. See Exh. 17 at 11-12.

The Board agrees with the Agency and has included appropriate language barring the initiation of a Subpart C proceeding when a complaint has been filed in any forum that addresses the same release or substantial threat of a release.

Other Matters. Beside the various structural and editorial changes made to Section 741.105, Karaganis and White seeks clarification of the relationship between a Subpart B and Subpart C proceeding. Specifically, Karaganis and White questions whether the Subpart C "procedures are strictly limited to those parties willing to accept 100% of the liability among themselves, or whether the procedures are available to parties who are willing to accept 100% of the costs, but who ultimately intend to seek contribution from others who share a portion of liability for the required response." PC 19 at 11. Karaganis and White explains that participants may wish to enter into a Subpart C proceeding and take responsibility for initially funding 100% of the response costs for a release or substantial threat of a release. While these participants would be willing to bear the full costs up front to facilitate a timely cleanup of a release or substantial threat of a release, Karaganis and White emphasize that these participants may not be willing to accept an order that imposed 100% of the liability for the release because it could create a preclusive effect on any future contribution actions that the participants may be entitled to initiate against other responsible parties. PC 19 at 11. For these reasons, Karaganis and White seek clarification of the relationship between the Subpart B and C proceedings.

As the Subpart C procedure has been set up at second notice, the Subpart C proceeding is a purely voluntary allocation proceeding. The participants will not be found liable under the Act for the contamination at the site because a Subpart C proceeding is solely an allocation proceeding. There is no finding of a violation of the Act. In order to initiate the proceedings, the participants must agree to assume 100% of the response or response costs from a release or substantial threat of a release. In the final order, the Board will find each participant responsible for a share of the costs of the response or the performance of a response based on the information presented at hearing or in a stipulation. If participants want a finding of liability under the Act for the contamination at a site, an action under Subpart B proceeding must be initiated. The Board believes that the changes to the provisions in Subpart C since first notice clarify this distinction between Subparts B and C.

Private Enforcement Actions

At first notice, the Board concluded that, based on the plain language of Section 58.9, the regulations for determining proportionate share should apply to private enforcement actions that seek cost recovery. See Proportionate Share Liability (November 3, 1998) slip op. at 41-45. After reviewing the arguments, the Board found the plain meaning of Section 58.9 of the Act made it applicable to private parties as well as the Agency and the State.

The Agency, the AGO, and the SRAC continue to raise concerns regarding this issue. The AGO objects to private party allocation proceedings in which 100% of the costs are not allocated because it believes that private party actions could adversely affect the State in two principle ways. First, the AGO argues that if an allocation is ordered in a case where the State is not a party, orphan shares may be designated to the State as a practical matter even though the State has had no input in the allocation. See. Exh. 18 at 4. To protect the State's interests, the AGO argues that the State would have to get involved in each private party action that includes orphan shares. The AGO contends that this could effect how the Agency allocates its resources, and since the Agency's resources are limited, may compel the Agency to address certain sites, rather than addressing sites

that pose a greater threat to human health and the environment. See Exh. 18 at 4; Tr.5 at 61-62. The Agency raised a similar concern at hearing. See Tr.5 at 28.

Second, the AGO alleges that an allocation determination in a private party action in which the State does not participate may impact the State's rights in future actions, *i.e.*, if the State is unwilling or unable to participate, a final Board order may be *res judicata* as to the State with respect to those issues decided by the Board. See Exh. 18 at 4. Again, the AGO contends that to avoid such a result the Agency and the AGO may be forced to participate in a private party action in which it would otherwise choose not to participate. See Exh. 18 at 4. The Agency raised similar concerns at hearing. See Tr.5 at 27-28.

At hearing, SRAC argued that private cost recovery actions do not work within the context of proportionate share because unlike private cost recovery actions under CERCLA, there exist none of the limitations or requirements to review the nature of the costs alleged in an action. Tr.5 at 153-54. Moreover, since Section 58.9 does not indicate what those limitations are or should be, SRAC does not know how "you can run a private cost recovery program that is not specifically provided." Tr.5 at 154. Citing NBD Bank v. Kreuger Ringier, Inc., 292 Ill. App. 3d 691, 686 N.E.2d 704, 708-09 (1st Dist. 1997), SRAC further argues that the Act does not provide for private costs recovery actions.[8] See PC 25 at 4. Therefore, SRAC believes that the Board should specifically state that no private cost recovery actions are allowed under the Part 741 rules. PC 25 at 5. Nevertheless, SRAC acknowledges that because the proposed rules are not consistent with Section 58.9(a)(1), resolution of the private cost recovery issue is not intrinsic to the adoption of the rules. PC 25 at 5.

The issues raised by the AGO, the Agency, and the SRAC are basically the same issues that were raised at first notice regarding private enforcement actions that seek cost recovery. The Board still finds that the statutory language of Section 58.9 covers private enforcement actions, and therefore, private enforcement actions are subject to proportionate share and are covered by these rules. As in our first-notice opinion, we again emphasize that Section 58.9 does not create any new cause of action. See Proportionate Share Liability, (R97-16), slip op. at 45. However, once a complaint is filed by the State or any person "to require any person to conduct remedial action or to seek recovery of costs for remedial activity," the standards and procedures set forth in Subpart B are applicable to determine that person's proportionate share. We find it appropriate to apply these rules to all private enforcement actions seeking either remedy.

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[8] The Board has previously distinguished NBD Bank, which discussed cost recovery in an environmental law context, and has held that the NBD Bank decision does not impact the line of Board decision's finding authority to award cleanup costs for a violation of the Act. See Malina v. Day (January 22, 1998), PCB 98-54. In Malina, the Board noted that the NBD Bank decision involved an action in tort to recover cleanup costs resulting from plaintiffs' remediation of contaminated soil on property purchased from the defendant. The court decided that the "economic loss doctrine" precluded recovery under section 353 of the *Restatement (Second) of Tort*. The court also decided that, under the facts of the case, no private right of actions existed under the Act to allow recovery of costs in tort. The Board in Malina stated that NBD Bank did not address the availability of cleanup costs as a remedy for a violation of the Act, nor did it discuss the aforementioned line of Board decisions finding that the Board had the authority to award such costs. Accordingly, in Malina the Board found that nothing in NBD Bank affected the Board's prior holdings that the Act allows a private party to sue another for a violation of the Act and for the Board to award costs. See Malina, PCB 98-54 at 3.

As to the participants' suggestions that judgments in private party cases may give rise to an orphan share, or limit the ability of the Agency to file its own cases at such sites, these effects arise from the language of Section 58.9 itself. We do not address here whether the State will be bound by a determination of a party's proportionate share in a private party enforcement action. We merely note that such a potential effect flows from Section 58.9, not the Board's conclusion that these rules govern how proportionate shares will be determined in private party actions. Moreover, to the extent that an orphan share arises from a private enforcement action, the State is not liable for that share, and nothing compels the State to pay the orphan share.

The participants and the Board agree that a private party may bring an enforcement action seeking to require someone to perform remedial action. Tr.3 at 82. The disagreement about whether these rules may be applied to private enforcement actions involves only private cost recovery actions. The Board recognizes that private enforcement actions seeking cost recovery present complicated issues. At hearing, the Board raised as a potential solution to some of these issues, a suggestion that private cost recovery actions be linked to the SRP. See Tr.5 at 30. The Board also sought comment on whether a second docket should be opened to address some of these issues. See Proportionate Share Liability (November 3, 1998), slip op. at 4.

The Agency responded that linking private action to the SRP would alleviate some concerns about proportionate share determinations at sites where incomplete or ineffective remedies have been performed. The Agency further commented that resource related problems may be unavoidable. However, if a second docket is opened, the Agency stated that it would participate in identifying and discussing such issues. See PC 22 at 3.

Karaganis & White commented that it did not support creating a separate docket because it believes that Section 58.9 makes no distinction between private cost recovery action and State actions. Thus, Karaganis and White believes that "[a]n additional docket would only serve to create distinctions where none are intended to exist." PC 28 at 5. SRAC also commented that it was not clear that a second docket would be productive. See PC 25 at 5.

The Board will not open a second docket at this time. Instead, the Board will continue to examine how best to resolve the issues involved in determining proportionate share in private enforcement actions through a future rulemaking or otherwise.

