ILLINOIS POLLUTION CONTROL BOARD
September 3, 1998

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

Proposed Rule. First Notice.

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

On December 21, 1995, Governor Jim Edgar signed into law House Bill 901 as Public Act 89-443, effective July 1, 1996. This amendatory legislation added a new liability section to Title XVII of the Environmental Protection Act (Act). This new liability section, Section 58.9, repealed joint and several liability in environmental actions and replaced it with proportionate share liability. The proposal that the Board adopts today for first notice establishes the procedures for determining proportionate share. In the sections that follow, the Board will provide background for this rulemaking, a summary of the proposed rules for first notice, and a more detailed summary of each section of the proposed regulations, as well as a discussion of the issues which have arisen during the hearings for each section and the Board's resolution of those issues.

BACKGROUND

In the spring of 1995, the Illinois General Assembly passed House Bill 544 and Senate Bill 46. These bills created the Site Remediation Program (SRP) as a new Title XVII within the Environmental Protection Act. Both bills were identical and set forth a risk-based system of remediation for contaminated sites. Additionally, both House Bill 544 and Senate Bill 46 replaced the former joint and several liability provisions for environmental actions with a new proportionate share liability scheme. In the summer of 1995, Governor Edgar amendatorily vetoed both bills to remove the proportionate share liability provisions, leaving all other provisions of the bills intact. See 89th Ill. Gen. Assem., House Proceedings, October 20, 1995, at 7605-06 (Governor's Message). Within the Governor's veto messages, the Governor expressed concern regarding the proportionate share liability provisions of the bills, including the issue of adequate funding for "orphan shares, those shares of responsibility left uncovered because no responsible parties can be identified or held liable." See 89th Ill. Gen. Assem., House Proceedings, October 20, 1995, at 7605 (Governor's Message). During the fall 1995 veto session, the General Assembly voted to accept Governor Edgar's amendatory veto of House Bill 544, thereby enacting the SRP without the proportionate share liability provisions. House Bill 544 became law as Public Act 89-431, effective December 15, 1995. No action was taken on Senate Bill 46, and the bill subsequently died.

Besides establishing the SRP, Public Act 89-431 also mandated that the Illinois Environmental Protection Agency (Agency) propose rules to the Board prescribing procedures and standards for the administration of Title XVII within nine months after the effective date of the bill (September 15, 1996). See 415 ILCS 5/58.11(c) (1996). The Board was then required to adopt within nine months after receipt of the Agency's proposed rules, rules that were consistent with Title XVII, including provisions for classification of land use and the voidance of No Further Remediation letters. See 415 ILCS 5/58.11(c) (1996).

Public Act 89-431 (Title XVII) was subsequently amended by Public Act 89-443. During the fall 1995 veto session, the General Assembly passed House Bill 901, which in addition to containing the identical contents of Public Act 89-431, also contained the original proportionate share liability provisions vetoed out of Public Act 89-431. Public Act 89-443 also established additional funding for the Hazardous Waste Fund to be used by the Agency in its efforts to address orphaned, contaminated sites, thus addressing the Governor's concerns regarding the "orphan share" issue. With the addition of the funding scheme to address orphan sites, the Governor signed House Bill 901 into law as Public Act 89-443, effective July 1, 1996. This new liability scheme established by Public Act 89-443 is contained in Section 58.9 of the Act.

Title XVII, as enacted by Public Act 89-431 and as modified by Public Act 89-443, is intended to serve several important purposes. Those purposes are to: (1) establish a risk-based system of remediation based on the protection of human health and the environment relative to present and future use of the land; (2) assure that the land use for which remedial action was undertaken will not be modified without consideration of the adequacy of such remedial action for the new land use; (3) provide incentives for the private sector to undertake remedial action; (4) establish expeditious alternatives for the review of site investigation and remedial activities, including a privatized review process; and (5) assure that the resources of the Hazardous Waste Fund are used in a manner that is protective of human health and the environment relative to present and future uses of the site and surrounding area.[1] See 415 ILCS 5/58 (1996). In order to achieve the objectives of the SRP, the Board was required to conduct three separate rulemakings to implement the provisions of Title XVII. See 415 ILCS 5/58.9(d), 58.11(c) (1996).

The first set of rules necessitated by Title XVII achieve the first two objectives of Title XVII and address "risk-based remediation objectives," which is the focus of Section 58.5 of the Act. As required by Section 58.11(c), the Agency proposed and the Board adopted rules, effective July 1, 1997, establish a tiered approach to remediation based on risks to human health and the environment and a consideration of the proposed land use at a contaminated site. See In the Matter of: Tiered Approach to Corrective Action Objectives (TACO): 35 Ill. Adm. Code Part 742 (June 5, 1997), R97-12(A). Two further rulemakings to refine the TACO standards were completed by the Board on December 4, 1997, and June 4, 1998, respectively. See In the Matter of: Tiered Approach to Corrective Action Objectives (TACO): Amendments to 35 Ill. Adm. Code 742.105, 742.200, 742.505, 742.805, and 742.915 (December 4, 1997), R97-12(B); In the Matter of: Tiered Approach to Corrective Action Objectives: Amendments to 35 Ill. Adm. Code 742 (June 4, 1998), R97-12(C).

The second set of rules necessitated by Title XVII address the procedural aspects of administering a State clean-up program when private parties are proceeding with site remediation, either voluntarily or pursuant to a State enforcement action. These procedures are the focus of Sections 58.4, 58.6, 58.7, 58.8, and 58.10 of the Act and achieve the third and fourth objectives of Title XVII. As required by Section 58.11(c), the Agency proposed and the Board adopted rules,

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[1] The first four objectives were enacted under Public Act 89-431. The fifth objective was added by Public Act 89-443. Additionally, in the spring of 1997, the General Assembly passed Senate Bill 939 as Public Act 90-123, effective July 21, 1997. This bill amended the Illinois Income Tax Act (35 ILCS 5/101 et seq. (1996)) and the Act by adding Section 58.14 to create the environmental remediation tax credit. This tax credit allows taxpayers to credit against their Illinois income tax liability a portion of the costs the taxpayer expended to clean up certain contaminated properties. Public Act 90-123 also added a sixth purpose of Title XVII and mandated that the Board adopt for second-notice rules providing for the Agency's review of environmental remediation costs within six months of receipt of a rulemaking proposal by the Agency. The Board adopted these rules for second notice on July 8, 1998. See In the Matter of: Review of Remediation Costs for Environmental Remediation Tax Credit (Amendments to 35 Ill. Adm. Code 740) (July 8, 1998), R98-27.

effective July 1, 1997, addressing those sections of the Act. See In the Matter of: Site Remediation Program and Groundwater Quality (35 Ill. Adm. Code 740 and 35 Ill. Adm. Code 620) (June 5, 1997), R97-11.

The third set of rules necessitated by Title XVII must address the procedural and substantive aspects of applying proportionate share liability to environmental actions under Section 58.9 of the Act. These provisions are the subject of this rulemaking and address the fifth objective of Title XVII.

Specifically, Section 58.9 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. . . . ." 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, in any material respect, to the release of regulated substances. See 415 ILCS 5/58.9(a)(2)(A) (1996). Section 58.9 also provides that if the State of Illinois seeks to require a person to conduct remedial activities, the Agency must provide notice to such person. The notice must include "the necessity to conduct remedial action pursuant to this Title and an opportunity for the person to perform the remedial action." 415 ILCS 5/58.9(b) (1996). 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 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). 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 liability in environmental actions, Section 58.9 also directed that the Board adopt, within 18 months of the effective date of the amendatory act, rules and procedures for determining proportionate share. 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 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).

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 In the Matter of: 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.[2] On February 5, 1998, the Board accepted this matter for hearing. See In the Matter of: Proportionate Share Liability (35 Ill. Adm. Code 741) (February 5, 1998), R97-16.

The Agency's proposal is the result of a coordinated effort between the Agency, the Illinois Attorney General's Office (AGO), and the Site Remediation Advisory Committee (SRAC). The SRAC was established by Section 58.11, 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).

In developing the proposal, the Agency met formally with SRAC at least nine times between February 14, 1997, and March 24, 1998. Additionally, several subgroups also held meetings during this time period and informal contacts were made. Representatives from the AGO began attending the Agency/SRAC meetings in October 1997. Additionally, a representative from the Illinois State Bar Association attended many of the meetings. See Stat. at 2-3; see also Exh. 5 at 5. As a result of these efforts, consensus was reached on many of the issues raised by this rulemaking, but areas of disagreement still exist. Stat. at 3; Exh. 5 at 5. The Agency identified the major areas of disagreement to be the applicability provisions, the provisions on information orders, and the burden and standard of proof. See Stat. at 3.

In summary, the Agency's proposal consists of three subparts. Subpart A contains the applicability provisions, definitions, and other general information and procedures. Subpart B contains procedures for determining liability and proportionate share where the State of Illinois has filed a complaint with the Board seeking to require removal or remedial action (hereinafter referred to as a "response") or to obtain cost recovery. Subpart C is available to potentially responsible parties (PRP) who are not the subject of an enforcement complaint and who have agreed among themselves to allocate the entire costs of a response action.

The Board has held four public hearings in this matter.[3] Those hearings were held on May 4, 1998, in Springfield, May 12, 1998, in Chicago, and May 27 and June 10, 1998, in Springfield. At the May 4, 1998 hearing, Gary P. King, manager of the Division of Remediation Management within the Agency's Bureau of Land, and John S. Sherrill, an Agency employee in the Remedial Project Management Section of the Division of Remediation Management within the Agency's Bureau of Land, testified and responded to prefiled questions. At the May 12, 1998 hearing, the Agency's witnesses again testified, along with Matthew J. Dunn, Chief of the State-wide Environmental Enforcement/Asbestos Litigation Division of the AGO. At the May 27, 1998 hearing, the Agency's witnesses again testified, along with several other witnesses: Sidney M. Marder, Executive Director of the Illinois Environmental Regulatory Group (IERG); David L. Rieser, a partner at Ross & Hardies, representing the Illinois Steel Group (ISG) and the Chemical Industry Council of Illinois (CICI); David E. Howe, Senior Attorney at Caterpillar, Inc.; and Laurel O'Sullivan, Staff Attorney for Business and

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[2] 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 _."

[3] A prehearing conference was also held on October 28, 1997, in Springfield, Illinois.

Professional People for the Public Interest (BPI). At the fourth hearing on June 10, 1998, Carey Rosemarin, an attorney with Jenner & Block, testified on behalf of Commonwealth Edison (Com Ed),[4] and the Agency provided additional testimony in response to the other testimony presented at the hearings.[5]

During the course of the hearings, the following exhibits were accepted into the record:

Exhibit 1: Photograph of the Steagall Landfill taken on November 6, 1985, by the Agency.

Exhibit 2: Photograph of the Steagal Landfill taken on November 6, 1985, by the Agency.

Exhibit 3: Enlarged photograph of open refuse at the Logan Landfill taken in August 1996 by the Agency before remedial action was conducted at the site.

Exhibit 4: Enlarged photograph of the Logan Landfill taken in September 1997 by the Agency after remedial action was conducted at the site.

Exhibit 5: Prefiled testimony of Gary King of the Agency.

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[4] On June 26, 1998, Com Ed filed a motion with the Board to correct the transcript from the June 10, 1998 hearing. According to the motion, various statements of Rosemarin were incorrectly transcribed. Com Ed therefore requests that the transcript be corrected. As no response to the motion was received and no prejudice will result from the granting of the motion, the Board hereby grants Com Ed's motion to correct the transcript. Accordingly, the Board makes the following revisions to the June 10, 1998 transcript: (1) line 19 on page 102 is corrected to read "some crucial modifications are effected"; (2) line 7 on page 103 is corrected to read "Quoting from 58.9 in pertinent part, and I"; (3) line 9 on page 103 is corrected to read "The operative provisions of 58.9 read as"; (4) line 14 on page 104 is corrected to read "of the restatement to support 210(d)(3)."; (5) line 13 of page 107 is corrected to read "58.9 was enacted against the backdrop of years and"; (6) line 25 of page 107 is corrected to read "There is similar authority, in Biomedical"; (7) line 15 of page 108 is corrected to read "disproportionate liability, again in derogation of the"; (8) line 3 of page 111 is corrected to read "The bases of this position are"; (9) line 10 of page 111 is corrected to read "any consideration of the potential withdrawal of"; (10) line 13 of page 112 is corrected to read "Initially, I refer to the"; (11) line 9 of page 113 is corrected to read arbitrary and capricious if the Agency relies on"; (12) line 13 of page 114 is corrected to read "has existed at the national level and reflected in the"; (13) line 24 of page 133 is corrected to read "percent is not foisted upon them"; and (14) line 13 of page 137 is corrected to read "I can't imagine any of the non-volume,".

[5] Public Act 90-489, which amended Section 27 of the Act (415 ILCS 5/27 (1996)), requires the Board to request that the Department of Commerce and Community Affairs (DCCA) conduct an economic impact study (EcIS) on certain proposed rules prior to adoption of those rules. By letter, dated February 5, 1998, the Board requested that DCCA conduct such a study. At the June 10, 1998 hearing, the Board asked for public comment on DCCA's decision not to conduct an economic impact study for this rulemaking. Tr.4 at 138-40. The Board received no comment on this issue.

Exhibit 6: Prefiled testimony of John Sherrill of the Agency.

Exhibit 7: Agency's document entitled "Allocation Scenarios Illustrating Approaches to Apportionment for Liable Parties."

Exhibit 8: Agency's document entitled "4(q) Notice Summary 1984 through 1997."

Exhibit 9: Prefiled testimony of Matthew Dunn of the AGO.

Exhibit 10: Prefiled testimony of Sidney Marder of the IERG.

Exhibit 11: Prefiled testimony of David Rieser on behalf of the ISG and CICI.

Exhibit 12: Prefiled testimony of David Howe of Caterpillar, Inc.

Exhibit 13: Testimony of Laurel O'Sullivan on behalf of BPI.

Exhibit 14: Agency's document entitled "Agency's Errata Sheet Number 1."[6]

Exhibit 15: Agency's document entitled "Hazardous Waste Fund (HWF) Fiscal Years 1998 and 1999 Projections for Remedial Work."

Exhibit 16: Alternative language for Section 741.210(d) submitted by Carey Rosemarin on behalf of Com Ed.

In addition to the testimony and exhibits presented at hearing, the Board has also received the following public comments in this matter:

PC 1: Comments of the IERG, submitted by Whitney Rosen (3/21/97).

PC 2: Comments of the National Association of Independent Insurers, submitted by Richard Hodyl, Jr., Insurance Services Counsel (3/28/97).

PC 3: Supplemental comments of the IERG, submitted by Whitney Rosen (2/2/98).

PC 4: Comments of Thomas A. Ryan on behalf of Browning-Ferris Industries of Illinois, Inc. (BFI) (4/20/98).[7]

PC 5: Comments of Laurel O'Sullivan on behalf of BPI (7/8/98).

PC 6: The Agency's Posthearing Comments (7/14/98).