Section 741.110 Definitions

Section 741.110 contains definitions of terms used in the proposed regulations. The definitions are primarily from the Act with minor modifications in a few instances. For example, the Board's proposal has combined the definitions of remedial action contained in Sections 3.34 and 58.2 of the Act (415 ILCS 5/3.34, 58.2 (1998)). These definitions were combined, as proposed by the Agency, because sites may or may not be performing remedial action under the SRP. See Stat. at 7-8. Thus, a broader definition of "remedial action" was needed. The Board has made a couple of changes to Section 741.110 since first notice. Specifically, the Board has added a definition of "pesticides" and "proportionate share" to the rules. The reasons for these decisions follow.

Pesticides. As discussed earlier, the Board has determined that the Part 741 rules should cover regulated substances and pesticides. Because of this decision, the Board has included in Section 741.110 a definition of pesticides. The definition of "pesticides" is the same definition as was contained in the Agency's proposal, except that the statutory citation to the Illinois Pesticide Act (415 ILCS 60/4 (1998)) has been removed.

Proportionate Share. Because the term proportionate share is used throughout the rules, the Board included a definition of "proportionate share" in the proposed second-notice rules. As proposed, "proportionate share" meant "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, under or from 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." The Agency claims that a definition of "proportionate share" is not necessary because its generic meaning is sufficiently clear. PC 22 at 3. The Agency also commented that the definition did not work well in all contexts because it contained elements of both liability and allocation. For example, the Agency points out that the use of "proportionate share" in the context of relief from final orders makes it seem as though the issue of liability can be reopened, when only allocation should be reconsidered. The result, the Agency suggests, is that the definition creates more confusion than it resolves. PC 22 at 4. Karaganis & White also comments that that definition as proposed is ambiguous and is subject to being easily misconstrued. PC 28.

The Board does not agree that the meaning of proportionate share is itself sufficiently clear. Therefore, the Board has retained in the rules a definition of proportionate share. The Board also notes that the concept of proportionate share involves the allocation of liability to perform or pay for a response. This is distinct from liability for violating the Act. However, the Board does agree that the definition as proposed could be simplified by removing the term "liability." Therefore, the Board has modified the definition of "proportionate share" to read "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."

Remedial Action. The Board accepted the definition of "remedial action" as proposed by the Agency, but, at first notice, added to the end of the definition of "Remedial Action" the following underscored language: "Remedial action means 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, preparation of work plans and reports, removal or treatment of contaminants, construction and maintenance of engineered barriers, and/or implementation of institutional controls." This language was added to keep the definition of "remedial action" in the Part 741 rules consistent with the definition of "remedial action" contained in 35 Ill. Adm. Code 740.120.

The Agency does not objection to the expansion of the definition as long as the Board clarified in the opinion that these activities are "remedial action" only to the extent that they are consistent with permanent remedies at the site. See Exh. 17 at 2. The Board agrees with the Agency and so clarifies. The activities delineated in the definition of remedial action are only remedial action to the extent that they are consistent with permanent remedies at a site and not part of removal actions.

Other Matters. At first notice, Karaganis & White urged the Board to adopt a definition of the term "action." PC 8 at 8. Although the Board declined at first notice to adopt a definition of the term "action," we noted Karaganis & White's comment on this issue and solicited additional comment.

In response, the Agency supported the Board's decision to not include a definition of action that would include the issuance of notice under Section 4(q) or 58.9(b). See Exh. 17 at 2. The Agency asserted that in its legal sense the term "action" means a proceeding in court of justice in which the parties are determined, citing Flynn v. Allis Chalmers Corp., 262 Ill. App. 3d 136, 139, 634 N.E.2d 8, 10 (2nd Dist. 1994) and Black's Law Dictionary. The Agency explains that no rights are determined by the Agency's issuance of either notice, and under Section 58.9(c), neither the Agency nor the subject of a 58.9(b) notice can be required to use the Board's procedures when negotiating the response to the scope of work requested in the notice. See Exh. 17 at 2-3. The Agency also

points out that Section 58.9(e) prohibits any interference in Part 741 with the Agency's 4(q) notice authority. For these reasons, the Agency supports the Board's initial decision to not include a definition of "action" in the rules. However, the Agency states that a definition adopting the traditional meaning of action might be useful to eliminate any further questions See Exh. 17 at 3.

The Board believes that it is clear from the context of the rules that the traditional meaning of the term "action" is to be used. Therefore, the Board has not included a definition of "action" in the rules.

Section 741.115 Discovery Before an Action is Filed

The Agency's proposal contained a procedure that allowed the Agency to obtain an information order from the Board in cases where the proportionate share rules applied and before an action was filed with the Board. The provisions on information orders contained in the Agency's proposal were similar to those provided under Section 104(e)(2) of CERCLA (see 42 USCS § 9604 (e)(2)) and were only available to the Agency.

The rule adopted by the Board at first notice was available to all persons and modeled after Illinois Supreme Court Rule 224 which allows for precomplaint discovery. Like Supreme Court Rule 224, the focus of this discovery rule is identifying persons liable, not quantifying the extent of their liability. As proposed at first notice, Section 741.115 provided that any person who wished to engage in discovery before seeking an allocation of proportionate share could file a petition for the Board for the sole of purpose of ascertaining the identity of a person who could be liable for a release or a substantial threat of a release. Section 741.115 also set forth what the petition had to include. The petition also had to be accompanied by an affidavit attesting that the petitioner could not obtain the information sought by any other means. The petition had to be served on the person to whom the order was directed. After service of the petition, the respondent could file a response to the petition, and the petitioner was allowed to file a reply to the response. The Board would then review the petition and issue an order. If any respondent failed to comply with the Board's order, Section 741.115 authorized the petitioner to seek penalties under Section 42 of the Act. See 415 ILCS 5/42 (1998).

Authority and Need to Adopt a Rule for Discovery before an Action is Filed. In adopting such a rule for first notice, the Board identified two major issues. They were: (1) whether the Board had the authority to adopt a provision regarding information orders; and (2) whether information orders were necessary. The Board determined that it did have the necessary authority to adopt a rule allowing such information orders based on the Board's broad authority to adopt procedures to implement the proportionate share provisions of Section 58.9, as well as under the inherent authority granted to administrative agencies to adopt rules necessary to perform the duty conferred upon them by statutes. See Oak Liquors Inc. v. Zagel, 90 Ill. App. 3d 379, 380-81, 413 N.E.2d 56, 58 (1st Dist. 1980). Accordingly, the Board concluded that Section 58.9, as well as the inherent authority granted to administrative agencies, clearly empowered the Board to promulgate such a rule to facilitate the allocation of proportionate share.

Having determined that the Board had the authority to adopt such a rule, the next question at first notice was whether such a rule was necessary. At first notice, the Board concluded that discovery prior to an action being filed was necessary to ensure that Section 58.9 worked. To assure complete site remediation, the Agency should be able to identify as many potentially liable parties as possible before filing a complaint. The Board also found that without such a discovery tool the proportionate share rules would not provide for such a timely, complete, and equitable allocation of responsibility. Accordingly, the rule was adopted with limitations incorporated to ensure that it is effective and not abused by the petitioner or the respondent.

During the first-notice comment period, the Agency, the AGO, SRAC, and Karaganis & White commented on the Board's authority. The Agency and the AGO supported the Board's authority. SRAC continues to maintain that the Board does not have the authority to adopt procedures for obtaining information before an action is filed. See PC 25 at 2. SRAC asserts that the procedure creates a cause of action for which the Board should have to have specific legislative authorization. Because Title XVII does not provide for such an information order, SRAC submits that the Board does not have the authority to adopt such a procedure. See Exh. 19 at 3. Karaganis & White agrees with the SRAC that the Board does not have the authority to adopt a provision on discovery before an action is filed. PC 28 at 6. Neither commentator presents any new argument.

Based on our analysis at first notice, the Board believes it does have the authority to adopt rules providing for discovery before a complaint is filed. The Board is clearly empowered to promulgate rules and procedures to determine proportionate share, and adoption of the proposed rule is a procedure to facilitate the discovery of information that will be used to determine proportionate share. See generally Shutes v. Fowler, 223 Ill. App. 3d 342, 584 N.E.2d 920 (4th Dist. 1991) (finding the Illinois Supreme Court had authority to promulgate Supreme Court Rule 224).