PC 7: The AGO's Posthearing Comments (7/14/98).

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[6] The errata sheet suggests that certain revisions to the original proposal be made. These revisions are primarily based on questions and comments raised during the hearings.

[7] PC 1 through PC 4 were received before the Board held hearings in this matter. Additionally, the comments of Thomas A. Ryan on behalf of BFI were originally submitted as prefiled testimony. However, because Ryan was unable to attend the hearings in this matter, he asked that the testimony be considered as a public comment. The hearing officer granted this request at the first hearing in this matter.

PC 8: Comments of Karaganis & White, Ltd. (Karaganis & White) (7/14/98).

PC 9: Comments of the City of Chicago, Department of Environment (City) (7/14/98).

PC 10: Comments of Carey Rosemarin on behalf of Com Ed (7/14/98).

PC 11: Comments of the United States Environmental Protection Agency (USEPA) (7/14/98).

PC 12: Public Comments of Mohan, Alewelt, Prillaman & Adami (Mohan) (7/15/98).

PC 13: Posthearing Comments of David Rieser on behalf of the SRAC, the ISG, and the CICI (7/17/98).

PC 14: Posthearing Comments of Randy A. Muller on behalf of the Illinois Banker's Association (7/21/98).

PC 15: Posthearing Comments of Whitney Rosen on behalf of the IERG (7/23/98).[8]

During the course of the prefirst-notice period, approximately 1,100 pages of testimony, questions, public comments, responses, and exhibits have been gathered. In adopting the proposed rules for first notice, the Board has reviewed and considered all matters of record, including the proposal, testimony, exhibits, and public comments submitted by the Agency and other participants in this rulemaking. The Board commends the Agency, the SRAC, the AGO, and all others who participated in this proceeding. Proportionate share liability in environmental law is a new concept in Illinois and it raises some difficult and complex issues. The time and thought that the participants devoted to this rulemaking gave the Board a well-developed record upon which to resolve those issues. The Board looks forward to the continued participation of these and other participants in this rulemaking.

Following the adoption of this order, the proposed rules will be published in the *Illinois Register*, upon which a 45-day public comment period will begin. As proportionate share is a new concept in Illinois, the Board encourages all participants and others to review the Board's proposal and comment on its merits within the 45-day comment period. The Board must adopt final regulations to implement Section 58.9 before January 1, 1999. The last regularly scheduled Board meeting before that date is December 17, 1998.

SUMMARY

The purpose of Part 741 is to establish procedures for the determination of liability and allocation of proportionate share for the performance or cost of a response resulting from the release or substantial threat of a release of regulated substances. See 415 ILCS 5/58.9(d) (1996). Subpart A contains the applicability provisions, definitions, and other general information and procedures. Subpart A also provides for discovery before an action is filed for the limited purpose of ascertaining the identify of persons potentially liable. Subpart A also contains allocation factors and allows for the modification of a final allocation determination based on newly discovered evidence.

[8] PCs 13, 14, and 15 were received after the deadline for filing posthearing comments. The three public comments were accompanied by a motion to file the comments *instanter*. As no prejudice will result from their filing, the motions to file *instanter* are hereby granted.

Subpart B contains procedures for determining proportionate share where a complaint has been filed with the Board by the Agency, the State of Illinois, or any person. The Subpart further sets forth the requirements for asserting proportionate share liability either in a complaint or as an affirmative defense, and sets forth provisions concerning necessary parties, pleading requirements, and provides for the filing of stipulations and settlements.

Subpart C contains procedures for potentially liable persons who are not the subject of a complaint and who have agreed among themselves to allocate the entire cost of a response action. These parties may initiate a Subpart C proceeding by filing a joint petition with the Board. At the outset, the participants may choose to proceed to mediation or to directly proceed with the Board's voluntary allocation proceeding. If the parties elect to engage in mediation, the subpart sets forth the procedures for mediation. If, at any time, the parties agree to a settlement, the parties can either file a motion to dismiss the allocation proceeding before the Board or file a stipulated settlement agreement with the Board. If no settlement is reached, the parties may notify the Board and proceed through the Board allocation procedure.

Because of the Board has changed and reorganized many sections of the Agency's proposal, the following is a conversion chart for aid in referring to the Agency's proposal:

Agency Proposal	Board Draft
741.100	741.100
741.105	741.105
741.110	741.110
741.115	741.115
741.120	741.120
	741.125
741.125	741.150
741.200	741.200
	741.205
	741.210
	741.215
	741.220
	741.230
741.205	741.135
	741.220
741.210(b)	741.225
741.210(d)	741.225
741.215	741.140
741.220	741.145
741.300	741.300
741.305	741.305
741.310	741.130
741.315	741.310
741.320	741.135
	741.315
	741.320

	741.325
	741.330
741.325	741.335
741.330	741.140
741.335	741.145
741.340	

DISCUSSION

As noted earlier, the proposed regulations contain three subparts. This section of the opinion sets forth a more detailed description of each subpart, along with a discussion of the Board's resolution of any issues that have arisen with respect to any corresponding section of the Agency's proposal.

Subpart A

Subpart A sets forth the general provisions of Part 741. Specifically, Subpart A (1) identifies the purpose of Part 741; (2) identifies the circumstances under which a Subpart B or Subpart C proceeding may be initiated and specifies circumstances under which Part 741 is not applicable; (3) includes definitions for certain terms used in the proposed regulations; (4) sets forth a procedure whereby persons are able to conduct discovery before an action is filed; (5) requires that notice be given to a person whom the State seeks to require to conduct a response action and provides what that notice must include (commonly referred to as a Section 58.99b) notice); (6) provides that the Agency may offer the person to whom notice is given an opportunity to meet with the Agency to resolve outstanding issues; (7) requires that the Agency be given notice of, and may participate in, any proceeding seeking allocation of proportionate shares of liability; (8) includes provisions concerning mandatory disclosure and discovery; (9) provides procedures for the conduct of hearings; (10) provides procedures for the Board's allocation of proportionate shares of liability; (11) sets forth factors the Board may consider in determining allocations; (12) allows for a final allocation determination to be adjusted under certain circumstances; and (13) includes a severability provision in the event a section, subsection, sentence, or clause of the regulations is judged invalid.

At the hearings and in the public comments, issues were raised regarding applicability (Section 741.100 Applicability), precomplaint discovery (Section 741.115 Discovery Before an Action is Filed), notice under Section 58.9(b) of the Act (Section 741.120 Resolution of Issues in 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 these issues, are discussed below.

Section 741.100 Purpose

Section 741.100 sets forth the purpose of the Part 741 rules. As originally proposed by the Agency, this section provided that 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." The Board has made two changes to the language of this section as originally proposed by the Agency. First, the Board has changed the language from "removal or remedial action" to "response." As the definitions make clear, the term response encompasses both removal and remedial action. Therefore, the Board has used the term response action throughout the rules, instead of removal or remedial action. Second, the Board has removed the reference to pesticides. Regulated

substances include hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). CERCLA includes pesticides as a category of hazardous wastes. Thus, the Board does not believe that a separate definition of pesticides is needed, as pesticides are included in the definition of regulated substances. Accordingly, the Board has deleted the definition of pesticides and any references to pesticides.

Additionally, the Board notes that while the Agency's proposed regulations for Part 741 cover the "performance or cost of removal or remedial action resulting from the release or substantial threat of a release of regulated substances or pesticides," Section 58.9 only speaks of remedial action for releases of regulated substances. The Board acknowledges that the Agency included removal, and substantial threat of a release to keep the Part 741 provisions consistent with other regulations under Title XVII and Section 58.9(a)(1). See Stat. at 1, n.1. However, because Section 58.9 does not include these concepts, the Board seeks comment on whether these concepts are appropriate to include in the regulations.

Section 741.105 Applicability

Section 58.9(a)(1) of the Act provides that:

> Notwithstanding any other provisions of this Act to the contrary, including subsection (f) of Section 22.2, in no event may the Agency, the State of Illinois, or any person bring an action pursuant to this Act or the Groundwater Protection Act to require any person to conduct remedial action or to seek recovery of costs for remedial activity conducted by the State of Illinois or any person 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. 415 ILCS 5/58.9(a)(1) (1996).[9]

In the Agency's proposal, Section 741.105 sets forth the applicability provisions. Subsection (a) provides that Subpart B is applicable whenever a complaint has been filed with the Board seeking to require any person to conduct a response action or to recover the cost of a response action performed by the State. Subsection (b) provides that Subpart C is applicable when any or all PRPs at a site have agreed to allocate the entire costs of the response action among themselves. Subpart C is not available if a complaint has been filed in any forum, including with the Board under Subpart B. Participation in Subpart C also requires an Agency-approved Remedial Action Plan (RAP) under the SRP Program or a written agreement with the Agency regarding the performance of a response action following the issuance of notice under Section 4(q) or 58.9(b) of the Act. 415 ILCS 5/4(q), 58.9(b) (1996).

Although Section 58.9 begins with the phrase "[n]otwithstanding any other provisions of this Act to the contrary," the Agency proposed that the limitations in Section 58.1 of the Act, which by its terms applies to all provisions of Title XVII, be limits on the applicability of the regulations under Section 58.9. Section 58.1(a)(2) provides:

[9] The language of Section 58.1(a)(1) has remained unchanged since it was initially proposed in House Bill 544 and Senate Bill 46.

> Any person, including persons required to perform investigations and remediations under this Act, may elect to proceed under this Title unless (i) the site is on the National Priorities List (Appendix B of 40 CFR 300), (ii) the site is a treatment, storage, or disposal site for which a permit has been issued, or that is subject to closure requirements under federal or State solid or hazardous waste laws, (iii) the site is subject to federal or State underground storage tank laws, or (iv) investigation or remedial action at the site has been required by a federal court order or an order issued by the United States Environmental Protection Agency. To the extent allowed by federal law and regulations, the sites listed under items (i), (ii), (iii), and (iv) may utilize the provisions of this Title, including the procedures for establishing risk-based remediation objectives under Section 58.5. 415 ILCS 5.58.1(b)(2) (1996).

Thus, the Agency's proposal limited the applicability of Section 58.9 by the limitations contained in Section 58.1.

In the Agency's errata sheet (Exh. 14), (which reflected changes that the Agency made to its original proposal after certain concerns were raised at hearing), the Agency proposed that Part 741 was not applicable to:

2) Sites on the National Priorities List;

3) Sites where investigative or remedial action at the site has been required by a federal court order or an order issued by the United States Environmental Protection Agency;

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 State or federal solid or hazardous waste laws: or

   B) That is subject to closure or corrective action requirement under State or federal 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.

Based on the language of the Agency's proposed applicability language, three different positions have arisen concerning the propriety of the applicability language. The first is the Agency's and the AGO's position that Part 741 is limited by the limitations on Title XVII contained in Section 58.1; the second is that there are no limitations on Part 741, and thus Part 741 applies to all sites; and the third is that there should be some limitations on the applicability of Part 741, but the limitations are not as broad as the Agency proposes. Resolution of this issue depends on how the statutory language of Section 58.9 of the Act is construed.

The Illinois Supreme Court has set forth 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 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).

Additionally, 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. Dow Chemical Co. v. Department of Revenue, 224 Ill. App. 3d 263, 266, 586 N.E.2d 516, 519 (1st Dist. 1991).

Based on these principles of statutory construction, the Board finds that Section 58.9 was not intended to be limited by the provisions of Section 58.1 of Title XVII. Thus, the Board concludes that Section 58.9 applies to all remediation sites, rather than only those sites not exempted from XVII by Section 58.1.

To reach this outcome, the Board reviewed the language of both Sections 58.1 and 58.9. In viewing the language of the two sections, the Board finds that Section 58.1 and 58.9 address different legal aspect of Title XVII, and thus they can be read together without conflict or ambiguity. Section 58.1 identifies the sites that may be enrolled in the SRP and the sites that may not be enrolled in the SRP. Section 58.9, on the other hand, addresses the liability of persons for remedial action and costs. Additionally, Section 58.1 provides that persons may elect to proceed under Title XVII, while the proportionate share liability provisions of Section 58.9 apply to actions involving remedial actions or costs recovery for the same. The type of site involved is not relevant to the question of a person's liability or the extent of such liability. Nothing in Title XVII requires that these two sections coincide; each is independent and stands alone. The Board understands that the Agency and the AGO's seeks to link the two sections together in an attempt to ensure that federally delegated programs are not jeopardized. Nevertheless, Section 58.1 and 58.9 have distinct purposes and must be read independently.

Further, Section 58.1 defines the types of sites to which Title XVII may apply, and it specifically lists several sites to which Title XVII is not applicable. Thus, based on the language of Section 58.1, all the provisions in Title XVII, including Section 58.9, would appear to be inapplicable to sites excluded from Title XVII by Section 58.1. Section 58.9, however, begins by noting that "[n]othwithstanding any provisions of this Act to the contrary." Consequently, the question for the Board to decide is whether the "notwithstanding" phrase of Section 58.9 was intended to exclude Section 58.9 from the limitations in Section 58.1. We conclude that it was.

The ordinary meaning of the phrase "notwithstanding" is defined as "without prevention or obstruction from or by; in spite of." Webster's Third New International Dictionary 1545 (1981). Therefore, a literal interpretation of the phrase "notwithstanding" in the context of Section 58.9(a) could only mean that any action brought against a person to require a person to conduct remedial action or to seek recovery of costs for remedial activity beyond a person's proportionate degree of responsibility is prohibited. Thus, Section 58.9 applies to all actions brought pursuant to the Act or the Groundwater Protection Act, which seek remediation or costs, even those actions involving sites excluded from Title XVII by Section 58.1. Because the language of Section 58.9 is clear, the Board cannot read into it exceptions and limitations where none are specific or can be inferred by clear implication. To adopt the Agency's position would render meaningless the "notwithstanding" phrase of Section 58.9(a).

Other courts that have interpreted the phrase "notwithstanding" have similarly found this phrase to be unambiguous. See American Federation of State, County, and Municipal Employees v. Chief Judge of the Circuit Court of Cook County, 209 Ill. App. 3d 283, 568 N.E.2d 139 (1st Dist. 1991); Department of Central Management Services v. State Labor Relations Board, 249 Ill. App. 3d

740 (4th Dist. 1993). Further, two circuit courts which have interpreted Section 58.9 have each found the language of Section 58.9 to be clear and unambiguous and free of limitations. While the Board is not bound by these decisions, the Board does find them persuasive.

The first decision addressing the applicability of Section 58.9 was entered on July 9, 1997, in People of the State of Illinois v. Designer Metal Products, Inc., Case No. 96-CH-111 (13th Dist. LaSalle County). In that case, the owner of Designer Metal Products and the contaminated property died and the estate was handed over to the trustee to liquidate the estate and pay off all its creditors. The State sought to compel the defendant estate to pay for remediation of the property. The defendant sought to dismiss the action based on Section 58.9(a)(2)(F) which precludes the State from seeking remedial action or response costs from a corporate fiduciary that has acquired ownership or control of a site through acceptance of a fiduciary appointment. The State argued that it was seeking enforcement under Section 21(f) of the Act, not Section 58, and therefore, the limitations of Section 58.9 were inapplicable. The circuit court disagreed and held that the language of Section 58.9(a) was clear in that it limited the State's authority under the entire Act, not just Title XVII.