Further, the Board found at first notice that there was no reason to limit the use of this type of discovery to the Agency. As originally proposed by the Agency, information orders were a tool that could only be used by the Agency. When the Board asked why the use of information orders was strictly limited to the Agency, the Agency responded that: (1) it was concerned about extending the use of the information order too far; and (2) the provision was modeled on the federal Superfund Law which did not extend the use of the orders beyond the agency. Tr.2 at 55. The Agency acknowledged, however, that use of information orders in a Subpart C action would be a very useful tool which would change the dynamics of that type of proceeding. Tr.2 at 56. The Board found that there was no reason to limit the use of the discovery to the Agency. Thus, the rules allowed for the discovery mechanism to be used by any person. After the Board's first-notice opinion and order, the Agency focused on being the recipient of such an order versus being the petitioner. Tr.5 at 25. Raising a new issue, the Agency said that the rule should not apply to it due to FOIA. The AGO however objects to the broadening of the discovery tool to private parties. See Exh. 18 at 5. We still find no reason to restrict this discovery tool to the Agency.

Limitations to a Discovery Order. In response to public comments, the Board has modified Section 741.115, limiting its applicability, as well as making several editorial changes to Section 741.115 for clarity. First, the Board has exempted agencies subject to FOIA requests from its applicability. Second, the Board has explained what a petitioner must demonstrate to qualify for such an order. Third, the Board has modified the time limits within Section 741.115 as requested by commentators. Finally, the Board addresses the limited scope of information which may be discovered under this rule in response to questions raised by the Agency, the AGO, and SRAC.

Information Available under FOIA and Privileged Information. The Agency objects to private parties being able to obtain information from the Agency. The Agency maintains that it would be a resource burden and distraction from regular Agency business if it was subject to the provisions of Section 741.115. See Exh. 17 at 3; PC 17 at 5. The Agency maintains that the FOIA process serves the same purpose as the existing Supreme Court Rule 224, and therefore, the Agency asserts that there is no reason for the rule to be applied to the Agency. See Tr.5 at 25. The Agency explains that it responds to thousands of FOIA requests annually, and the Agency has a routine for handling those. However, the Agency argues that if they are subject to the Section 741.115, a resource burden would be placed on the Agency in responding to those requests. Tr.5 at 26.

Karaganis & White argues that the Agency should not be excluded from being a possible recipient of an information request. It explains that there may be times when the Agency has failed to respond to a FOIA request, and therefore the Section 741.115 procedure should be available to obtain relevant information. PC 28 at 6.

The Board agrees with the Agency that this discovery mechanism is not needed for agencies subject to FOIA, since much of the same information could be obtained through a FOIA request. See Malberg v. Smith, 241 Ill. App. 3d 428, 607 N.E.2d 1370 (5th Dist. 1993) (stating that a Rule 224 discovery petition was very similar to an action pursuant to FOIA). If the Agency fails to respond to the FOIA request or objects to the request, FOIA has procedures for appealing an agency determination. To the extent that the information is not covered by FOIA, the Board does not believe that it is appropriate to expand the information that can be obtained from an agency beyond of the FOIA process. Moreover, the Board understands that if persons are allowed to file a Section 741.115 petition to seek information from the Agency, the Agency may be inundated with requests for which it does not have a process (while it does have the FOIA process) which could put extensive resources burdens on the Agency. The Board has thus added a provision that a petition under Section 741.115 cannot be brought against agencies subject to FOIA.

SRAC requests clarification that the rule does not require the disclosure of privileged information. See Exh. 19 at 5. The Board agrees that Section 741.115 should not apply to information that is privileged. The Board has therefore included a provision exempting such material from disclosure under Section 741.115.

Qualified Petitioner. SRAC requests that the Board clarify that the discovery under Section 741.115 procedure is available only to persons who allege that they are "seeking an allocation of proportionate shares of liability" and that the failure to support this allegation should be a basis for denial of the order. SRAC seeks such a limitation because it is concerned that persons not involved in the remediation of a site could use this procedure to obtain information regarding responsible parties. See Exh. 4 at 4.

In response, the Board has modified the language at 741.115 to clarify that the Board will grant a petition only to persons who wish to engage in discovery before filing an action seeking proportionate shares. Even then, such a petition must prove why such discovery is necessary and why the information cannot be obtained by any other reasonable means. Only if the Board finds that the requested discovery is necessary to identify persons who may have proximately caused or contributed to a release or substantial threat of a release of regulated substances or pesticides and that the information could not have been obtained by any other reasonable means, will the Board possibly grant the petition. The Board believes that Section 741.115 discovery should be limited to persons who intend to bring an action to seek a response or response costs.

Time Limitations. Finally, SRAC acknowledges that using Supreme Court Rule 224 as a reference was not inappropriate, it notes that Supreme Court Rule 224 contains important limitations that were not incorporated into the Board's rule. Specifically, SRAC maintains that an order under Supreme Court Rule 224 is limited in duration, and thus, so should an order by the Board under Section 741.115. Additionally, SRAC contends that Supreme Court Rule 224 was designed to preclude abuse by requiring the petitioner to pay for reasonable expenses of those complying with such order. SRAC thus urges the Board to adopt such a compensation requirement as well. See Exh. 19 at 4. Similarly, Karaganis & White contends that a recipient's right to object to the discovery should not be waived simply because it has not responded within 14 days from the service of the petition. PC 28 at 6.

The Board has modified Section 741.115 in response to these three comments. The Board has added language to the rule that would establish that the Board's order under Section 741.115 would expire after 60 days unless extended for cause shown. The Board has also added a provision that requires a petitioner to bear the respondent's reasonable expenses of providing the discovery. Finally, the Board has expanded the time period for the filing of a response to such a petition from 14 days to 30 days. The Board believes that these are important safeguards to preclude abuse of this discovery mechanism, and thus have incorporated these limitations into Section 741.115.

Scope of Information Available. The Agency argues because the scope of information that may be obtained through Section 741.115 is so narrow, its usefulness is substantially limited compared to the federal authority and the Agency's proposal on information orders. PC 22 at 4. The Agency maintains that to effectively encourage and manage cooperative cleanups, it needs to have a very early understanding of the site operations, those involved, and the relative responsibility of each. PC 22 at 5. The Agency contends that its proposed rule is the only one that allows it to obtain adequate and timely information. Thus, the Agency urges the Board to adopt the Agency's proposed rule contained in its errata sheet. PC 22 at 5.

Similarly, the AGO questioned whether the only information available under Section 741.115 is the names of potentially responsible parties, or could information on the types of waste generated or products used also be obtained. See Exh. 18 at 5. SRAC also asks the Board to clarify the scope of the information that can be discovery under this rule. Specifically, SRAC believes that the language of Section 741.115 should be made clear that the only information that can be obtained are the names of responsible parties, not broader categories of information.

At first notice, Section 741.115 provided that a person could file a petition under Section 741.115 for the sole purpose of ascertaining the identity of a person who may be liable for a release or substantial threat of a release of regulated substances or pesticides. Based upon their comments, the participants want to know whether only the identity of a person can be obtained under Section 741.115. While the Board modifies Section 741.115(a) in the attached order, the purpose remains the same. As originally proposed and still today, under Section 741.115, a petitioner may only seek to discover the identify of persons who may have proximately caused or contributed to a release or substantial threat of a release at a site. This information includes the name of a potentially liable person. The extent of the inquiry necessary to identify such persons will be determined by the Board on a case-by-case basis. Because Illinois Supreme Court Rule 224 serves as the model for the Board's rules, we will follow case law when determining what is properly discoverable. New language at Section 741.115(c) requires the petitioner to provide the Board with a copy of the proposed discovery request. This requirement will enable the Board to review the actual discovery requests to insure that they are not overreaching.

Section 741.120 Section 58.9(b) Notice

In the Board's first-notice proposal, Section 741.120 addressed Sections 58.9(b) and (c) 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. See 415 ILCS 5/58.9(c) (1998).