In the second case, the circuit court denied the State's motion to strike an affirmative defense claimed by both Midwest Metallics, L.P., S.D. Metals, Inc., and James Pielet, based on Section 58.9 of the Act. People v. Cole Taylor Bank, Case No. 97-CH-330 (1st Dist. Cook County). In that case, the defendants filed several affirmative defenses, including one alleging that the State could not seek to compel defendants to remediate a property contaminated with a variety of wastes. The court denied the State's motion to strike the affirmative defense, noting that Section 58.9(a)(1) refers to the "Act" and therefore applies to all remedial action brought under the Act. While the Board is not bound by these circuit court decisions, the Board finds that they are persuasive.

Based on these considerations, the Board concludes that the express terms of Section 58.9 are clear and provide that the applicability of proportionate share liability is not limited by any other provisions of the Act to the contrary. Thus, the Board has not included the Agency's proposed list of limitations on Part 741 in the rules adopted today for first notice.

The Board recognizes that this interpretation of Section 58.9 may jeopardize Illinois' federally authorized, delegated and/or approved environmental programs. For example, the USEPA notes that in order to receive authorization under Section 3006 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6926, a State must have a program equivalent to the federal program and provide for adequate enforcement. Section 3009 of RCRA, 42 USC 6929, prohibits a State from imposing requirements less stringent than those authorized under RCRA Subtitle C respecting the same matter as governed by federal RCRA Subtitle C regulations. Requirements for adequate enforcement authority at 40 CFR 271.16(b)(2) provide that the burden of proof and degree of knowledge or intent required under state law for establishing violations in actions for civil penalties and criminal remedies shall be no greater than the burden of proof or degree of knowledge or intent USEPA must provide when it brings an action under RCRA. PC 11 at 2. If proportionate share liability applies to RCRA facilities, the USEPA maintains that the Section 58.9 could make the State RCRA program less stringent by allowing owners of hazardous waste treatment, storage and disposal facilities to avoid liability for remedial activity and costs under RCRA and would make it much more difficult for the State to enforce RCRA corrective action requirements. PC 11 at 3. The USEPA contends that the same proposition holds true for RCRA Subtitle D, RCRA Subtitle I, the Clean Water Act, and the Safe Drinking Water Act. Under these programs as well, USEPA contends Illinois may not meet minimum requirements, and the State program would be less stringent. PC 11 at 3-5.

While the Board recognizes the problems posed by the Agency, the AGO, and the USEPA, we find that the clear and unambiguous language used by the legislature in Section 58.9 leaves no room for an alternative Board interpretation. Moreover, even USEPA acknowledges the Board's dilemma here. While USEPA supports the efforts to impose limitations on Section 58.9, given the two circuit court interpretations of the law, USEPA has "some doubts whether the regulations will overcome the courts' reading of the statutory language." PC 11 at 5. Thus, USEPA contends that "[a] statutory amendment may be necessary to assure compliance with the legal requirements for federally delegated, authorized, or approved programs in Illinois. USEPA states that it is "currently discussing with the State the effects of certain Illinois laws upon Illinois' authorized, delegated and/or approved federal environmental programs, proposed Attorney General interpretations of those laws, proposed amendments to those programs and applications for new programs, and may include Section 58.9 in those discussions." PC 11 at 5. The Board agrees that if the USEPA position regarding Illinois' delegated programs is correct, a legislative amendment is necessary to assure Illinois' compliance with the federal regulations, as the Board does not have the authority to read into Section 58.9 limitations that are not explicitly found there.

Finally, the Board notes that even if the Board were to conclude that the limitations in Section 58.1 applies to Section 58.9, legislative action would still be needed to assure Illinois' delegated programs. The sites exempted from Title XVII are sites for which a permit has been issued or that are subject to federal or State hazardous waste laws and sites subject to federal or State underground storage tank laws. However, the problems with Illinois' delegated programs extend beyond RCRA and UST sites and include sites subject to the Clean Water Act and the Safe Drinking Water Act as well. Because the statute does not specifically exempt these programs, the Board is unable to exempt them from this rule. Therefore, Illinois' delegated programs may still be in jeopardy even with the Board reading certain limitations into Section 58.9. This is a legislative problem which the Board is also powerless to remedy.

For the foregoing reasons, the Board has not included in the applicability section the limitations on Title XVII contained in Section 58.1.

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 Agency proposal combining the definition of remedial action contained in Sections 3.34 and 58.2 of the Act (415 ILCS 5/3.34, 58.2 (1996)). The Agency combined these definitions because sites may or may not be performing remedial action in the SRP. See Stat. at 7-8. Thus, a broader definition of "remedial action" was needed.

The Board has made three changes to the definition section as proposed by the Agency. First, the Board has not included in Section 741.110 the definition of "unallocated share" as proposed by the Agency in its errata sheet. See Exh. 14 at 3. As amended by the Board, the regulations never use the term, and thus the Board has not included the definition of "unallocated share" in Section 741.110. Secondly, the Board has 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 these rules consistent with the definition of "remedial action" contained in 35 Ill. Adm. Code 740.120. Finally, as noted above, the Board has deleted the definition of pesticides as it is already a "regulated substance."

Karaganis & White urges the Board to adopt a definition of the term "action." PC 8 at 8. Karaganis & White asserts that Section 58.9 provides that the State or any person may not pursue an "action" to require any person to conduct remedial action or to seek recovery of costs for remedial activity beyond that person's proportionate share of responsibility for the release. Karaganis & White contends, however, that the Agency's proposed regulations do not define the term "action," but instead limit the procedures for attempting to determine a person's portion of responsibility to after the State has filed a complaint. Thus, Karaganis & White believes that the Agency's proposal creates a distinction between a complaint filed before the Board, which is considered an action, and a notice letter, issued pursuant to Section 4(q) or Section 58.9(b) of the Act (415 ILCS 5/4(q), 58.9(b) (1996)), which is not considered an action. PC 8 at 8. Karaganis & White asserts that the distinction created is not supported by the language of the Act. Rather, it contends that Section 58.9(c) provides that once notice has been issued, the Agency and the person receiving the notice may attempt to determine the costs of conducting the remedial action in accordance with rules promulgated by the Board. Accordingly, Karaganis and White urges the Board to adopt a definition of "action" which includes the issuance of notice under either Section 4(q) or Section 58.9(b). PC 8 at 9.

The Board declines at this time to make the change Karaganis & White requests. Section 58.9(b) provides that the Agency must provide notice to a person in which the State seeks to require that person to conduct remedial activities for a release or threatened release of a regulated substance. See 415 ILCS 5/58.9(b) (1996). If the Agency has issued such notice, the statute provides that the Agency and the person to whom the notice was sent may attempt to determine the costs of conducting the remedial action that are attributable to that person. See 415 ILCS 5/58.9(c) (1996). Section 58.9(c) then goes on to state that "[d]eterminations pursuant to this Section may be made in accordance with rules promulgated by the Board." See 415 ILCS 5/58.9(c) (1996).

Because the statute states that determinations under Section 58.9(c) "may" comply with the Board's proportionate share rules, the Board cannot adopt a definition of "action" which would require the Agency to use the procedures in this Subpart. The Board therefore declines to adopt a definition of "action" as suggested by Karaganis & White. However, as Karaganis & White was the only participants to comment on this issue, the Board would appreciate comment during the first-notice period from others on whether a definition of "action" is needed and how that term should be defined.

Section 741.115 Discovery Before an Action is Filed

Section 741.115 of the Agency's proposal contains a procedure allowing the Agency to obtain an information order from the Board in cases where the proportionate share liability rules apply and before an action is filed with the Board. The provisions on information orders

contained in the Agency's proposal are similar to those provided under Section 104(e)(2) of CERCLA, 42 USCS § 9604(e)(2).

Specifically, Section 741.115 of the Agency's proposal provided that the Board could issue information orders upon request by the Agency and a demonstration of a reasonable basis for belief that a release or substantial threat of a release may exist. The information order would then require the person named to furnish to the Agency, upon reasonable notice, the necessary information or documents. Section 741.115 identified types of information subject to the order, two methods of providing such information, and provided for penalties in case of noncompliance.

In response to comments, the Agency submitted an amended Section 741.115 in its errata sheet. See Exh. 14. The new Section 741.115 generally conforms to that originally proposed, except for the following major differences: (1) the section maintains that the Agency will file a petition to commence the information order process, and provides notice to the person to whom the order is to be directed; (2) the petition must contain certain items including a statement supported by affidavit of the Agency'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; and (3) the section provides for the filing of a response and a reply.

Two major issues have been identified regarding information orders. Those issues are: (1) whether the Board has the authority to adopt a provision regarding information orders; and (2) whether information orders are necessary. These issues will be addressed in turn.

Whether the Board has the Authority to Adopt Section 741.115. The Agency maintains that such authority does exist. The Agency admits that Section 58.9 of the Act does not expressly authorize information orders. See PC 6 at 13; Tr.1 at 56. However, the Agency argues that the Board has broad discretion under Section 58.9(d) to adopt procedures to implement proportionate share liability. PC 6 at 3; Exh. 5 at 8, 17; Tr.1 at 56. The Agency asserts that this broad grant of authority is sufficient for the Board to adopt provisions pertaining to information collection. PC 6 at 3. The Agency also argues that the legislature does not have to spell out every detail in order for an administrative agency to exercise its rulemaking authority. PC 6 at 3.

The AGO and BPI share the Agency's view that the Board has authority to adopt Section 741.115. In support, the AGO also cites the Board's broad grant of authority in Section 58.9 to adopt rules and procedures to implement Section 58.9. PC 7 at 4; Exh. 9 at 6. BPI agrees that the Board's authority for granting the Agency's request for an information order is found within the broad language of Section 58.9. PC 5 at 3.

Conversely, a number of interested parties believe that the Board does not have the authority to adopt Section 741.115. Com Ed, Mohan, and SRAC all assert that the Board does not have the authority necessary to adopt Section 741.115. Com Ed supports its view by making the following arguments: (1) that the General Assembly has not granted analogous authority to the Board in any Illinois environmental statute; (2) that Section 58.9(d), on which the State relies, merely authorizes the Board to adopt rules and procedures for determining proportionate share; (3) that even the State admits Section 58.9 does not expressly provide any statutory authority for the issuance of such information orders, and that the State's position impermissibly expands the statutory grant of authority in 58.9(d); (4) that by not expressly granting information gathering authority to the Agency, the General Assembly has implicitly recognized that the Agency does not require information orders; and (5) that, because the legislature has not granted the Board the authority to issue information orders, issuance of an order by the Board may constitute an unreasonable search and seizure in violation of the Fourth Amendment. See PC 10 at 17-20; Tr.4 at 114-116.

Com Ed also cites Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill. 2d 540, 370 N.E.2d 223 (1977) (hereinafter Bio-Medical), for the proposition that any power or authority claimed by an administrative agency must find its source within the provision of the statute by which it is created. Com Ed also relies on Landfill Inc. v. Pollution Control Board, 74 Ill. App. 2d 541, 545, 387 N.E.2d 258, 262 (Ill. 1978) (hereinafter Landfill) and Citizens For a Better Environment v. United States Environmental Protection Agency, 649 F. 2d 522, 525 (7th Cir. 1981), for the proposition that where an administrative agency promulgates rules without the statutory authority to do so, the rules are void.

Mohan asserts that the General Assembly did not authorize the Board to create broad powers such as information orders. Mohan further contends that the information order proposal is not rulemaking, but legislating, and that if the Agency feels so strongly that this power is necessary, it should present that need to the General Assembly. PC 12; Exh. A at 4.

Reiser, testifying for SRAC and representing CICI and ISG, also asserts that there is no language which specifies information orders in the statute, and therefore no statutory authority exists for the proposal. Tr.3 at 35; Exh. 11 at 7; PC 13 at 3. Reiser also adds that the Board is a creature of its enabling legislation and has only those powers enumerated to it in that legislation. Thus, Reiser concludes that since Title XVII did not provide for an information order, or for any of the procedures therein, Section 741.115 cannot be adopted by the Board. PC 13 at 3.

As noted, Section 58.9(d) of the Act requires the Board to adopt rules and procedures for determining proportionate share. This section further mandates that the rules provide "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." See 415 ILCS 5/ 58.9(d) (1996).

Given the Board's broad authority to adopt procedures to implement the proportionate share provisions, the Board finds that it does have the authority to adopt provisions regarding information orders. Moreover, the Board notes that, even absent the broad grant of authority in Section 58.9, the Board would still have the authority to adopt such provisions. Generally, courts have recognized that an administrative agency has authority to regulate and execute the provisions of the statute and to carry out the powers conferred upon it. See Eastman Kodak Co. v. Fair Employment Practices Comm'n., 86 Ill. 2d 60, 70, 426 N.E.2d 877, 881-82 (1981); see generally Freedom Oil Co. v. Pollution Control Board, 275 Ill. App. 3d 508, 655 N.E.2d 1184 (4th Dist. 1995). Moreover, courts have found that "an express legislative grant of authority to an administrative agency includes the power to do all that is reasonably necessary to perform the duty conferred by statute," and that "an agency is to be given wide latitude in determining what actions are reasonably necessary." See Oak Liquors, Inc. v. Zagel, 90 Ill. App. 3d 379, 380-81, 413 N.E.2d 56, 58 (1st Dist. 1980). As explained below, the Board finds that a modified version of the Agency's proposal concerning information orders is necessary for the proper and efficient functioning of the rules. Thus, the Board finds that under the general authority of administrative agencies to adopt rules necessary to perform the duty conferred upon it by statutes, the Board has the authority to adopt provisions allowing for the discovery of certain information before and action is filed with the Board.

Further, the Board finds that the cases cited by Com Ed are inapposite. Nothing in the proposed rules in the instant case infringes on authority granted to other entities as was the situation in the Landfill case. Moreover, the Bio-Medical case, the other case cited by Com Ed, concerned a regulation allowing termination from the Medicaid program for fraud and abuse which was found invalid even though adopted under a general grant of rulemaking authority. The court's decision was

based, in part, on the existence of other remedies within the Public Aid Code for addressing billing discrepancies. Since there are no other remedies available under the Act for addressing precomplaint discovery and the rules are reasonably related to the purpose of the proportionate share rules, the Board finds that this case also does not support a finding that the adoption of a rule governing precomplaint discovery would be beyond the Board's authority. Accordingly, the Board finds that Section 58.9, as well as the inherent authority granted to administrative agencies, clearly empowers the Board to promulgate rules to facilitate the allocation of proportionate share.

Having determined that the Board has the authority to adopt rules governing precomplaint discovery, the next question is whether such rules are necessary.