Because the proposed rules address only Board procedures, the Board has deleted most of the subsections contained in the first-notice proposal. The Board has retained, however, that portion of the rule that repeats the statutory requirement of Section 58.9(b) that a person whom the State seeks to require to conduct remedial activities for a release or threatened release of a regulated substance must be given notice by the Agency. The Board has also included the statutory language

of Section 58.9(b) as to what that notice must contain. The provisions regarding the Section 58.9(b) notice retained in the Part 741 rule provides the public with notice of the statutory requirements, while leaving the substance of the Agency's procedures regarding the notice to the Agency. Of course, the Agency may adopt whatever procedures it deems necessary to implement its responsibilities under Section 58.9 itself.

Section 741.125 Notice to Agency

At first notice, the Board included a rule that required a person who initiated a proceeding seeking allocation to give notice to the Agency of the proceeding. The provision also allowed the Agency to participate in any proceeding seeking an allocation of proportionate shares. Concerns have been raised about whether the Agency should receive notice of such proceedings. Based upon the comments received during first notice, the proposed rule has been modified to require that such notice be served on the Agency within 30 days after the complaint or petition seeking allocation is filed and to require the Agency, once so notified, to petition to intervene in the proceeding should it so choose.

The AGO and the Agency both commented on this notice requirement. The AGO asserts that the notice provision would put additional burdens on the Agency and the AGO to participate in private-party actions. See Exh. 18 at 6. However, the AGO believes that the Agency should be notified if private party actions are allowed. See PC 20 at 2.

The Agency asserts that with or without notice, it was unlikely that the Agency would have the additional resources to devote to meaningful involvement in actions that it did not initiate. See Exh. 17 at 4. Moreover, the Agency asserts that its biggest concern is collateral estoppel. It does not want the fact that a private action has been filed to collaterally estop it from raising some issue or arguing for a different result in a matter in which it is directly involved. See Tr.5 at 27-28; Exh. 17 at 4. If the receipt of notice makes it more likely than not that estoppel will be imposed by the Board or courts, the Agency prefers that the State's options not be foreclosed by the receipt of notice. PC. 17 at 12-13. However, if the Agency would be collaterally estopped whether it received notice or not, the Agency admitted it would rather receive the notice. But, the Agency emphasizes that it does not want to invite collateral estoppel by receiving notice. See Tr.5 at 29. Finally, the Agency suggests that if notice is required, that the Board provide for intervention as a matter of right.

Regardless of whether it receives notice, the possibility exists that the Agency may be collaterally estopped. Therefore, the Board has retained the provision requiring that the Agency receive notice of all actions seeking an allocation of proportionate shares. The Board has also included a provision to explain the participation of the Agency in these proceedings. After receiving the notice, the Agency may choose, but is not required, to participate in the proceeding. If the Agency wishes to participate, it would need to file a petition to intervene under the Board's procedural rules. See 35 Ill. Adm. Code 103.142. The Board does not provide, as the Agency suggests, that intervention by the State be a matter of right. However, we cannot foresee a situation where the Board would not grant a petition to intervene.

Once the petition for intervention is granted, the Agency then has all the rights of an original party. The Board emphasizes that if the Agency chooses to participate, the Agency will not be allocated responsibility for shares of unknown or insolvent parties. Because the State may, as a practical matter, end up paying for such parties' shares of remediation in order to ensure that remediation takes place, the State (through the Agency) is given notice and the opportunity to participate in allocation proceedings to protect this indirect, but nevertheless significant interest. Actual allocations of liability, however, would be made to the unknown or insolvent party; State assumption of such shares would be purely voluntary. Moreover, if the Agency does participate in

the proceedings, the Agency would be in a position to reopen a final order in which the Board allocated proportionate shares under the conditions set forth in Section 741.140. This opportunity would not exist if the Agency were not a party to the proceedings.

Section 741.130 Discovery After an Action is Filed

At first notice, the Board adopted a modified version of the discovery procedure outlined in the Agency's proposal at Section 741.130. As adopted by the Board, Section 741.130 relied on the Board's existing procedural rules for discovery. Specifically, it provided that all persons involved in an allocation proceeding under Subparts B or C must compile all relevant documents within their possession and make the records available for review by all others to the allocation proceeding within time limits set by the hearing officer. Subsection (b) provided that discovery must be conducted pursuant to the Board's procedural rules and that sanctions for failure to comply with a Board or hearing officer order, among other things, were available. Subsection (c) made clear that discovery pursuant to this section was not applicable to mediation proceedings under Subpart C.

Section 741.130(a). The Agency comments that the requirements may be interpreted too narrowly to get at the scope of information needed for allocation proceedings under Subparts B and C. Exh. 17 at 4; PC 17 at 10. Specifically, the Agency asserts that the phrase "pertaining to the release" may be interpreted too narrowly and would exclude documents shedding light on the contribution to the release and share allocation. The Agency therefore requests that this be clarified for the record or that language be added to make it clear that such documents are also subject to the mandatory disclosure and discovery provisions under Section 741.130. See Exh. 17 at 4. The Agency suggested language to so clarify the rule. See PC 17 at 10.

The Board agrees with the Agency that documents shedding light on the contributions to the release and share allocation, as well as the occurrence of the release itself should be subject to the mandatory disclosure requirements of Section 741.130. Examples of such information would include amounts and types of substances sent to the site and handling methods. The Board has added language to Section 741.130 that requires each party to a proceeding in which allocation of proportionate share is sought to compile documents pertaining to the release or threatened release, as well as to each party's proportionate share.

Several participants question whether the mandatory disclosure and discovery requirements of Section 741.130(a) are subject to claims of privilege. See Exh. 17 at 5; PC 21 at 2. The Board believes that information covered by Section 741.130(a) is subject to claims of privilege, and has therefore added a sentence to clarify that documents are subject to claim of privilege under 35 Ill. Adm. Code 101 and 103.

Section 741.130(b). In the proposed second-notice rules, the Board deleted Section 741.130(b). The Board reasoned that this subsection was unnecessary because the Board had included a provision in Section 741.105(b) that the Board's procedural rules apply to all proceedings under this Part, unless there was a conflict with the rules in Part 741. Thus, the Board concluded that Section 741.130(b) was unnecessary since it merely reiterated that discovery was governed by the Board's procedural rules.

The Agency asserts that if Subsection (b) is deleted, what remains is a mandatory disclosure provision that is limited solely to documents. The Agency contends that it is unlikely that all relevant information will be contained in documents and that the documents produced may themselves lead to a need for additional discovery. Therefore, the Agency states that discovery after an action is filed must include the discovery procedures available under 35 Ill. Adm. Code 101 and 103. The Agency also notes that the provision referencing the Board's procedural rules in Section 741.105 does not

resolve this problem because Section 741.130 could be construed as establishing a discovery mechanism for Subpart B that is independent of the Board's procedural rules. PC 22 at 6. The Board sees some merit in the Agency's logic and therefore has retained Subsection (b) in this second-notice order.

Section 741.130(c). Finally, the Board has deleted Subsection (c) as proposed at first notice, which provided that discovery pursuant to Section 741.130 was not applicable to mediation proceedings under Section 741.330. This rule is relocated to Section 741.315 which deals specifically with mediation. The Board believes this is where such a provision belongs.

Former Section 741.135 Conduct of Hearings (Deleted Entirely)

At first notice, the Board included a section that provided that the hearings under Subparts B and C would be conducted pursuant to the procedures in the Board's procedural rules, and that failure to comply with a hearing officer or Board order was sanctionable behavior. The rules also established that all parties or participants to the proceedings may present evidence relevant to the allocation of proportionate shares. Finally, this section provided that if proportionate share liability was raised in an enforcement complaint, the hearing on proportionate share liability could be combined with the hearing on the case in chief.

The Board has deleted the entire section because the we have included a provision in Section 741.105(b) that the Board's procedural rules apply to all proceedings under this Part, unless there is a conflict with the rules in Part 741. The Board believes that Subsections (a) through (c) are no longer necessary.[9] Subsection (d) is also deleted because, as more fully explained later, the Board no longer has taken the approach, as we did at first notice, that a determination on liability could be a separate proceeding from the allocation proceeding. Due to these deletions, the Board has renumbered all remaining sections in Subpart A.