Necessity of Information Orders. The Agency believes that information orders are important to assure a workable implementation of Section 58.9 that fully protects human health and the environment. Stat. at 8; Exh. 5 at 17. The Agency asserts that information orders are a modest tool that will allow it to obtain information from PRPs short of filing formal enforcement actions and relying on discovery procedures. Exh. 5 at 18. The Agency believes that under joint liability, successful completion of the entire cleanup did not require that all PRPs be named because any or all are potentially jointly liable for the entire release. Stat. at 8. However, under proportionate share liability, in order to assure complete remediation, the State must identify as many PRPs as possible before filing a complaint. Otherwise, asserts the Agency, the shares of unidentified PRPs will remain unallocated regardless of the effectiveness of the procedures that follow the filing of the complaint. Stat. at 8. The Agency argues that while the task has become more difficult, the tools available to the Agency for PRP identification remain limited to public records and voluntary interviews. PC 6 at 12.

The Agency stresses that information orders are a particularly important means of identifying PRPs, and identifying PRPs is crucial if proportionate share liability is to work. Tr.4 at 11. In addition, continues the Agency, under proportionate share liability the incentive for the identified PRPs to come forward with information regarding the contribution of other PRPs is substantially reduced because their own allocation will not be affected by what other parties have or have not done at the site. Stat. at 8-9. To effectively manage a cooperative cleanup, the Agency will need to be more effective than ever in identifying all PRPs and justifying the level of participation required. PC 6 at 12.

The Agency is especially concerned about the effect that the inability to identify PRPs may have when site conditions pose a significant threat, because if no PRP may be required to conduct remedial activities beyond its proportionate share, then a complete remediation cannot be performed until all PRPs are identified. Stat. at 9. The Agency maintains that without tools such as information orders to identify PRPs and bring them into the case, neither the Agency nor the Board will be able to construct a model of site operations that will lead to a timely, complete and equitable allocation of responsibility. Stat. at 9. The Agency admits that the information order is not a panacea for this problem, but a modest tool that will allow the Agency to obtain information short of filing formal enforcement actions and relying on discovery procedures. Exh. 5 at 18.

The Agency further asserts that information orders will enable the Agency to obtain access to the PRPs, develop a much clearer picture of site operations at an early stage, and thus allow the Agency to nudge PRPs toward cooperative cleanups without litigation. PC 6 at 12. This would allow the Agency to accomplish more with a given quantity of resources which the Agency states is critical considering the limited resources available. PC 6 at 12, 13. Information orders would allow responsible parties to become involved in the remedial process at an early stage, ultimately giving them more influence in planning and site characterization. PC 6 at 12, 13. The Agency notes that

civil discovery really does not help in a prelitigation context, and is, in fact, at the end of the process of investigation described by the Agency. Tr.4 at 10; PC 6 at 12.

The AGO agrees with the Agency that information orders are necessary, and asserts that such orders are necessary to advance the process of determining and allocating liability to accomplish expeditious remediation of contaminated property either before or after the initiation of formal administrative proceedings. Exh. 9 at 7. The AGO further contends that information orders are necessary to assist in filling the gap left by the change in liability from joint and several to proportionate share liability. Exh. 9 at 7. Additionally, the AGO asserts that information orders will provide an opportunity to the State early in the process to obtain as much information about a release as possible and to include as many liable parties in an allocation proceeding as possible. PC 7 at 3. Finally, the AGO maintains that information orders will also facilitate faster, more complete, and less expensive resolution of cases subject to these regulations. PC 7 at 3.

BPI also asserts that information orders are necessary. BPI argues that information orders are essential for the Agency to do its job as expeditiously as possible. Exh. 13 at 7; Tr.3 at 156. BPI also asserts that identification of PRPs is the only mechanism which the Agency has for safeguarding the State and taxpayers against having to cover orphan share costs. Exh.13 at 7; Tr.3 at 156. Finally, BPI states that information orders seem like a reasonable tool for the Agency to have at their disposal to aid in trying to identify PRPs, a task that is in the best interest of the State and its citizens. Tr.3 at 177.

On the other hand, the same parties that believe the Board is without authority to adopt provisions concerning information orders also believe that information orders are not necessary. For instance, Reiser testified that the Agency already has numerous means to gain information both under the Act and otherwise. PC 11 at 8. Reiser states that the Act gives the Agency broad authority to enter sites to inspect for potential releases, and that Illinois Supreme Court Rule 224 allows for precomplaint interrogatories to be filed before the court and the Board. PC 11 at 8; Tr.3 at 36. Reiser also notes that there are many different ways to get information including investigation and just asking for it. Tr.3 at 36.

Similarly, Com Ed asserts that the Agency's premise is entirely wrong, and that there is ample incentive for a PRP to come forward and produce information under the PSL rules. Tr.4 at 114. Com Ed dismisses the Agency's discussions about its need for information orders, and asserts that the issue is not need, but statutory authority, and the Board, Com Ed argues, does not have the necessary statutory authority. Tr.4 at 115. Com Ed does note, however, that there exists ample authority for the Agency to get the information it requires through existing means. Tr.4 at 115

Likewise, Mohan comments that there is simply no reason for the Agency to demand information orders. PC 12, Exh. A at 4. Mohan contends that if the Agency has identified a facility at which a release or substantial threat of release has occurred, the Agency need only be able to name a single potential party in order to bring a circuit court or Board enforcement action. A title search will usually reveal at least one party to be sued. PC 12, Exh. A at 4. Once the suit is filed, Mohan asserts that the State may use all litigation discovery normally available. In addition, criminal and administrative search warrants are available for prelitigation use. PC 12, Exh. A at 4.

Aside from the issue of necessity, participants are also concerned that information orders will be abused. PC 8 at 8; Tr.2 at 74. Karaganis & White proposes that safeguards be adopted to ensure that the provisions on information orders are properly used. For instance, Karaganis & White assert that Section 741.115 should contain a requirement that the Agency issue an initial request for relevant information. PC 8 at 7. Karaganis & White argues that the Agency should have to make a showing in the petition that this request was made and that the Agency received either no response

or a demonstrably inadequate response. PC 8 at 7-8. Karaganis & White concludes that these provisions will encourage the Agency to seek relevant information from channels that neither require the Agency or the potential respondent to incur transaction costs unnecessarily, nor raise the potential for penalties at the initial information gathering stage. PC 8 at 8.

The Board concludes that discovery prior to an action being filed is necessary to ensure Section 58.9 is workable. To assure complete site remediation, the Agency should identify as many potentially liable parties as possible before filing a complaint. Without effective tools such as the discovery prior to an action to identify potentially liable parties and bring them into the case, the Board does not believe the rules will lead to a timely, complete, and equitable allocation of responsibility. Thus, the Board adopts provisions providing for discovery prior to an action being filed.

However, the Board believes that such discovery should be limited. The main purpose of information orders is to aid the Agency in identifying as many potentially responsible parties as possible before the Agency files a complaint. The Board believes that it is in the best interest of all citizens of Illinois that as many potentially responsible parties are identified as possible before an action is filed. However, the Board understands the concern that there is a potential for abuse with such discovery. Therefore, the Board has revised the rules to allow for discovery before an action is filed.

The new provisions on discovery prior to an action are modeled on Illinois Supreme Court Rule 224. Illinois Supreme Court Rule 224 creates an independent action for discovery for the "sole purpose of ascertaining the identify of one who may be responsible for damages." See 172 Ill. 2d R. 224; see also Yuretich v. Sole, 259 Ill. App. 3d 311, 631 N.E.2d 767 (4th Dist. 1994); Roth v. St. Elizabeth's Hospital, 241 Ill. App. 3d 407, 607 N.E.2d 1356 (5th Dist. 1993); Malmberg v. Smith, 241 Ill. App. 3d 428, 607 N.E.2d 1370 (5th Dist. 1993); Shutes v. Fowler, 223 Ill. App. 3d 342, 584 N.E.2d 920 (4th Dist. 1991); Guertin v. Guertin, 204 Ill. App. 3d 527, 561 N.E.2d 1339 (3rd Dist. 1990). The relief sought in that action is limited to an "order authorizing the petitioner to obtain . . . discovery [of] the identification of responsible persons and entities." 172 Ill. 2d R. 224. Courts have also interpreted Illinois Supreme Court Rule 224 as allowing the discovery of certain additional facts pertaining to the potential liability of a person, but not actual liability, or the discovery of specific facts of wrondgdoing. See Beale v. Edgemark Financial Corp., 279 Ill. App. 3d 242, 664 N.E.2d 302 (1st Dist. 1996).

Like Illinois Supreme Court Rule 224, the focus of the Board's proposed rule is the identity of potentially liable parties, not their responsibility. Further discovery of specific facts of wrongdoing could be obtained after the filing of the substantive complaint. Moreover, the Board finds that the involvement of the Board in this process also protects against the potential abuses that are associated with precomplaint discovery.

Moreover, the Board notes that even if the Board did not include provisions on precomplaint discovery, the parties could still argue that Illinois Supreme Court Rule 224 applied to allow such discovery. Section 101.100(b) of the Board's procedural rules allows that in the absence of a specific rule to govern a particular situation the parties may argue a particular provision of the Illinois Supreme Court Rules apply. See 35 Ill. Adm. Code 101.100(b); People v. Cech (October 2, 1997), PCB 97-138. Thus, the Board concludes that it is better to provide for a specific rule regarding precomplaint discovery, rather than dealing with the application of Illinois Supreme Court Rule 224 on a case-by-case basis.

A final issue that needs to be addressed is whether the discovery mechanism should be used only by the Agency. As originally proposed by the Agency, information orders were a tool that could

only be used by the Agency. When 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 does not extend the use of the orders beyond the agency. Tr.2 at 55. The Agency acknowledges, 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 finds that there is no reason to limit the use of the discovery to the Agency. Thus, the rules incorporate this change.

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

Section 741.120 is based on Sections 58.9(b) and (c) of the Act. Subsection (a) provides for the issuance of notice to persons the State seeks to require to conduct remedial activities. Subsection (b) sets forth the content of the notice. The notice must include a basis for liability, the response to be performed, and an opportunity for the performance of the response. Subsections (c) through (e) offer opportunity and guidelines for settlement. Specifically, Subsection (c) provides that the Agency may offer the person to whom notice is sent an opportunity to meet with the Agency to resolve outstanding issues and to determine the costs of conducting the response action. Subsection (d) mandates that the meeting described in Subsection (c) be conducted within 30 days of receipt of the written notification. Finally, Subsection (e) provides that in determining an allocation, the parties may consider the allocation factors set forth in Section 741.140 of the proposed regulations.

In a publication attached to PC 12, Mohan contends that the opportunity to hold a meeting with the Agency should not be optional, but mandatory. Mohan asserts that "the Legislature considered the meeting to be a critical event in the proportionate share liability scheme, and relegating it to an optional, informal, typical [Agency] meeting will result in a complete loss of the opportunity intended by the General Assembly." PC 12, Exh. A at 4. Moreover, Mohan maintains that the significance of a meeting is especially crucial in an enforcement context. Mohan states that without an opportunity to meet with the Agency to determine the costs of conducting the remedial activity, a person may be subject to significant penalties if he refuses to do any cleanup, or the State may receive a windfall if the person does all the cleanup. Thus, Mohan concludes that the appropriate process should be that the Agency is required to conduct a meeting at which a person's extent of involvement may be discussed. Mohan further concludes that "[n]ot allowing [a polluter] this opportunity, after all, may well subject him to higher penalties *even though* he has a good faith, articulable basis to limit his own liability." (Emphasis in original.) PC 12, Exh. A at 5.

While the Board agrees with Mohan that an opportunity to meet with the Agency to discuss the extent of a person's responsibility for a release is important, the Board cannot require that the Agency conduct the meeting. Section 58.9(c) clearly provides that this meeting is discretionary. It states that "the Agency and person to whom such notice was issued 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." 415 ILCS 5/58.9(c) (1996) (emphasis added). Based on the statutory language of Section 58.9, the Board finds that it has no authority to require the Agency to offer such a meeting.

Moreover, the Board notes that this issue was raised by the Board at the first hearing. In response to a question of whether the meeting described in Section 58.9(c) was discretionary or mandatory, the Agency responded that the meeting was considered "not mandatory" and used as a basis for this response the language of Section 58.9(c). Tr.1 at 178. Additionally, the Agency stated that it normally provides a timeframe in these notices for a person to request to meet with the Agency. If a person is willing to meet in a timely fashion, the Agency asserted that "99 times out of 100" the Agency would meet with him. Tr.1 at 179.

Section 741.125 Notice to Agency

The Board has included a new provision in the regulations that requires a person who is initiating a proceeding seeking allocation to give notice to the Agency of the proceeding. This provision also allows the Agency to participate in any proceeding seeking an allocation of proportionate shares of liability. The Board notes, however, that the Agency will not be allocated responsibility for shares of unknown or insolvent parties. Since 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 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.

Absent joinder of all necessary parties, the Board could make a determination of liability of a participating party, and where applicable impose penalties for violations of the Act, but could not apportion liability, or consequently, order remediation or allow cost recovery.

Section 741.130 Mandatory Disclosures and Discovery

Section 741.310 of the Agency's proposal provides for a discovery period that is intended to facilitate the production of information for the purpose of creating a model of historical and current site operations. The discovery period would begin with a conference scheduled by the assigned hearing officer. The conference would bring the potentially liable parties together to discuss the organization and schedule of the proceeding through submittal of a joint proposal to the Board. The conference would be followed with a hearing officer order containing the agreement of the parties on organization and scheduling issues. If the parties could not agree on these issues, the hearing officer order would then resolve the issues.

Subsection (c) of the Agency proposal sets forth the time period for discovery. Within 30 days after issuance of the Board's order accepting the petition, all parties are required to produce and make available for review and copying all documents in their possession or control pertaining to the release. Beyond this initial production requirement, information may be obtained in accordance with the Board's discovery procedures in 35 Ill. Adm. Code 101 and 103. Time limits are provided for some of the discovery period activities with the intention of keeping the proceedings moving toward resolution. The remainder of the schedule is to be determined by the hearing officer order following the initial conference but may be amended as circumstances require.

The Board has adopted at Section 741.130 a modified version of the discovery procedure outlined in the Agency's proposal. The new provisions rely on the Board's existing procedural rules for discovery. This provision would apply to proceedings under both Subpart B and C. Specifically, Section 741.130(a) of the rules adopted today for first notice provide that within time limits set by the hearing officer, all persons involved in an allocation proceeding must compile all relevant documents within their possession and make the records available for review by all others to the allocation proceeding. Subsection (b) provides 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, are available. Subsection (c) makes clear that discovery pursuant to this section is not applicable to mediation proceedings under this Part.

Section 741.135 Conduct of Hearings

The Board has included a section regarding the conduct of hearing. These provisions apply to hearings under both Subparts B and C. Generally, Section 741.135 provides that the hearings will be conducted pursuant to the procedures in the Board's procedural rules, and that failure to comply with a hearing officer or Board order is sanctionable behavior. The rules also establish that all parties or participants to the proceedings may present evidence relevant to the allocation of proportionate share liability. Finally, Section 741.135 provides that if proportionate share liability is raised in an enforcement complaint, the hearing on proportionate share liability may be combined with the hearing on the case in chief.