Section 741.135 Allocation Factors

At first notice, Section 741.135 contained factors the Board could consider in determining proportionate share. The Board has made several changes to the language of this section, but the list of factors remains substantially unchanged. First, the Board has changed the introductory language from "the Board may consider any or all factors" to "the Board will consider any or all factors." (Emphasis added.) The Board believes that the Board should consider the allocation factors listed to the extent applicable to a particular case, rather than it being merely discretionary.

Second, the Board has changed the type of factors that the Board must consider. As originally proposed at first notice, the factors that the Board could consider "related to the cause of, or contribution to, a release or substantial threat of a release of regulated substances." This language seemed to imply that the factors the Board should consider in its allocation determination related to the liability of a party for a release or substantial threat of a release. However, because these are allocation factors, the Board should consider factors which relate to the allocation of

[9] SRAC agrees with the Board that it was appropriate to delete the various procedural regulations it had proposed. SRAC emphasizes that the Part 741 regulations only apply to certain types of enforcement actions, and thus SRAC concurs that the Board's current procedural rules should be sufficient. SRAC further notes that if experience with these proceedings demonstrate that additional procedures need to be established, SRAC suggests that they can be proposed on a case-by-case through a hearing officer order as required for an individual case or by modification of the rules. PC 25 at 2.

proportionate share rather than liability. Therefore, Section 741.135 now requires the Board to consider any and all factors which relate 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.

Finally, the Board has made several other changes to the factors enumerated in Section 741.135. Those changes mainly consist of adding a reference to "pesticides" and "substantial threats of a release" in order to make the subsections consistent with the Board's decision that these areas should be covered by the Part 741 rules. References to the term "liable" have also been deleted because they are unnecessary.

Section 741.140 Relief from Final Orders

At first notice, the Board determined that it was necessary to allow parties to reopen an allocation determination in some circumstances. Thus, the Board adopted provisions, contained in Section 741.140, that allowed any party to seek relief from a final order under certain circumstances. The Board modeled Section 741.140 on Section 101.301(b) of the Board's procedural rules. The Board also added a couple of additional provisions necessary based on the unique circumstances of allocation proceedings.

SRAC raises a concern with the language of Section 741.140. The rule at first notice provides that the Board could reopen a final Board determination under Part 741 for "[n]ewly discovered evidence which existed at the time of hearing and which by due diligence could not have been timely discovered." The paralleled language is at 35 Ill. Adm. Code 101.301(b)(1). SRAC maintains that the due diligence standard is problematic. SRAC explains that one of the tensions present in dealing with a response with the Agency is how much information about the site is gathered before a response is begun. Tr.5 at 104. SRAC explains that generally people who are responsible for the clean up of a site gather the information that they believe is necessary to perform the remediation they plan to do, which is not always the same amount of information that the Agency thinks is necessary. SRAC is concerned that relief from a final order will not be granted unless an "incredibly thorough" site evaluation is done. SRAC fears that only such an investigation will satisfy the due diligence standard. Tr.5 at 104-05. SRAC, therefore, suggests that either the Board include strong language which clarifies the due diligence standard or include the type of language included in the Agency's proposal. See PC 25 at 3.

` The Board has considered SRAC's concern and finds that the due diligence standard is appropriate. To allay SRAC's concern, the Board will provide further comment. As explained at first notice, the Board believes that the decision to reopen an allocation order must strike a balance between finality and fundamental fairness. Toward this end, the Board concludes that the due diligence standard is a necessary safeguard.

"Due diligence" is defined as "[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." Black's Law Dictionary (5th Ed.) 411. Based on this definition, "due diligence" does not require that all information at a site be gathered, but only that information that a prudent person would have discovered under the circumstances. In the context of these procedural rules the circumstances relate to the remediation at the site. Thus, the due diligence standard only refers to diligence in performing studies common and appropriate for development of a remediation plan. It does not refer to any additional information that could be obtained beyond the scope of an appropriate site investigation plan. In addition, we note there is yet another safeguard. An allocation

determination cannot be reopened unless the motion and supporting material show that the reopening would result in significant changes in proportionate share.

As proposed today, Section 741.140 contains several changes. All of the changes are either editorial or structural, and for the purpose of clarity.

Section 741.145 Severability

Section 741.145 is standard severability language. Other than renumbering the section, no changes have been made to this section since first notice.

Subpart B

As originally proposed by the Board at first notice, Subpart B contained eight sections: General (Section 741.200), Initiation of Allocation Determination (Section 741.205), Proportionate Share Liability as a Defense (Section 741.210), Necessary Parties (Section 741.215), Pleading (Section 741.220), Proof of Liability (Section 741.225), Settlements (Section 741.230), and Final Orders (Section 741.235). Based upon the comments of the participants, the Board has substantially changed Subpart B. These changes and the reasons for them is provided below.

Section 741.200 General

Section 741.200 has been rewritten since first notice to correspond to the changes made to the applicability provisions in Section 741.105(d) governing Subpart B and changes made to this subpart. Section 741.200 now provides that "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." This language parallels that at Section 741.105(a).

Sections 741.205 Burden and Standard of Proof

This section has been entirely rewritten. At first notice, rather than determining what party had the burden to prove proportionate share, the Board adopted rules providing that proportionate share could be raised as an affirmative defense. Based on this theory, the Board placed the burden on the respondent to prove the affirmative defense of proportionate share. The Board also concluded that rather than assign a party a burden to prove another's proportionate share, the Board would make that determination based on all evidence presented by all parties.

After reviewing the comments received during first notice, the Board has removed all those sections relating to raising proportionate share as an affirmative defense. In their place, the Board has included provisions on the burden and standard of proof for establishing a respondent's proportionate share. The Board finds that the burden of proving a respondent's proportionate share is properly placed on the complainant because Section 58.9 specifically provides that 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).

The Board does not believe it would be consistent with this language to require the respondent, rather than the complainant, to prove a respondent's proportionate share.

During the first-notice period, the Board received comments and heard testimony about the approach we took at first notice. The majority of the comments were (1) that Section 58.9 was not an affirmative defense, but rather a limitation on remedies; (2) that a nonadversarial system regarding apportionment would not work; and (3) that the burden to prove proportionate share should not be on the respondents. See Exh. 17 at 5; Exh. 18 at 6; Exh 19 at 6-8. Upon reflection, the Board agrees that Section 58.9 is a limitation on the remedy for an action seeking costs for a response or the performance of a response. Due to this conclusion, the Board has deleted the provisions contained in Subpart B at first notice. In their place, the Board has included two new sections. Section 741.205 addresses the burden and standard of proof; Section 741.210 addresses final orders.

Section 741.205(a). In the proposed second-notice rules, Section 741.205(a) placed the burden of proof on the complainant. 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. Section 741.205(b) provided that a respondent raising a defense to the action must prove that defense by a preponderance of the evidence. Finally, Section 741.205(c) provided that a complainant does not have to plead a specific alleged percentage of liability for the performance or costs of a response in the complaint.

The Agency and the AGO disagree that the burden of proof for allocation should be on the complainant. For that reason, the Agency's proposal placed the burden on respondents. Rather, they contend that the burden is more appropriately placed on the respondent. The Agency explains that this is appropriate to "leverage greater production of information by the parties most likely to have it and to reduce the chances that a responsible party will escape the process without paying its fair share because of insufficient information." PC 22 at 7. By placing the entire burden of proof on the complainant, the Agency contends that the Board has made recovery more difficult. PC 22 at 7.