Section 741.140 Allocation Factors

Section 741.240 of the Agency's proposal provides a list of allocation factors that the Board may consider in making its allocation determination. The list is not intended to be exclusive, and the Board may consider any other factors related to a liable party's cause of, or contribution to, a release or substantial threat of a release. Subsection (b) recognizes that risk-based corrective action, as embodied in TACO, may affect the allocation by affecting the nature of the remediation.

The Board has made several changes to the Agency's proposal. First, the Board has moved the provision to Subpart A and noted that the allocations factors listed therein may be considered by the Board in determining allocations in either a Subpart B or C proceeding. Secondly, this section specifically provides that the Board may consider any other factors relevant to a party's proportionate share of liability. Finally, the Board has deleted what was Section 741.215(b) of the Agency's proposal. That subsection provided that "[t]he Board shall not be required to determine precisely all relevant factors provided substantial justice is achieved." The phrase "provided substantial justice is achieved" is not defined and is an extremely vague. Therefore, the Board has concluded that such a provision does not aid either the Board or the parties in an allocation proceeding. Accordingly, the Board has not included this language in the proposal for first notice.

Section 741.145 Relief from Final Orders

Both Subparts B and C of the Agency's proposal include provisions that allow a Board allocation determination to be adjusted where, in the course of subsequent remedial activity, new information is discovered indicating the allocation determination should have been different. In Subpart B of the Agency's proposal, the adjustment provisions are found in Section 741.220; in Subpart C, the adjustment provisions are found in Section 741.335 of the Agency's proposal.

The Agency asserts that allowing for adjustments following a final determination in a contested case is necessary. The Agency explains that "[n]ormally, the only change allowed to a final determination is through reconsideration or appeal, and the time for doing so is strictly limited. To do otherwise may result in relitigating the same issues again and again, and this is inconsistent with the principles of *res judicata* and conservation of resources. On the other hand, the Agency recognizes that the original assumptions guiding planning for remediation at the site may be altered once work has begun and that the new information may have a significant impact on the costs attributable to specific PRPs." Stat. at 12-13; Exh. 5 at 26. For this reason, the Agency included provisions in its proposal allowing for the reopening of a final Board allocation determination.

The adjustment provisions in Sections 741.220 and 741.335 of the Agency's proposal are different, however, and demonstrate two different approaches to the reopening of a Board decision. Tr.2 at 152. Section 741.220 gives the Board general authority to use its discretion on adjustments, while Section 741.335 attempts to establish thresholds and procedures for adjustments. The latter approach was first suggested by SRAC. Stat. at 13, n.9; Exh. 5 at 26-27.

Specifically, Section 741.220(a) of the Agency's proposal provides that an apportionment determination may be reopened by any party when "subsequent performance of removal or remedial action at the site has revealed facts and circumstances that would have led to a substantially different allocation of proportionate shares had those facts and circumstances been presented to the Board at the time of the hearing." Section 741.220 also makes clear that the adjustment procedures are not available where the allocation arose out of a cost recovery complaint or count.

In Section 741.335 of the Agency's proposal, rather than the "substantially different allocation" test, the proposed regulations contain circumstances under which an allocation determination could be reopened. Those circumstances are: (1) if the response in the RAP or written agreement was not performed; (2) if the cost remediation varied from expected costs by 25% or $100,000, whichever is greater; (3) if a party can demonstrate that its allocation would be reduced by at least 20% or $25,000, whichever is greater; or (4) all parties to the allocation agree. Section 741.335 also provides that the adjustment procedure must be initiated by filing a petition with the Board, documenting with affidavits the information supporting the basis for the reopening, and that the petition must be served on all participants to the allocation. Participants will have 30 days, which can be extended, to respond to the petition. Subsection (d) provides that the Board shall issue a written decision, determining whether the allocation should be modified. If the Board determines that the allocation should be modified, Subsection (d) requires that the

Board allocate 100% of the costs of the response action performed or to be implemented. Finally, proposed Section 741.335(e) provides that if a petition for adjustment is not filed jointly by all parties, and the Board determines that the allocation should not be modified, the party petitioning for the modification must pay the costs of the other parties.

As noted, the main difference between the two proposed sections is that Section 741.220(a) would give "the Board general authority to use its discretion on reopeners while Section 741.335 attempts to establish thresholds and procedures for reopeners." Stat. at 13, n.9. The Agency succinctly states the difficulties with these two approaches: "[t]he advantage of threshold amounts is that the Board has some clear standards against which to judge the advisability of a reopener. The difficulty is . . . that the threshold amounts are purely arbitrary and may not be appropriate for every site or PRP." Stat. at 13, n.9; Exh. 5 at 26-27.

The Board believes that it is necessary to allow parties to reopen an allocation determination in some circumstances. Parties may seek an apportionment of liability before remediating a site. In the course of remediation, however, new information may come to light which indicates that the initial allocation of liability was incorrect. In such a situation, the Board agrees that participants should have a mechanism available to adjust the allocations. Stat. at 12-13; Tr.1 at 172-73; Tr.2 at 146-147; Tr.4 at 79-84. On the other hand, participants in allocation proceedings have a significant interest in finality of apportionment determinations. As one witness stated, "One of the worst things in the world to a PRP is to get some finality on something and then have their liability reopened because of newly discovered evidence." Tr.3 at 78. Thus, the adjustment procedure must strike a balance between finality and fundamental fairness.

While the Board agrees that the parties need to be able to seek relief from an allocation order, including reallocation of liability based on new evidence, the Board concludes that there need be only one procedure to apply to all allocation orders, and that procedure can be patterned after the Board's existing procedural rule on obtaining relief from a final order. Currently, parties to contested cases under Board jurisdiction can obtain relief from final orders under 35 Ill. Adm. Code 101.301(b), which provides in relevant part:

> b) On written motion, the Board may relieve a party from a final order entered in a contested case, for the following:
>
> 1) Newly discovered evidence which existed at the time of hearing and which by due diligence could not have been timely discovered[.]

(Other paragraphs of Section 101.301(b) provide for relief in the case of fraud or a void order.)

The Board has applied this test in proceedings for a number of years. In fact, absent specific provisions governing allocation proceedings, this general rule, Section 101.301(b), would apply. This rule therefore provides a useful starting point to consider the proper conditions for reopening an allocation determination. Next, the Board considers whether circumstances unique to allocation proceedings suggest that additional provisions need to be added to the general rule of Section 101.301(b).

Based on the following analysis, the Board concludes that a separate rule governing relief from allocation orders, including reallocation of liability, is necessary. Because this provision will apply to all allocation orders, it should be located with the general provisions in Subpart A of the proposed rules. Accordingly, the Board has added a new section 741.145[10] in lieu of proposed sections 741.220[11] and 741.335. This new language is modeled after Section 101.301(b) of the Board's procedural rules, but contains additional provisions based on the unique circumstances of allocation proceedings.

The Board begins its analysis by examining the various provisions of Section 741.220 and 741.335 of the Agency's proposal. The test in Section 101.301(b) is essentially a less specific version of the provisions proposed by the Agency in Section 741.220(a). Proposed Section 741.220(a) differs from Section 101.301(b) in several significant ways. First, Section 741.220(a) restricts the type of newly discovered evidence upon which reopening may be based. Under that section, reopening may only be based on evidence discovered where "subsequent performance of removal or remedial action at the site has revealed facts and circumstances[.]" From the testimony of various witnesses, the Board understands that parties anticipate that removal or remediation activities may result in information being discovered that would be the basis for reopening the allocation determination. Stat. at 12-13; Tr.1 at 172-73; Tr.2 at 146-147; Tr.4 at 79-84. The Board agrees, but cannot see any reason for limiting reopening with such a restriction. See PC 10 at 11, n.17. New information which would justify reopening an allocation proceeding may come to light from some other source, and in that event the parties should be able to seek relief from the allocation order. See PC 10 at 11, n.17. As an example, a previously unknown party may be identified after the initial allocation, and that party may have information in its possession that could impact the allocation determinations. The Board accordingly concludes that the restriction contained in Section 741.220(a) is too limiting.

Next, Section 741.220 also contains the "threshold of significance" requirement, that the newly-discovered evidence "would have led to a substantially different allocation of proportionate shares had those facts and circumstances been presented to the Board at the time of the hearing." Section 101.301(b) contains no similar language. Relief from a final order under Section 101.301(b) is at the discretion of the Board, and therefore the Board could deny relief when reopening a case could result in only a *de minimis* change in the end result. Because this issue is of significant concern to parties (see Tr.2 at 149-50; Tr.4 at 81-84), however, the Board concludes that it is appropriate to provide by rule that reopening will be denied absent a potentially significant change in allocation. The provision is found in Section 741.145(c).

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[10] The severability provisions, which were originally contained in Section 741.125 of the Agency's proposal, were moved and are now contained in Section 741.150.

[11] Section 741.220 contains a second subsection, which deals with appeals. Subsection 741.220(b) states, "Appeals of final orders of the Board shall be in accordance with Section 41 of the Act. Interlocutory appeals shall be allowed only with leave of the Board." This subsection adds nothing to the rules governing either regular appeals (Section 41(a) of the Act, 415 ILCS 5/41(a) (1996)) or interlocutory appeals (35 Ill. Adm. Code 101.304), and is thus superfluous. The Board therefore does not include a provision in the rules regarding appeals.

Finally, Section 741.220(a) provides that "[t]o the extent the underlying complaint was for cost recovery, the adjustment procedure is not applicable." The Agency explained the reason for this limitation as follows:

> [The Agency] thought it was important where you had a case, for instance, where we were seeking for PRPs to perform a cleanup and during the course of that case there would be an allocation assigned. Well, by the time you got through with the case you might find out that you had more information come in, and you could conclude at that point that maybe the allocation that was initially arrived at was not . . . as fair as it should be so, therefore, you should readjust that. [W]ith the cost recovery case the money has already been spent before the litigation is started . . . so there is no point in adjusting the cost recovery as to that because you already know what has been spent and what the allocation should be at the time the case is decided. Tr.1 at 172-73.

While the Board understands the Agency's rationale, the Board sees no reason to foreclose relief from the allocation determination where new information may come to light from some other source. The Board therefore concludes that such a provision is also unwarranted.

As proposed in Section 741.335, an allocation order cannot be reopened until after remediation is complete. The Board recognizes the distinct possibility that additional information may come to light as a result of remedial activities (at least until remediation is substantially complete). Thus, the most efficient approach would be to defer any ruling on reopening until after remediation. Given the broad definition of "remedial action" in the Act, however, the Board concludes that a blanket prohibition on reopening until remedial action is complete is too broad. "Remedial action" encompasses activities, such as monitoring, that could continue indefinitely. A better approach is for the Board to use its discretion when ruling on motions for reopening to avoid the needless expenditure of time and resources where remediation is not substantially complete.

As noted earlier, Section 741.335 also lists specific threshold amounts under which an allocation determination could be modified. As the Agency recognized, "the threshold amounts are purely arbitrary and may not be appropriate for every site or PRP." Stat. at 13, n.9. Whether a projected change in allocation is significant, and thus will support reopening an allocation order, will be determined based on the facts of each case. The Board accordingly does not adopt the dollar amount thresholds proposed for reopening allocation determinations. Rather, the Board concludes that a general "threshold of significance" provision such as that proposed in Section 741.220, rather than the specific conditions listed in Section 741.335, is appropriate. Again, this provision is found in Section 741.140(c) in the rules adopted for first notice.

Section 741.335(c) also allows 30 days for a response to a petition to reopen a case to be filed. This 30-day time period may be extended by the Board for an additional 30 days. Under Section 101.301(e), a response to a motion for relief from a final judgment must be filed within 14

days. In light of the potentially complex considerations which may be involved in an allocation proceeding, the Board recognizes that additional time to evaluate a motion to reopen an allocation order may be necessary. The Board finds 30 days an appropriate period. Where an extension is justified, this time period would be extended as in any other case; a specific provision regarding extension of the time to respond is thus unnecessary. Therefore, the Board has not included the additional 30-day provision.

Section 741.335(e) deals with petitions for adjustments that are not joined by all parties to an allocation determination. In a situation where all parties do not join the motion for adjustment and the Board determines that a reallocation is not warranted, Section 741.335(e) provides that the petitioning party is responsible for the cost and fees of the nonpetitioning parties. The Board concludes that this provision is inappropriate. Given that the threshold of significance will vary from case to case depending on specific facts and circumstances, the Board will not penalize a party for evaluating the significance of new information inaccurately.

Additionally, Mohan raised a concern regarding the time within which a reallocation may be sought:

> No time limit is given for this 'adjustment'; theoretically a party might be able to reopen a case 20 years after a cleanup has been completed. That problem can be solved easily enough by including a time limit for bringing such an action. PC 12, Exh. A at 6.

Under Section 101.301(d), a motion for relief from a final order must be filed within one year of entry of the order. The Board recognizes that where remediation is underway, this deadline may not provide sufficient time; new evidence could be discovered in the course of remediation more than one year after the entry of the allocation order. The Board concludes that where remediation has begun within a year of entry of the allocation order, a more appropriate time limit is three years. Either time period could be extended for cause, where a motion for extension was filed within the applicable time period. These provisions are found in the Board's rules adopted today in Section 741.145(e)

Section 741.150 Severability

Section 741.150 is standard severability language. No changes have been made to the Agency's proposed language.

Subpart B

Subpart B sets forth the provisions that apply when the Agency, the State of Illinois, or any person files a complaint with the Board that raises issues of proportionate share liability. Specifically, this Subpart (1) identifies the general provisions of the subpart; (2) establishes how an allocation proceeding may be initiated and explains how proportionate share liability may be raised as an affirmative defense; (3) provides that all known parties which could be located through a diligent search must be joined as parties; (4) sets forth the necessary elements of a complaint seeking an allocation of proportionate shares of liability; (5) describes how a petitioner may prove

that the respondent caused or contributed to the release or substantial threat of a release of regulated substances; (6) allows for the filing of stipulations and settlements; and (7) provides the standards for the Board in issuing a final order allocating shares of liability.

As originally proposed by the Agency, Subpart B contained five sections: General (Section 741.200), Procedures (741.205), Burden and Standard of Proof (Section 741.210), Allocation Factors (Section 741.215), and Adjustments and Appeals (Section 741.220). Based mainly on comments regarding the burden and standard of proof section of the Agency's proposal, the Board has substantially rewritten Subpart B to include eight sections addressing the issues described above. Because the genesis of the new provisions relate to issues regarding the burden of proof in allocation proceedings, the Board will discuss some of the provisions in Section 741.205 through 741.230 together, rather than separately.

Section 741.200 General

Section 741.200 describes the procedures and standards contained in Subpart B. This section was rewritten to correspond to the other changes made to this subpart.

Sections 741.205 through 741.230

Section 741.210 of the Agency's proposal sets forth the burden and standard of proof for complaints filed under Section 741.105(a) of the proposed regulations. Subsection (a) places the burden of proof for the threshold issue of liability on the State. Subsection (b) provides that the State must prove liability by a preponderance of the evidence. Ways in which a party may have caused or contributed to a release are listed at subsections (b)(1) through (b)(5). Subsection (c) sets forth defenses to liability. Subsection (d) provides for the determination of proportionate shares once liability has been demonstrated. Subsection (d)(2) places the burden of proving a party's share on that party. Under subsection (d)(3), the Board could allocate responsibility for any unallocated response actions or costs to any respondent unable to demonstrate its proportionate share.

Regarding the Agency's burden of proof provisions of its proposal, three main issues have been identified: (1) whether the liability categories contained in Section 741.210(b)(1) through (5) of the Agency's proposal were appropriate; (2) whether the burden of proof should shift to respondent to prove his proportionate share of responsibility; and (3) the proper allocation for a respondent whose proportionate share is not proven. Each of these issues will be discussed in turn.

Liability Categories. Section 58.9 of the Act requires that liability for remediation or response costs be apportioned according to the degree to which a person caused or contributed to a release. The Agency's proposal includes five ways in which a person may have caused or contributed to a release:

> b) To establish liability, the State shall prove by a preponderance of the evidence that the respondent cause or contributed to the release or substantial threat of a release in one or more of the following ways:

1) By act or omission that is a proximate cause of a release or a substantial threat of a release of regulated substances or pesticides;

2) By act or omission that has aggravated or failed to mitigate a release or substantial threat of a release such that additional removal or remedial action is necessary or additional response costs have been incurred;

3) By ownership or operation of a site or facility used for disposal, transport, storage or treatment of regulated substances or pesticides and from which there has been a release or substantial threat of a release of any such regulated substances or pesticides if the respondent owned or operated the site or facility at the time of any such disposal, transport, storage or treatment;

4) By arranging with another party or entity by contract, agreement, or otherwise for disposal, transport, storage, or treatment of regulated substances for pesticides owned, controlled or possessed by the respondent at a site or facility owned or operated by another party or entity from which there is a release of any such regulated substances or pesticides; or

5) By accepting any regulated substances or pesticides for transport to a disposal, storage or treatment facility or site from which there is a release or a substantial threat of a release of any such regulated substances or pesticides.

The Agency maintains that Subsections 741.210(b)(1) and (b)(2) are based on traditional principles of causation where a person's act or omission has lead directly to a release or exacerbated an existing release. PC 6 at 14. The Agency also acknowledges that Subsections (b)(3) and (b)(5) are patterned after Subsections 22.2(f)(2) through (f)(4) of the Act, but contends that Subsections (b)(3) and (b)(5) are ways in which persons may have contributed to a release under Section 58.9 without having directly caused the release. PC 6 at 14. Without liability for those that have contributed to the release, the Agency contends that there would rarely, if ever, be liability at commercial facilities for generators, arrangers, or transporters. PC 6 at 14. As to Subsection (b)(3), the Agency contends that the underlying idea that such actions are contributions to the release is based on the assumption that the substances would not have been on site to be released had they not been accepted by the former owners and operators. PC 6 at 15.

While BFI supports the majority of the Agency's proposal, BFI opposes Section 741.210(b)(5). BFI argues that under the Agency's proposal, a transporter could be liable even if it did not select the site for disposal. BFI believes that this is unfair to transporters, and it also fails to recognize the economic realities of the waste disposal business. PC 4 at 1. BFI argues that even under CERCLA a transporter must select the site for disposal before it is a liable party. See 42 U.S.C. 9607(a)(4). Section 9607(a)(4) provides for transporter liability for any person who:

> [a]ccepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . ."

BFI also argues that federal courts which have addressed CERCLA have also acknowledged Congress' intent to make transporters liable only when they select the site for disposal. See U.S. v. Western Processing Co., 756 F. Supp. 1416, 1420 (W.D. Wash. 1991). Thus, BFI urges the Board to make it clear in the rules that a transporter who does not select the disposal site is too far removed from causing the release to be a liable party. PC 4 at 2.

Karaganis & White objects to the list of liability categories. Under the Agency's proposal, Karaganis & White asserts, an owner, arranger, or a transporter who did not directly or proximately cause a release can be held liable. Additionally, Karaganis & White argues that there is no nexus between the proposed bases of liability and the incurring of response or remedial expenses. PC 8 at 11-12. Karaganis & White also contends that the list of liability categories is a resurrection of joint and several liability by incorporating the list of responsible parties from the federal and State superfund statutes without regard to the language in Section 58.9 of the Act. PC 8 at 11.

Mohan also objects to the proposed methods of establishing liability. Mohan asserts that the only statutorily authorized method is the first one—showing that the respondent caused or contributed to the release by act or omission that is a proximate cause of a release of regulated substance. PC 12, Exh. A at 4. Mohan contends that the other categories are not supported by the statutory language of Section 58.9 of the Act.

As noted earlier, Section 58.9 of the Act provides that no person may be required to conduct remedial action or pay for costs of 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." 415 ILCS 5/58.9(a)(1) (1996). For the Board to include categories of liability in these rules, such as those set forth in Section 741.210(b) of the Agency's proposal, the Board would have to conclude that the parties listed would, as a matter of law, always directly cause or contribute to any release with which they may be connected. The Board is unwilling to do so. Thus, the Board will not adopt the categories listed in paragraphs (b)(3) through (b)(5).

Paragraph (b)(1) of the Agency's proposal merely restates the key provision of Section 58.9(a) of the Act, and the Board therefore has retained this provision in the current regulations. Additionally, the Board concludes that Subsection (b)(2) of the Agency's proposal reflects traditional principles of causation and thus the Board has , for now, retained this provision as well. The Board invites comments from interested parties on whether Subsection (b)(2) is appropriate in these rules. Accordingly, the Board has included these two provisions as defining liability in Section 741.225 of the regulations adopted today for first notice.

Assignment of Burden of Proof. In the Agency's proposal, Section 741.210(d)(2) provides that following a determination of liability "[i]t is the burden of each respondent to prove by a preponderance of the evidence the degree to which the respondent caused or contributed to the release or substantial threat of a release based on the allocation factors . . . ." Two major issues arose with regard to this subsection. Those issues were: (1) whether the burden of proof should shift to a respondent to demonstrate the proportionate share of that liability, and (2) whether the shifting of burden was authorized by Section 58.9.

The Agency contends that the Board has the authority to shift the burden of proof to the respondent. In support, the Agency cites Section 58.9(d) which empowers the Board to adopt "any other standards and procedures which the board may adopt pursuant to this Section." PC 6 at 3. The Agency also notes that the legislature need not spell out each and every detail for administrative agencies to exercise their rulemaking authority and that an express grant of authority to an administrative agency includes the power to do all that is reasonably necessary to perform the duty conferred by statute. See PC 6 at 5-6. The Agency further asserts that the burden shifting is supported by Section 433(B)(2) of *Restatement (Second) of Torts* (Restatement). See PC 6 at 15-16; see also Tr.1 at 63, 116-117. Finally, the Agency asserts that shifting the burden is appropriate because its provides an incentive to PRPs to provide information. Tr.2 at 51, 53; Tr.4 at 20-21.

The AGO, the City of Chicago, and BPI agree with the Agency that the shifting of burden is authorized and is necessary. These entities provide basically the same reasons in support of the shift in the burden as the Agency. See PC 7 at 5; Exh. 9 at 9-10; PC 9 at 2; Exh. 13 at 8-9; Tr.3 at 157.

SRAC, Karaganis & White, and Mohan oppose shifting the burden. They argue that a shift in the burden is "contrary to the language of Section 58.9 and contrary to the legislature's intent that joint and several liability be eliminated in favor of proportionate share liability." PC 13 at 5. SRAC contends that there is no language in Section 58.9 to support shifting of the burden of proof and no basis for speculation that burden shifting was intended by the legislature. Exh. 11 at 4; Tr.1 at 118. Moreover, SRAC asserts that when the legislature intends to shift the burden of proof it does so explicitly. For example, under Section 22.2(j) of the Act, a defendant has the specific burden of proving defenses to Section 22.2(f) actions and the specific burden to demonstrate that it is an innocent landowner. SRAC points out that such a direction is absent in Section 58.9. Tr.3 at 25.

SRAC also contends that lack of information is not a reason to shift the burden from the State to other parties. "In no other enforcement context would the State be able to foist its burden of proving a necessary element of an offense on a defendant, just because the defendant had better access to information than the State." PC 13 at 6. Moreover, SRAC contends that a "liable" person may not have better access to information about his role at a given site than the Agency. The "liable" person may well have been in complete compliance with all laws and standards in existence at the time of the action which gave rise to the release, and may, for entirely legitimate reasons, not have additional information regarding the site. The fact that a person is "liable" under the Agency's proposal should not result in the imposition of additional burdens simply because it cannot prove its proportional share at a given site. PC 13 at 6-7.
Additionally, SRAC maintains that a PRP will bring forward information to the Agency and will do so because the PRP wants to be involved as little as possible. Tr.3 at 62.

Com Ed also opposes the shifting of the burden of proof. Under Section 741.210(d), Com Ed asserts that the Board could impose liability on a person by default, not on the basis of the amount of harm it caused. PC 10 at 4. Com Ed argues that the Agency's sole legal support is the *Restatement* which Com Ed does not believe supports the Agency's theory. PC 10 at 5. Com Ed explains that the *Restatement* states that the burden of proving causation is upon the plaintiff and further provides that, in cases where joint tortfeasors exist, the burden of proving that the harm is capable of apportionment is on the defendant. However, Com Ed notes that by enacting the proportionate share liability standards in Section 58.9, it has already been determined that, as a matter of law, the harm at Illinois contaminated sites always is divisible and a reasonable basis for apportionment exists. PC 10 at 6. Thus, Com Ed asserts that Section 433B of the *Restatement* has already been fulfilled.

When discussing the various parties' burdens in proceedings involving allocation of proportionate shares of liability, it is important to keep in mind the distinction between the determination of a given party's liability and the allocation of shares of liability among multiple liable parties. This distinction has often been blurred in the course of this rulemaking.

The determination of liability is a well established process, and the burdens of the parties with respect to that determination are well known. Section 741.210(a) of the Agency's proposal merely restates the long-standing rule. The complainant alleges facts establishing liability, and must prove the allegations in its complaint. An equally well established rule is that the respondent may raise affirmative defenses, and has the burden of proof with respect to those defenses. See generally, 735 ILCS 5/2-613.

This "assignment of burdens" is unaffected by the advent of proportionate share liability. Section 58.9 merely provides new affirmative defenses which were not previously available to respondents. In keeping with long-established rules, the burden of proof with respect to these defenses is on the respondent. The Board therefore concludes that the issue is not whether the burden of proof to demonostrate proportionate share liability shifts to the respondent. Rather, the issue is how the respondent is obligated to support its affirmative defense. Thus, the second issue debated by the participants, *i.e.*, whether shifting the burden is authorized by Section 58.9, is not relevant.

It is important to note the nature of that burden with respect to the most significant of these new defenses—that contained in Section 58.9(a). Section 58.9(a) provides, as has been discussed, that no person may bring an action to require a respondent to conduct remedial action, or seek costs for remedial activity with respect to a release, beyond the respondent's proportionate share of responsibility for the release. To successfully assert this provision as a defense to an action, the respondent is required only to plead and prove that some other person or entity at least partly caused or contributed to the release. That other person or entity's specific proportionate share of liability is not an element of the defense. Apportionment of liability is a separate issue, to be addressed only after issues of liability have been resolved.

Neither is a specific proportionate share of liability an element of a claim for remediation or cost recovery. To hold otherwise would require a complainant in a case involving only one responsible party to prove a negative, *i.e.*, that there are no other responsible parties, a potentially insurmountable burden.

There is thus no specific set of facts which must be proven in order to establish that a party is, for instance, 40% liable for a release, as opposed to 20% or 60%. The significance of any particular piece of information or circumstance will vary from case to case, depending on all facts and circumstances of a particular matter. When determining proportionate shares, the Board will have a body of evidence before it, which it will evaluate, and based on all the evidence, allocate shares of liability. Thus, in the context of allocation determinations, "burden of proof" is a misnomer for the duty of participants.

Based upon the comments of the participants, it appears that the main purpose of assigning the burden of proof to respondents in the Agency's proposal is 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.

Similarly, the AGO notes that the Act is silent on the issue of burden of proof and provides only that a person cannot be required to pay more than its proportionate share. There is no guidance in the statutory language regarding how a person's proportionate share should be determined or upon whom the burden of proof lies. Since it is the liable party who presumably has the information about its contribution to the release, the AGO believes that it is necessary that the burden of proof be placed on the liable party. PC 7 at 5; see also Exh. 9 at 9-10. The AGO also contends that the shift is necessary to ensure that respondents provide all information in their possession relating to a release.

The Board believes that the goal of obtaining the most complete information possible about a release can be better realized by directly imposing a duty on participants in an allocation proceeding to come forth with such information, than through the indirect method contained in the Agency's proposal, *i.e.*, assignment of the "burden of proof." As previously explained, the Board has included a rule at Section 741.130 of the first-notice proposal requiring 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.

After discovery, each party may introduce any evidence that party desires for consideration by the Board. No party, however, is required to introduce evidence, or to prove any particular fact or set of facts in an allocation proceeding. Rather, since each party has access to all available relevant information, the self-interest of each party will result in a complete record before the Board: all parties will introduce whatever evidence is available that suggests greater shares for other participants and lesser shares for themselves.

Unproven Proportionate Share. The third major "burden of proof" issue debated by the participants in this rulemaking proceeding is the proper allocation to a party whose proportionate share is not proven. Under the Agency's proposal, if there is no evidence establishing a specific proportionate share for a party, that party may be assessed all unapportioned costs or response actions. The Agency included such a provision in its proposal because it believed that such a provision was necessary to motivate the production of complete and accurate information and to prevent clearly liable parties from entirely escaping responsibility in cases where there was insufficient information to apportion harm or where the harm was not divisible. Exh. 5 at 23; see also Tr.1 at 63; PC 6 at 16. Moreover, the Agency asserts that this provision is not a return to joint and

several liability because it does not require a potentially responsible party to pay more than its share of the harm. Exh. 5 at 24; Tr. 1 at 64. The important point, according to the Agency, is that any "such allocation would not violate the Section 58.9 restriction on assigning a share beyond the person's proportionate degree of responsibility. The restriction assumes that the person's share is known or can be determined. Where the liable party's share cannot be proven, neither can it be proven that the party had paid more than its share, and there is no violation of Section 58.9." PC 6 at 17-18.

The AGO and BPI support the Agency's proposal based on the same reasons espoused by the Agency. See PC 7 at 6; Exh. 13 at 10-11; Tr.3 at 160-161. The City also supports the Agency's provisions. However, in order to minimize concern that a PRP who is unable to prove its proportionate share could be allocated the entire unallocated share, the City suggests that language be added to Section 741.210(d)(3) which would affirmatively require the Board to consider any evidence a PRP could provide which would indicate that it was not responsible for a portion of the unallocated share. Thus, for instance, a PRP that could show it began operating in 1997 would not be allocated the entire unallocated share of a site that had been receiving waste since 1995. Or, as another example, a PRP that can show that it has never used a particular substance would not be allocated costs associated with cleaning up that substance. Further, the Board should be required to consider information concerning other PRPs who are unable to determine their proportionate share. Thus, if two or more PRPs disposed of essentially the same waste at a facility, and both are unable to determine their proportionate share, the entire unallocated share could not be allocated to only one PRP. PC 9 at 2-3.