The AGO explained its similar concerns by citing legal theories and policy considerations. First, the AGO maintains that placing the burden on a complainant to prove proportionate share is contrary to the *Restatement of Torts (Restatement)*. Specifically, the AGO references section 433B(2) of the *Restatement* which provides, in pertinent part, that "[w]here the tortious conduct of two or more actors has combined to bring about harm to the plaintiff . . . the burden or proof as to the apportionment is upon each actor." See *Restatement (Second) of Torts* 433B(2). PC 24 at 2. The AGO contends that the *Restatement* applies to innocent plaintiffs suing more than one wrongdoer and that the situation in proportionate share proceedings is closely akin to an action brought by the State against more than one liable party to obtain clean up of a contaminated property or cost recovery. Thus, the AGO asserts that the Board should find that the *Restatement* is analogous to the State's situation in a proportionate share proceeding and use it as a model to resolve the burden of proof issue in this rulemaking. If the Board does not decide to impose the burden of proof on the liable party, the AGO contends that the Board should return to the concept proposed at first notice. The AGO cites several cases under CERCLA to support its argument. See PC 24 at 3-4. Additionally, the AGO argues that public policy also supports imposing the burden of proving proportionate share on the liable party due to the fact that there may be insufficient evidence to establish a party's proportionate share and because placing the burden on a complainant is a disincentive for liable parties to come forward with evidence to establish proportionate share. PC 24

at 4-5. Finally, the AGO contends that placing the burden on complainants will slow down the clean up process and will likely adversely impact the State's ability to obtain clean up of contaminated property in Illinois, which will diminish the State's enforcement authority under the Act. PC 22 at 5-6.

For the following reasons, the Board concludes that the burden of proving a respondent's proportionate share should be on the complainant. First, the Board concludes that the AGO's reliance on the *Restatement* and certain CERCLA cases is misplaced. The provisions of the *Restatement* cited by the AGO essentially provide that the burden of proving causation is on the plaintiff, and that in cases where joint tortfeasors exists, the burden of proving that the harm is capable of apportionment is on the defendant. However, by enacting proportionate share liability, the legislature has already determined that, as a matter of law, the contamination at a site is always divisible. Thus, the *Restatement* is inapplicable to proportionate share and does not provide an appropriate model to base these procedures on. More fundamentally, at its core, the *Restatement* deals with joint and several liability and is based on common law. The proportionate share liability provisions were intended to move away from joint and several liability and are based on statutory, not common, law. Thus, the Board does not find the *Restatement* or the cases cited by the AGO persuasive.

Based upon the comments of the participants, the main purpose of assigning the burden of proof to respondents in the Agency's proposal was to ensure that respondents have an incentive to come forth with information in their possession regarding responsibility of various parties for a release. For instance, the Agency asserts that shifting the burden is appropriate because its provides an incentive to parties to provide information. Tr.2 at 51. The Agency argues that the incentive to produce information is not as strong under a proportionate share liability system as under joint and several liability because the risk of being held liable for 100% of the remedial costs is absent. However, the Agency observes that the incentive to produce information is still greater than it would be under a system where none of the costs of remediation are allocated to a liable party unless its share can be proven. Tr.2 at 53; Tr.4 at 20-21.

The Board has included mandatory disclosure and discovery provisions. Therefore, the Agency's and AGO's rationale for the shift of burden is obviated. As previously explained, Section 741.130 requires all participants in an allocation proceeding to compile any and all documents within their possession or control pertaining to the release at the subject site and make the records available for review and copying by the parties to the allocation proceeding. Moreover, the Board has retained Subsection (b) of Section 741.130, at the Agency's request, to ensure that other discovery devices were available. Further, because these are adversarial proceedings, there is an inherent incentive for respondents to collect and put forth information to reduce their individual risks of being assigned a large share of the response or response costs.

First and foremost, Section 58.9 is essentially a limit of the remedy available in certain enforcement actions. The Board believes Section 58.9 places the burden of proving a respondent's proportionate share on the complainant, just as the remainder of the Act places the burden of proving any other violation of the Act on the complainant. The complainant does not have to allege a specific percentage of proportionate share in the complaint, but it must put forth enough evidence for the Board to determine shares. For all these reasons, the Board finds that placing the burden of proving a party's proportionate share on the complainant is appropriate and is supported by the language of Section 58.9.

The AGO and the Agency also contend that the Board should list specific ways that a complainant may prove that a respondent "caused or contributed" to a release or substantial threat of a release. See PC 22 at 6. The Board, however, declines to list specific ways that a complainant may prove that a respondent "caused or contributed" to a release or substantial threat of a release.

Whether a respondent has caused or contributed to a release or substantial threat of a release will be fact specific. The Board does not believe it appropriate to establish a presumption that certain actions rise to the level of having caused or contributed to a release or substantial threat of a release.

Section 741.205(b). Aside from the burden of proof on the issues of liability to perform or pay for a response, the Board has also included a provision setting forth the burden to prove any defenses raised in an action. As contained in the Board's proposed second-notice proposal, Section 741.205(b) provided that an action seeking proportionate share was subject to all defenses allowed by law, including those defenses set forth in Section 22.2(j) and 58.9(a)(2) of the Act.

The Board has received three comments on this section. First, SRAC asks that this section be amended to delete the reference to Section 58.9(a)(2). SRAC argues that Section 58.9(a)(2) is a limitation, not a defense, and therefore requests that the reference to Section 58.9(a)(2) be deleted from Section 741.205(b). PC 25 at 4. On the other hand, the Community Bankers Association of Illinois filed a comment urging the Board to reference Section 58.9(a)(2) in the rules. PC 16. Third, Karaganis & White requested that the sentence regarding the burden of proof on defenses be made more clear. PC 28 at 8.

The Board agrees with SRAC that Section 58.9(a)(2) is technically a limitation rather than a defense. The Board has therefore modified the language in Section 741.205(b) to make this distinction. However, regardless of whether this is a limitation or a defense, if an action is brought against a person who falls within one of the exemptions of Section 58.9(a)(2), the Board believes that the burden of proving the limitations is on the person claiming the exemption. Thus, the Board continues to reference Section 58.9(a)(2) in Section 741.205(b). The Board has also amended the last sentence of Section 741.205(b) in response to the comment of Karaganis & White.

Section 741.205(c). Finally, Section 741.205(c) provides that a complainant is not required to plead a specific percentage of liability for the performance or costs of a response in the complaint. All the participants in this rulemaking were in agreement that a complainant should not have to include this information in a complaint as it may be too early to know this information. After discovery, if a complainant wishes to put forth an alleged percentage, that is allowed, but is not required.

Section 741.210 Final Orders

The Board proposal at first notice contained a provision regarding final orders in Subpart B. However, the Board has substantially rewritten this section since first notice. First, Section 741.210(a) specifies that the Board will enter an order determining whether a respondent proximately caused or contributed to a release or substantial threat of a release.

Under Section 741.210(b), the Board then 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. This provision was added in case a complainant alleged, but failed to establish, a specific percentage for a respondent. The Board can still enter an order allocating a share to that respondent based on the degree to which a preponderance of the evidence showed that 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.

Section 741.210(b) also provides that the Board's allocation determination will be based on the allocation factors set forth in Part 741. Finally, Subsection (c) provides that if a party fails to

comply with the Board's order, the Board may order such party to pay penalties under Section 42 of the Act. See 415 ILCS 5/42 (1998).

Settlements

At first notice, the rules contained a provision on settlements. Specifically, the section on settlements provided that "[a]t 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 order." The Board included this provision in the rules as a way for a party to settle out early in the proceedings. However, according to the proposal, the only way that a party could settle out early was if all the other parties agreed.

In its comments, Karaganis & White asserts that the requirement that all parties must agree to assign a certain percentage of liability to a particular party is too strict and would be difficult to meet in many situation. Karaganis & White suggests that the settlement provisions be revised to allow individual settlements between parties. PC 19 at 9.

The Agency asserts that its proposal did not contain a settlement provision, but believed that the State retained the flexibility to settle independently with any of the respondents, as in cases brought under joint and several liability. The Agency also questions whether the settlement provisions are contrary to Section 22.2(a) of the Act, which allows the State to settle with *de minimus* parties. PC 17 at 11.

The Board agrees that requiring all parties to an allocation proceeding to participate in a settlement is too strict. The Board believes that settlements should be allowed to occur as they are in other enforcement actions. The Board therefore concludes that settlements should proceed as normal under the Board's procedural rules, and accordingly, the Board has deleted the section on settlements from the rules.

Subpart C

As originally proposed by the Agency, Subpart C set forth the provisions that applied when no complaint had been filed with the Board, and any or all potentially liable parties petitioned the Board to allocate among themselves the entire costs of remediation at the contaminated site. Section 741.300 sets forth the general procedures for allocation when no complaint had been filed with the Board. Section 741.305 of the Agency's proposal provided that the potentially liable persons could initiate a Subpart C proceeding by filing with the Board, and established what information a petition must contain. Section 741.310 provided for a discovery period that was intended to facilitate the production of information for the purpose of creating a model of historical and current site operations. Section 741.315 sets forth the requirements for submitting the participants' joint proposal, either setting forth the agreed allocation of shares of responsibility or a proposal for hearing to resolve the allocation disputes, to the Board. If the participants agreed on allocations for any or all participants, the Board would directly review the allocation agreement. If the participants requested a hearing, Section 741.315 required the hearing officer to issue an order for the scheduling and conduct of the hearing. Section 741.320 outlined the procedures when the participants requested a hearing and gave the hearing officer 30 days to review the evidence and make a recommendation to the Board on the allocations for each participant. Following the hearing officer recommendation, the parties had 30 days to file briefs in support or opposition to the recommendation. Section 741.325 contained provisions regarding the Board's review of the agreed allocation arising out of the joint agreements or the hearing officer's recommendation. Finally, Section 741.330 provided that the Board shall use the allocation factors available under Section 741.240 in apportioning liability for the response or response costs.

At first notice, the Board noted that the proposed Subpart C procedure was unique in environmental law. It is a procedure which was part voluntary and part adjudicatory. It is voluntary in the sense that all parties to the proceeding agree to assume responsibility for the contamination at issue. It is adjudicatory in that the parties seek a determination of their proportionate share concerning the contamination that is binding and appealable. The Agency's proposed rules were developed after a series of discussions with SRAC. Testifying on behalf of SRAC, Reiser explained the procedure as follows: "It is essentially a binding allocation, a State-funded binding allocation process, a binding arbitration process, let me put it that way, where at the end of the day you get a Pollution Control Board determination that as between these parties these are the appropriate shares." Tr.3 at 77.

Under Subpart C, the Board's order at first notice contained procedures intended to guide participants to settlement and, failing that, a procedure that would formally and finally adjudicate specific shares of responsibility for the costs or performance of a response. The Board's order also provided for mediation within the Board's allocation proceeding. After addressing the applicability of this Subpart, the Board describes section by section the changes made to Subpart C since first notice.

Applicability

After the Board's proposed second-notice opinion and order, MBF filed a comment with the Board suggesting that the voluntary allocation proceeding under Subpart C should be available to persons or sites described in Section 741.105(f)(2) through (f)(5). Basically, MBF argues that since Subpart C exclusively addresses voluntary allocations, Subpart C could cover proceedings dealing with the persons or sites described in Section 741.105(f)(2) through (f)(5) without implicating the federal delegation. Before Subpart C could apply to these persons or sites, MBF suggests that the following conditions be met: (1) the relief sought by the petition is allowed by federal law, federal authorization, or other federal approval; (2) the response at the site has been completed, or the nature of the response has been determined pursuant to applicable federal and/or state law, authorizations, or other approval; and (3) the relief sought by the petition will materially advance the performance of the response at the site, or the payment of costs of response at the site. PC 27 at 2.

The suggested revisions are very interesting and thought provoking. We note that Section 741.105(g) may address MBF's concerns. Pursuant to Section 741.105(g) Subpart C may be utilized by sites and persons specified in Section 741.105(f)(2) through (f)(5) to the extent allowed by federal law. If that requirement is satisfied, the Board will treat the action like any other action under Subpart C. Again, the Board appreciates the comments by MBF, but believes that these suggestions cannot be incorporated in the proposed rule without an opportunity for additional public comment.

Section 741.300 General

Section 741.300 has been rewritten since first notice to correspond to the changes made to the applicability provisions in Section 741.105(e) governing Subpart C and to correspond to the other changes made to this subpart. The Board has also made a couple of other editorial changes to this section for the sake of clarity. The Agency has also suggested that the Board revise Section 741.300 by amending the introduction to read: "This Subpart sets forth the procedure that *may* apply . . . ." (Emphasis added.) The Board agrees with this suggestion and has made the change requested.

Section 741.305 Initiation of Voluntary Allocation Proceeding

As originally proposed by the Agency, a Subpart C proceeding could not be initiated until site activities had progressed at least to the point where there was an approved Remedial Action Plan (RAP) under the SRP or a written agreement with the Agency as to the activities to be performed in response to the Section 4(q) or 58.9(b) notice. At first notice, the Board retained a modified version of the Agency's provision in the regulations. The Board noted that participants had questioned whether the statutory language supported such a provision and whether it afforded any benefit. See PC 12, Exh. A at 7. The Board believed that a benefit did exist in situations in which persons agreed to accept 100% of the costs or performance of a response, but have not stipulated to specific shares of the response. In such a case, the Board concluded that allocation process was likely to be much more effective if the necessary response was known. Nevertheless, the Board questioned whether this prerequisite was necessary when the participants stipulated to specific shares.

The Agency responded that a RAP or written Agency agreement should be necessary under either scenario. Exh. 17 at 13. Therefore, the Board has changed Section 741.305 so that a RAP or written Agency agreement is required regardless of whether the participants have stipulated to specific shares of the costs or performance of a response.

The Agency has also suggested that the following language be added to Subsection (e): "The State or the Agency also may appear specially to move the Board to stay the Subpart C proceeding." PC 22 at 8. Since the Board has included in the rules a prohibition on the filing of a Subpart C petition when a complaint addressing the same release has been filed in another forum, the Board finds the change requested by the Agency appropriate. With certain modifications to the Agency's language, the Board has modified Section 741.305(e).

Section 741.310 Allocation Proposals and Hearing Requests

Section 741.310 applies where the participants are engaged in the adjudicatory allocation process. Within 60 days following the close of discovery, the parties are required to file with the Board either or both of the following: (1) an agreed allocation for any or all participants, and/or (2) a proposal for hearing for the resolution of all allocations for which the participants have been unable to reach agreement. If the participants have agreed on allocations for any or all participants, the allocation agreement goes directly to the Board, which reviews the proposal and issues an order under Section 741.325. If a hearing is requested as part of the joint proposal, Section 741.310(c) requires the hearing officer to issue an order for scheduling and conduct of the hearing. The parties then may submit briefing memoranda to the hearing officer identifying the issues to be resolved at hearing and supporting their proposed allocation.

The only changes the Board has made to this section since first notice are purely editorial.

Section 741.315 Settlements

Section 741.315 allows participants to reach an agreed allocation among themselves at any time, as long as the agreement results in allocation of 100% of the costs of the response in the RAP or other Agency-approved plan.

The Board has made only editorial changes to this section since first notice.

Sections 741.320 Mediation

At first notice, the Board recognized that the participants wanted a procedure that had elements of both mediation (the facilitation of voluntary agreement) and adjudication (formal decisionmaking where no agreement has or can be reached). Therefore, the Board proposed that

the participants engage in voluntary mediation, to be followed by a traditional Board hearing on the allocation issues if voluntary agreement was not reached through mediation or mediation was not desired.

At first notice, the Board specifically requested comment regarding the details of this proposed procedure and received none until after issuing a modified rule in our November 12, 1998 order. After further reflection during first notice, the Board chose to modify the proposed mediation rules. Specifically, the Board deleted those provisions from the rule that deal with the internal procedures of mediation or that require the Board to maintain a list of qualified mediators. The Board believes that this modification is appropriate as the internal procedures for mediation can be dealt with by the mediator and the participants. Moreover, the Board currently has no procedures in place to maintain a list of mediators. In fact, SRAC recognized in its proposed second-notice comment, such a list can pose certain problems for a State agency. Thus, Board has deleted most of Section 741.325 as proposed at first notice. The only remaining requirement is that mediation must be completed within 120 days after a notice of intent to mediate has been filed with the Board. We note the Board has also extended the period for mediation, from 60 to 120 days because the Board believed that 60 days may not be a long enough period.

Section 741.325 Settlement Through Mediation

This section sets forth the procedures for settlement that apply when a settlement has been reached through mediation. No substantive changes have been made to this section since first notice.

Section 741.330 Board Review and Final Orders

Section 741.335 provides for Board review of agreed allocations arising out of joint proposals and for the issuance of a Board decision allocating proportionate shares to the participants. Additionally, Section 741.335 provides that the Board may accept or revise agreed allocations, but the final order must allocate 100% of the costs of the response to the participants in the proceeding.