Conversely, several participants in this rulemaking contend that where there is no evidence of a particular proportionate share, an element of the case against a respondent has not been proven, and consequently no liability can be assessed. Tr.3 at 27.

The various positions of the participants are based on the view that a specific percentage allocation is an element of a cause of action or defense, which must be proven before that claim or defense can be sustained. The Board, as noted, has not adopted that approach. Rather, under proposed Section 741.225, the Board makes a determination based on all evidence presented by all parties as to proportionate shares of liability. In any case where there is sufficient evidence to prove liability, there will be at least some evidence from which the Board can make an allocation of proportionate shares. Consequently, a party will not be allocated an unfair share merely because that party does not possess extensive evidence regarding its involvement in a release. Furthermore, the burden will not be on the State to prove any party's share.

Other Procedural Matters.

Necessary Parties. In a proceeding to apportion liability, all liable parties who can be identified through a diligent inquiry must be made parties. The Board may allocate shares of liability to entities which are not made parties, or to unknown actors, but such allocations would not be binding on any such entities. Allocations of liability to participating parties, however, would be conclusive of those parties' liability in a subsequent action involving a previously unknown or nonparticipating party. Accordingly, the Board has included a new provision at Section 741.215 in the regulations concerning necessary parties.

Stipulations and Settlements. At the hearings, Howe, testifying on behalf of Caterpillar, noted that there is no provision in the Agency's proposal for a party to settle out of an allocation proceeding unless the parties agree to assume responsibility for 100% of remediation. "[I]f a party gets involved in a proceeding and basically wants to settle out and buy their peace, I'm not sure that I see any means by which they could do that without there being a 100% allocation already being made; in other words, there doesn't appear to be a way for anybody to settle early through these proceedings[.]" Tr.2 at 143. "[B]usinesses and others who are deemed liable for a portion of the cost of cleanups should be able to quickly resolve, via compromise and settlement, issues relating to their individual liability if they so desire. This will enable them to obtain closure with respect to those issues." Exh.12 at 2.

For a complete or partial settlement in an allocation proceeding to be binding, it would have to be accepted by all participants. Where such agreement can be reached, the Board agrees that a party should be able to "settle out" of a proceeding. Given the nature of allocation proceedings, however, it is possible that the Board may, after all evidence is considered, find that a party which has settled out is responsible for a greater proportionate share of liability than its settlement amount. If other parties agree to let a settling party out of an allocation proceeding before the proceeding is completed, therefore, those parties must also agree to assume liability for any share allocated to that party beyond the settlement amount. The Board has added Section 741.230 to permit settlements under these terms.

Section 741.230 also contains a provision allowing parties to an allocation proceeding to conclude an allocation proceeding through stipulation where the parties allocate and assume 100% of remediation or response costs.

Section 741.235 Final Orders

Section 741.235 provides standards for the Board in entering a final order determining liability and allocating shares of liability. Specifically, this section provides that final orders must be based on the evidence presented at hearing or in a stipulation. Moreover, this section establishes that the failure to comply with a Board order may result in the assessment of penalties under Section 42 of the Act. 415 ILCS 5/42 (1996).

Private Enforcement Actions

> Section 31(d) of the Act allows private parties to enforce the Act:
>
> > Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder or any permit term or condition thereof. 415 ILCS 5/31(d) (1996).

As a remedy for such violations, a private party may ask the Board to issue such orders as the Board deems appropriate, including orders requiring the respondent to conduct remedial action, imposing penalties, or revoking permits. See 415 ILCS 5/31(a) and 31(b) (1996); see also Discovery South Group, Ltd. v. PCB, 275 Ill. App. 3d 547, 559, 656 N.E.2d 51, 59 (1st Dist. 1995) ("Illinois decisions reflect the generally acknowledged authority of the Board to take whatever steps are necessary to

rectify the problem of pollution and to correct instances of pollution on a case-by-case basis"). In addition, the Board has held that it may order a respondent to reimburse the complainant for the costs of remedying a respondent's violations. See Lake County Forest Preserve District v. Ostro (July 30, 1992), PCB 92-80; Herrin Security Bank v. Shell Oil Co. (September 1, 1994), PCB 94-178; Streit v. Oberweis Dairy, Inc. (September 8, 1995), PCB 95-122; Richey v. Texaco Refining and Marketing, Inc. (August 7, 1997), PCB 97-148; Dayton Hudson Corporation v. Cardinal Industries, Inc. (August 21, 1997), PCB 97-134; Malina v. Day (January 22, 1998), PCB 98-54.[12]

Section 58.9 of the Act appears to place limits on this ability of private parties to sue for remedial action or recovery of costs for remedial activity. Section 58.9 provides, in relevant part:

> Notwithstanding any other provisions of this Act to the contrary, including subsection (f) of Section 22.2, in no event may the Agency, the State of Illinois, *or any other person* bring an action pursuant to this Act or the Groundwater Protection Act to require any person to conduct remedial action or to seek recovery of costs for remedial activity conducted by the State of Illinois *or any person* . . . . 415 ILCS 5/58.9 (1996) (emphasis added).

The Agency's proposal, however, did not address how, if at all, Section 58.9 would apply to private enforcement actions. In response to questions regarding this issue, the Agency confirmed that it viewed the Subpart B proceeding as applying "strictly to cases brought by the State . . . ." Tr.1 at 97. The Agency also stated that its attempt to deal with the private enforcement action issue resulted in the development of Subpart C. But the Agency conceded that Subpart C would not address a citizen's enforcement suit brought under Section 31, such as a suit alleging a violation of Section 21 of the Act for open dumping of regulated substances. Tr.1 at 98.

The Agency took its position regarding private enforcement actions because of the following concerns:

> First, [the Agency] [was] concerned that with these third party cases that there could be an orphan share arising out of those. Now, it is not an issue that [the Agency] would be legally obligated to fund those orphan shares, but it would be a situation where potentially cleanup would not go forward unless the State funding was made available. We are going to be very reluctant to spend State dollars at sites where we have not been closely involved in developing the remediation and oversighting activities and so forth. If there is a third party action and the case goes to a final judgment before the Board and there is a split on the proportionate share, you know, what happens then at that site after the completion of the case.
>
> Another question is whether the judgment in those third party cases would impose limitations on the Agency filing its own cases at such sites . . . .
>
> The second big concern is that a third party case could disrupt ongoing Agency activities. If [the Agency] [has] issued a 4(q) notice and [the Agency] [is] trying to proceed to get an entire cleanup at a site and a third party case is filed, that could put our Agency activities at the site in some kind of limbo pending the outcome of that case. Tr.4 at 24- 25.

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[12] Several federal courts have also concluded that the Board has the authority to hear private costs recovery actions. See Midland Life Insurance Co. v. Regent Partners I General Partnership, 1996 U.S. Dist. LEXIS 15545 (N.D. Ill. Oct. 17, 1996); Krempel v. Martin Oil Marketing, Ltd., 1995 U.S. Dist. LEXIS 18236 (N.D. Ill. Dec. 8, 1995).

As a result of these concerns, the Agency urges the Board to refrain from addressing private enforcement actions in this rulemaking:

> If the Board is going to conclude that third party actions need to be addressed, then in our view it should not do so in this docket. The appropriate thing to do would be to set up a separate Docket B to look at that issue. [The Agency] think[s] there [are] at least three reasons for that.
>
> First, I think that the concerns that we have identified relative to how our program operates are substantial . . . .
>
> Second, it would have a chance . . . to get the issues raised in our proposal at least somewhat settled before opening them up to new issues that might be raised by third party complaints.
>
> Third, the inclusion of a third party action in 741 is an issue that may be of interest to a much broader section of the public than the parties interested in the procedures that we have outlined in 741. Tr.4 at 26-27.

In its posthearing public comment, the Agency reiterated its request that the Board address private enforcement actions in a separate docket. PC 6 at 19.

Mohan criticized the Agency's proposal for failing to address private actions. "Assume an innocent landowner did nothing to cause the problem but discovered that past owners had caused it—this person is bound by the prohibitions of Section 58.9 just as much as the state is, yet nowhere in IEPA's proposed rules is there any mechanism for this class of persons to obtain any source of declaration of contributors' proportionate share of liability." PC 12, Exh. A at 7.

Other commentors were less sure that Section 58.9 applied to private actions, and emphasized that Section 58.9 was not intended to create any new cause of action. Tr.3 at 82. However, Reiser, who testified on behalf of SRAC, CICI, and ISG, suggested that to the extent that Section 58.9 applies to actions brought under other parts of the Act, "there is no reason that in an individual enforcement action between two parties or even between three parties the Board cannot apply the same principles that are drawn here." Tr.3 at 83. Howe, testifying on behalf of Caterpillar, agreed: "With respect to the 58.9, the way that I had interpreted that is to the extent that a private right of recovery might exist elsewhere in the Act, that then in that situation, you could not—a person could not force somebody else to pay more than their proportionate share." Tr.3 at 84.

The Board finds that the record raises the following issues regarding private enforcement actions: (1) whether Section 58.9 applies to actions brought by private parties; and (2) if so, whether the proposed regulations should be changed to address private party suits, or whether the Board should reserve these issues for a separate docket. The Board addresses each of these issues in turn.

The plain language of Section 58.9 applies to actions brought by "any person" against "any person." Given the plain language of Section 58.9, the Board must find that Section 58.9 applies to an action brought by a private party "to require any person to conduct remedial action

or to seek recovery of costs for remedial activity . . . ."[13] Having determined that Section 58.9 applies to private actions, the Board now must resolve how the proposed rules should address private suits.

Participants in this rulemaking have outlined three different routes for the Board to take on this issue. First, the Agency has urged that the Board address the issue in a separate docket. Second, Mohan has argued that the proposal address private party claims. Third, representatives for SRAC and Caterpillar have observed that the same principles set forth in the proposed rule could be applied to private party claims.

The Board is not persuaded that this issue should be addressed in a separate docket. The Board believes that claims by private parties and the State raise many of the same issues. Consequently, the Board believes that a better rule will result if these issues are addressed with the input of those who may be affected by private party claims. Moreover, to the extent a broader section of the public is interested in this issue, they still have the opportunity to comment on this issue during the first-notice period.

The Board also does not agree that private party claims will interfere with the Agency's ability to issue 4(q) notices and proceed with cleanups. Under Section 4(q), the Agency has the authority "to provide notice to any person who may be liable pursuant to Section 22.2(f) of this Act for a release or a substantial threat of a release of a hazardous substance or pesticide. Such notice shall include the identified response action and an opportunity for such person to perform the response action." Section 58.9(e) expressly states that it does not affect the Agency's 4(q) powers: "Nothing in this Section shall limit the authority of the Agency [to] provide notice under subsection (q) of Section 4 or to undertake investigative, preventive, or corrective action under any other applicable provisions of this Act." 415 ILCS 5/58.9(e). The fact that a private party action is pending regarding a site therefore will not affect the Agency's ability to issue 4(q) notices.

The Agency also suggests that judgments in third party cases may give rise to orphan shares, or limit the ability of the Agency to file its own cases at such sites. Tr.4 at 24-25; see also People v. Progressive Land Developers, Inc., 216 Ill. App. 3d 73, 79-80, 576 N.E.2d 214, 218-19 (1st Dist. 1991) (holding that *res judicata* barred the Attorney General from litigating whether certain monies were charitable assets when the same claim had earlier been brought by another party: "a nonparty may be bound by a judgment if its interests were so closely aligned to a party's interests that the party was the nonparty's virtual representative"). But to the extent that these

[13] The Board acknowledges that despite the Board's rulings in Ostro and following cases, some of the participants believe that the Act does not allow for private actions to recover the costs of remedial action. Tr.3 at 70. All agreed, however, that a private party may bring an enforcement action seeking to require someone to perform remediation. Tr.3 at 82. Therefore, even if private parties could not bring cost recovery actions, the Board would still need to decide whether and how Section 58.9 applied to private actions that seek to require someone to undertake remedial action or to recover costs for remedial activity.

effects arise,[14] they originate from the language of Section 58.9 itself. These effects will not be avoided even if the Board addresses private party actions in a separate docket. Therefore, these potential effects are not a reason to defer the Board's consideration of this issue.

Based on the record, the Board believes that private party claims are best addressed by expanding the procedures and standards set forth in Subpart B to complaints filed by any person. It is true, as Reiser and Howe suggest, that the language in Section 58.9 is self-executing; Section 58.9 applies whether or not the Board adopts rules to implement it. But Section 58.9(d) requires the Board to adopt rules and procedures for determining proportionate share, and the Board sees no reason not to make it clear that the same standards will apply to all claims.

Finally, the Board emphasizes that it agrees that Section 58.9 does not create any new cause of action. However, once a complaint has been 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 shall apply to determine that person's proportionate share. Subpart C remains available for those situations in which private parties can meet its requirements and seek an allocation of proportionate share.

The rules at first notice reflect these proposed changes, and the Board welcomes comment on its proposed resolution of these issues.

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 PRPs petitioned the Board to allocate among those participating PRPs the entire cost of remediation at the contaminated site. Section 741.300 set 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 set 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 participating potentially responsible parties, 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 PRP. 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,

[14] The Board does not address here whether the State would be bound by a determination of a party's proportionate share in a private party enforcement action; the Board merely notes that potential effect flows from Section 58.9, not the Board's decision to promulgate rules on how proportionate shares will be determined in private party actions.

Section 741.330 provided that the Board shall use the allocation factors available under Section 741.240 in apportioning liability.

The proposed Subpart C procedure is unique in environmental law. It is a procedure which is part voluntary and part adjudicatory. It is voluntary in the sense that all parties to the proceeding have agreed that they are each in some part responsible for the contamination at issue. It is adjudicatory in that they seek a determination of their proportionate share of liability 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 proposed Subpart C, the Board's hearing officers would assume a much greater role in the decisionmaking process than they have in the past. Specifically, the proposed rules provided for the hearing officer to initially guide the parties to a settlement and, failing that, issue a recommended decision and order to the Board on the substantive issues of proportionate share. The Board would then review that recommendation and accept it or reject it, presumably in whole or in part. The Board's decision, appealable pursuant to Section 41 of the Act, would be the binding allocation to which Reiser referred.

Concerns were raised at hearing by individual Board Members regarding the propriety of changing the Board's decisionmaking scheme. The Board is somewhat unique among administrative adjudicatory agencies, because it decides cases without a hearing officer recommendation. Participants in this proceeding identified other issues regarding this subpart, including the need for and type of procedures required for voluntary allocation petitions.