As originally proposed by the Agency, the participants in a Subpart C proceeding had to bear the risk of default by any of the participants. At first notice, the Board concluded that making a participant responsible for a defaulting participant's share was a disincentive to proceeding under Subpart C. Therefore, the Board struck this provision and in its place provided that sanctions could be assessed against a defaulting participant. During first notice, the Agency questioned how a Board order would be violated if such an order does not require the parties to perform or pay for a response. Exh. 17 at 14. Based on the Agency's comment, the Board has added a provision at Subsection (c) stating the Board's final order will include an order to perform or pay for a response based on the proportionate share determined during the proceeding. The Board has also made other nonsubstantive changes to this section for clarity.

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 and development of the rules. Tr.5 at 176-178. Some of the participants supported this approach in order to examine any changes to the rules before they were formally adopted for second notice. See PC 19 at 2; PC 20 at 5.

The Board has serious concerns about missing a statutory deadline for the promulgation of rules required by the Illinois legislature. Rather than do so, the Board has provided additional

hearings and comment periods to maximize public input in the short amount of time available. We adopted an order on November 12, 1998, which contained the modifications made in response to the first notice comments received by that date and information obtained at the hearing. Our decision to publicly disseminate a proposed second notice and extend the time for comment, albeit short, were consistent with the requirements of the Illinois Administrative Procedures Act and in fact aided in the public discussion of the issues involved in this rulemaking, as well as the Board's consideration of those issues. See Proportionate Share Liability 35 Ill. Adm. Code 741 (November 12, 1998), R97-16.

Further, the issues in this proceeding have been thoroughly and completely examined, both publicly before the Board and internally at the Board. We also recognize that the legal complexity surrounding these issues results from the ambiguous statutory provisions which guide us all in this proceeding. We believe that, absent further legislative guidance, an extension of time will not aid us in making some of the more important decisions to develop proportionate share rules in accordance with these statutory provisions. Those core determinations are, of course, the question of applicability of these rules to federal sites and the question of who bears the burden of proving the extent of a liable party's contribution to the contamination at a site. While the Board recognizes that no one will be completely satisfied with these rules, the Board assures all participants in this matter that their testimony, comments, and positions on all issues have been considered and have been fully examined by the Board.

TECHNICAL FEASIBILITY

Section 27 of the Act provides that before adopting a rule, the Board must consider the "technical feasibility" of the rule. See 415 ILCS 5/27(a) (1996). The Board does not believe that there are any issues regarding technical feasibility that would arise as a result of the proposed regulations. The proposed regulations would not impose any new burdens on the regulated community to install equipment or to develop new technology. Rather, the proposed regulations establish procedures to resolve the factual and legal issues related to the apportionment of responsibility for response costs or to conduct remedial action. Consequently, no technical requirements are necessary for compliance with the proposed regulations. The Board therefore finds that the proposed rules are technically feasible.

ECONOMIC REASONABLENESS

Section 27 of the Act also provides that before adopting a rule, the Board must take into account the "economic reasonableness" of the rule. See 415 ILCS 5/27(a) (1996). As noted previously, the proposed regulations do not impose new regulatory burdens on persons, nor do the regulations create any new causes of action. Rather, the regulations establish procedures to deal with the factual and legal issues created by changing the liability scheme in Illinois from joint and several liability to proportionate share liability. While no new technological burdens are imposed, the proposed rules may increase the litigation costs to the State and PRPs in an action to recover response costs or to require remedial action.

As Section 741.105 of the proposed regulations sets forth, a Subpart B proceeding may only be initiated whenever the State, the Agency, or any person files a complaint with the Board seeking to require any person to conduct a response or to recover the costs of a response performed by the State. The Agency asserts in its Statement of Reasons that "elimination of joint liability and the requirement to prove cause or contribution will impose additional cost burdens on the State when developing enforcement cases." Stat. at 19. The Agency also contends that it "anticipates a significant increase in the resources required to identify PRPs prior to filing enforcement action at sites with multiple PRPs and a corresponding increase in the resources required to develop the cases once the PRPs are identified." Stat. at 19. Additionally, the Agency contends that the absence

of joint liability will shift the costs of the "orphan share" to the State. For these reasons, the Agency believes that adoption of the proposed rules will increase the costs of bringing actions against PRPs.

The Board agrees with the Agency that the State's costs of enforcement actions will be increased and that there may be an increase in costs because the State may be, as a practical matter, forced to assume the share of costs or remedial action that is not attributable to any person, or is attributed to an insolvent or absent person. However, the Board believes that these increased costs are the result of statutory amendments mandating a system of proportionate share liability and not because of the implementing regulations adopted for second notice today.

Moreover, a Subpart C proceeding can be initiated only when any or all potentially liable parties at a site have agreed to allocate the entire costs or response among themselves. While compliance with the formal requirements of Subpart C may increase the costs of resolving issues of liability among potentially liable parties, participation in a Subpart C proceeding is entirely voluntary. For these reasons, the Board finds that the proposed regulations are economically reasonable.

CONCLUSION

The Board finds that the proposed rules, as revised, are economically reasonable and technically feasible. Therefore, the Board adopts the following proposal for second notice. Additions from first notice are double-underlined, and deletions from first notice are stricken through.

ORDER

The Board proposes for second notice the proposed rules for 35 Ill. Adm. Code 741. The Clerk of the Board is directed to file these proposed rules with the Joint Committee on Administrative Rules.

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

PART 741
PROPORTIONATE SHARE LIABILITY

SUBPART A: GENERAL

Section

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

SUBPART C: VOLUNTARY ALLOCATION PROCEEDINGS

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 ~~define applicability and~~ establish procedures under ~~Section 58.9 of the Act for the~~ which the Board will allocat~~e~~ion ~~of~~ proportionate shares of the performance or costs of ~~of liability 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, 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 [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.~~

~~c) 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 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 ~~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 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~~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.~~

c~~e~~) 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 who must~~shall~~l 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 3014 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 petitionService and filing must be in accordance with 35 Ill. Adm. Code 101.Subpart C, except that petitioner must initially serveice 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.

hj) 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).

jk) 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) 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. 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 ~~H~~hearing ~~O~~officer, each~~all~~ party~~ies~~ 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 h~~H~~earing o~~O~~fficer will~~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 741.135~~40~~ 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 a ~~liable~~ person's proportionate share ~~of liability~~.

Section 741.140~~45~~ 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 741.14~~50~~ 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 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.

~~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 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 the 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.

~~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 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. ~~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, under or from 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 if:~~.~~

~~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.

b~~c~~) The petition under subsection~~s~~ (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~~ 741.3253~~0~~ of this Subpart or to proceed with the Board's allocation proceedings~~dure~~ under Sections 741.310 and~~through~~ 741.315 of this Subpart.

c~~d~~) 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~~officer as necessary.

d~~e~~) 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~~f~~) 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 ~~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 involve~~sing~~ the same release or substantial threat of a release, the Board may, upon motion by any participant~~s~~ or at its discretion, stay the ~~Subpart C~~ proceedings under this Subpart pending the outcome of the other~~Subpart B~~ 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~~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, ~~A~~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~~officer 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~~ participant~~s~~ ~~shall~~ submit a pre-hearing memorandum~~a~~ 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~~ prohibits the participants from entering at any time into a settlement for Board review if the settlement allocates among the settling participants~~reaching 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~~choose~~ 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.~~

b~~d~~) While mediation is proceeding, the time period~~s~~ for the allocation proposal and hearing request~~s~~ 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.~~

c~~i~~) Mediation must be completed within 120~~60~~ 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) A~~a~~ joint motion to dismiss the Board action~~,~~; or

2) A~~a~~ 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 share~~s 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.

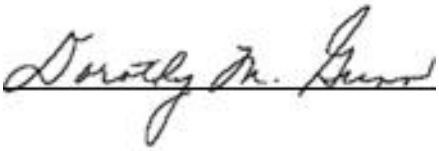
c) The Board's final order will include an order to perform or pay for the response based on the proportionate shares determined during the proceeding.

d~~c~~) The Board may impose ~~P~~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 3rd day of December by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board