Necessity of Subpart C

According to Karaganis & White, Subpart C, as proposed by the Agency, "contains the most complex procedural requirements possible where they are least needed–where purportedly responsible parties have decided to cooperate with each other to achieve the final cleanup." PC 8 at 13. Karaganis & White asserts that it remains unclear what purposes Subpart C serves, since under the Site Remediation Program participants are currently free to voluntarily remediate a property and obtain a No Further Remediation letter from the Agency. Karaganis & White speculate that one possible benefit may be that the Board is available to resolve disputes over the allocation, a concept that Karaganis & White generally supports. PC 8 at 13.

Mohan also believes that the proposal has limited utility in a very narrow class of cases. According to Mohan, the only time this type of proceeding would be used is if a few major players are involved in a site and agree to simply ignore the minor players who refuse to come to the table. PC 12, Exh. A. Moreover, Mohan contends that at any site at which a major participant is not available, there is no incentive for the other major participants to use this proceeding because they would first have to agree to clean up 100% of the problem. In contrast, forcing the Agency to sue first would result in the State picking up the "orphan share." PC 12, Exh. A at 7.

As noted before, Section 58.9 of the Act requires the Board to adopt rules and procedures for determining proportionate share. Section 58.9 further requires that these rules provide, among other things, "procedures to establish how and when such persons may file a petition for determination of such apportionment." See 415 ILCS 5/ 58.9 (1996). Based upon this statutory mandate, the Board finds that the rules promulgated to implement Section 58.9 must include procedures for allocating responsibility for a release that are independent of an enforcement

action. The Board further believes that such a process will benefit PRPs by providing a procedure to resolve disputes over allocation and thus will encourage the cleanup of contaminated sites. Moreover, the Board finds that the procedures under Subpart C (as modified by the Board in this order) are not overly burdensome or complex and are necessary for a properly functioning rule. While this type of procedure may be used in a limited number of circumstances, the Board believes this process serves a useful function, while at the same time encouraging responsible parties to completely remediate contaminated sites.

The parties admitted at hearing that the process as proposed was not "set in stone." Rather, it appeared that the parties desire the Board's assistance in developing a process that would meet the goal of the parties—expediency, finality, and workability. Utilizing the framework provided by the Agency through its discussions with SRAC, the Board has modified Subpart C to provide a procedure that, hopefully, meets those goals. The Board welcomes both general and specific comment on the value and workability of the changes advanced in this first-notice proposal.

Generally, the Board's changes from the Agency's proposal reflect a sense on the part of the Board that the parties are looking for both a procedure that would guide participants to settlement and, failing that, a procedure that would formally and finally adjudicate specific shares of responsibility. While we do not believe the Agency's specific proposal would accomplish both of these goals, we offer at first notice a procedure that might do so. The procedure, further explained below, involves a period of confidential mediation before a qualified individual, as well as a traditional Board adjudicatory procedure where mediation is unsuccessful or not desire.

Section 741.300 General

Section 741.300 lists the procedures for allocation when no complaint has been filed with the Board. The State will not be a party in Subpart C proceedings (but may participate) although the proceedings may arise because the State issued a notice under Sections 4(q) or 58.9(b) of the Act. 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 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. While the Board has retained a modified version of this provision in the regulations adopted today for first notice, the Board notes that participants in this rulemaking have questioned whether the statutory language supports such a provision and whether it affords any benefit. See PC 12, Exh. A at 7. The Board believes that a benefit does exist in situations where persons agree to accept 100% liability for a release, but have not stipulate to specific shares of liability. In such a case, the allocation process is likely to be much more effective if the necessary remedial action is known. However, when the parties stipulate to specific shares of liability, the Board questions whether this prerequisite is necessary. The Board would therefore appreciate comment on this requirement.

Additionally, the Board has made a few minor changes to the Agency's language to keep it consistent with other changes made to this Subpart.

Section 741.305 Initiation of Voluntary Allocation Proceeding

As adopted, Section 741.305 provides for the initiation of the Subpart C proceeding by petition to the Board. As noted above, if participants do not stipulate to specific shares of liability, a Subpart C proceeding can only be initiated if there is an Agency-approved RAP or a written agreement with the Agency. The petition must identify the site in question and the participants, the stipulated share of specific parties, if any, and a certification by all participants that they have agreed to allocate among themselves the entire cost of the response action to be performed. The 100% allocation is required even if all known potentially liable parties do not participate. The petition must also include a statement of whether the participants choose to engage in mediation or proceed directly to Board's adjudicatory allocation process.

Subsection (e) provides that participation in a Subpart C proceeding is a waiver of the right to contest the nature of a response action agreed to as provided at Section 741.105(b). The provision does not preclude amendment of SRP Remedial Action Plans in accordance with SRP rules or negotiation of response actions arising from Section 4(q)/58.9(b) notices. Subsection (e) provides that if a Subpart B proceeding is initiated after a Subpart C proceedings has been initiated, the Board may, upon motion or *sua sponte*, stay the Subpart C proceeding pending the outcome of the Subpart B proceeding.

The Board made several changes to the Agency's proposed language, other than those already noted. First, the Board has deleted the requirement that the petition contain each participants proposed allocation for itself. The Board believes that this information is not necessary at the initiation of the voluntary proceeding, and at that time, there may be little information to provide an accurate assessment of a participant's proposed allocated share.

Second, the Board has deleted the requirements that participants waive the right to contest the nature of the agreed response contained in the RAP or other Agency' approved plan. In its place, the Board has provided that the remedy may be contested in the voluntary allocation procedure. The Board seeks comment on this alternative or whether the waiver is necessary. If necessary, the Board questions whether such a waiver should be limited until after the allocation determination was made, or was intended to forever preclude a challenge to an Agency decision on a remedial action plan.

Section 741.310 Allocation Proposals and Hearing Requests

Section 741.310 applies where the participants are engaged in the adjudicatory allocation process, rather than mediation, and sets forth the requirements for submitting the parties' joint proposal to the Board. 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.

Karaganis & White is concerned because it believes that missing from the proposal is any mechanism by which a party who may have proximately caused a small share of a release or substantial threat of a release, and who had demonstrated their proportionate share, may either conduct (or pay for) their proportionate degree of remedial action and then be released from any further liability. Karaganis & White thus encourages the Board to consider any such proposal submitted during the rulemaking process and adopt a workable mechanism for such parties. PC 8 at 14.

The Board believes that the current proposal does allow a party to settle out early. The proposal allows for participants to file a joint agreement with the Board for any or all participants. Thus, if all participants have agreed to a particular participant's allocation, that agreed allocation goes directly to the Board for review. Accordingly, the proposal does contain a mechanism for a PRP to settle out early and not participate further. The Board agrees with the Agency that "[t]o allow any party to submit a proposal for resolution at any time would invite free-lancing and force the hearing officer and the parties to spend time evaluating and responding to individual proposals rather than focusing on the task at hand, reaching a fair division of the responsibility among the participating parties." Stat. at 15, n.10. Moreover, if no agreement can be reached by the participants, the participant who wants an allocation may initiate a proceeding under Subpart B. Thus, the Board has retained these provisions unchanged in the regulation adopted today. However, the Board questions whether this section is necessary since the Board has included provisions, discussed below, providing for mediation. The Board would appreciate comment on this subject.

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 Remedial Action Plan or other Agency-approved plan.

Sections 741.320 through 741.330 Mediation

Today, for first notice, the Board has proposed an alternative to the Board's traditional adjudicatory process that would involve voluntary and confidential mediation before a qualified individual whose purpose is to facilitate agreement between the parties, not to adjudicate any legal or factual issues. This process is proposed as a result of the Board's recognition that the parties appear to be looking for a procedure that has elements of both mediation (the facilitation of voluntary agreement) and adjudication (formal decisionmaking where no agreement has or can be reached). The Agency proposed increasing the role of Board hearing officers in part so that they might better direct negotiations. Yet, the Agency's proposal would also have the hearing officer issue a recommended decision to the Board. The Board at this time declines to adopt the Agency's proposal as it relates to the role of the hearing officer and instead proposes the concept of voluntary mediation, to be followed by a traditional Board hearing on the allocation issues if voluntary agreement is not reached through mediation or mediation is not desired.

Pursuant to Sections 741.320 through 741.330, the mediation process would work as follows. Where the participants agree, in lieu of a traditional Board hearing regarding allocation issues, a qualified mediator would be chosen by the parties or appointed by the Board. The mediator would control the process, with all timeframes being determined by the mediator and the participants. All

information gathered in the mediation process would be kept confidential by the mediator and would not be discoverable in this proceeding. Further, unless the participants agreed otherwise, any information gathered in the mediation could not be used in a subsequent allocation proceeding. Where the process culminated in agreement of all participants, the participants could move that the Board approve the stipulated settlement agreement, or alternatively, that the Board dismiss the underlying petition for allocation. Where the participants cannot reach agreement, the adjudicatory allocation process would always be available. The Board hopes that the proposed process (where the facilitator of the agreement has absolutely no role in the adjudication of the matter) might serve what we perceive to be the interests of the parties: expediency, finality, and workability. The Board's proposed rules for first notice regarding mediation are set forth in the order. We welcome all comments regarding their workability.

Section 741.335 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 liability to the participants. As initially proposed by the Agency, the Board was required to make a final determination on allocation within 90 days of the close of the hearing. The Board has not included the 90-day provision as the Board finds that this time period may be too limited in complicated cases.

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. The Board has also made changes to the Agency's language as noted above to correspond to the changes made regarding the hearing officer's role in the proceedings.

As originally proposed, Subsection (c) required that the parties to the Subpart C proceeding bear the risk of default by any of the participating parties. Several participants to this rulemaking commented on the propriety of this provision. The City asserts that Section 741.325(c) is the greatest disincentive to participation in Subpart C proceeding. Under that section, if a PRP defaults after its share has been allocated, its share will be allocated among the other PRPs. Thus, the City contends that a PRP responsible for the majority share could default before paying its allocated costs and the other smaller PRPs would end up either defaulting themselves or paying a much higher cost. Accordingly, the City contends that the proceedings at best will have been a waste of time, if all PRPs end up defaulting. At worst, all PRPs who are actually responsible for only a small percentage of the problem may end up paying the majority PRP's costs, thus defeating the purposes of the proportionate share scheme. The City offers two approaches to remedy this problem: (1) provide for sanctions to be assessed by the Board against a defaulting PRP; and (2) include language which would allow the remaining PRPs to pursue a cost-recovery action or breach of contract action against the defaulting PRP. Such measures would create a disincentive for the majority PRP to default. PC 9 at 3-4.

Mohan opposes to this provision for basically the same reasons as does the City. Mohan also contends that this provision is not supported by any statutory language. Mohan maintains that legislative history and the language of the legislation itself very specifically provide that the State may not force orphan shares on other parties, even under a voluntary scheme. PC 12, Exh. A at 7.

The Board agrees that making a participant responsible for a defaulting participants share is a disincentive to proceeding under Subpart C. Therefore, the Board has struck this provision and in its place provided that sanctions may be assessed against a defaulting participant.

Other Matters

The City believes that a specific provision should be included for the inclusion of a potentially liable party who may be discovered during the course of the discovery phase and who agrees to participate. The City contends that the lack of such specific language may discourage potentially liable parties from entering into a Subpart C proceeding if they are not certain that all viable potentially liable parties have been identified. Thus, the City encourages the Board to amend Section 741.305(a) to clarify that later-identified PRPs may join in a Subpart C proceeding that is already underway. PC 9 at 3. The Board does not believe that such a provision is necessary because the Board's general rules on amending a complaint and joinder of parties would apply.

Karaganis & White is also concerned that the proposal currently lacks any provision to compel a necessary party to participate in the allocation procedure if the party fails to voluntarily do so, or for taking into account the allocable shares of such a party relative to the participating parties' shares. PC 8 at 13. The Subpart C proceeding is a purely voluntary proceeding, and thus, the Board cannot compel a party to participate. As noted earlier, Subpart B is available when potentially liable parties cannot agree to proceed under Subpart C.

Mohan also notes that the Subpart C is only available if the participants have already secured the Agency's approval of a remediation action plan or if the PRPs sign a written agreement with the Agency to perform removal actions and remediation irrespective of the outcome of the proceedings. Mohan asserts that there is no statutory language that supports this restriction. To the contrary, Mohan contends that the statute is explicit in that it prohibits the State from forcing any person to do more than its proportionate share of remediation or pay more than its proportionate share of costs. PC 12, Exh. A at 9. As noted earlier, the Board has retained the provision requiring an Agency-approved Remedial Action Plan or written agreement before potentially liable parties may initiate a Subpart C proceeding. However, the Board would appreciate more comment on this subject from the participants.

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 practicall 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 first notice today.

Moreover, a Subpart C proceeding can only be initiated whenever 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 cost 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 Agency's proposal, with the Board's revisions, is economically reasonable and technically feasible. The Board therefore adopts the following proposal for first notice.

ORDER

The Board directs the Clerk to cause the filing of the following proposed rules with the Secretary of State for first-notice publication in the *Illinois Register*.

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

PART 741
PROPORTIONATE SHARE LIABILITY

SUBPART A: GENERAL

Section

SUBPART B: ALLOCATION 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]

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

NOTE: Capitalization denotes statutory language.

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 allocation of proportionate shares of liability for the performance or cost of a response resulting from the release or substantial threat of a release of regulated substances.

Section 741.105 Applicability

a) 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)

"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 (a) 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 OR SUCH PERSONS; (b) EMISSIONS FROM THE ENGINE EXHAUST OF A MOTOR VEHICLE, ROLLING STOCK, AIRCRAFT, VESSEL, OR PIPELINE PUMPING STATION ENGINE; (c) 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 (d) 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 INTO THE ENVIRONMENT, TO PREVENT OR MINIMIZE THE RELEASE OF regulated substances 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 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 MAY OTHERWISE BE NECESSARY TO PROTECT THE PUBLIC HEALTH OR WELFARE. THE TERM INCLUDES OFFSITE TRANSPORT OF regulated substances, OR THE STORAGE, TREATMENT, DESTRUCTION, OR SECURE DISPOSITION OFFSITE OF SUCH regulated substances OR 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 FROM THE ENVIRONMENT, ACTIONS AS MAY BE NECESSARY TAKEN IN THE EVENT OF THE THREAT OF RELEASE OF

regulated substances INTO THE ENVIRONMENT, ACTIONS AS MAY BE NECESSARY TO MONITOR, ASSESS, AND EVALUATE THE RELEASE OR THREAT OF RELEASE OF regulated substances, 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 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 for such discovery with the Board.

b) The petition must be brought in the name of the petitioner and must name as respondents the person or persons from whom discovery is sought. The petition must include:

1) The name and address of the respondent(s);

2) The reason the proposed discovery is necessary;

3) 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.

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.

e) The petitioner 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 shall be designated the respondent(s). The notice of filing must inform the respondent of the filing of the accompanying petition and of the respondent's opportunity to respond to the petition within 14 days of the date of service.

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

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

h) Service and filing must be in accordance with 35 Ill. Adm. Code 101.Subpart C, except that initial service of the petition must be made personally, by registered or certified mail, or by messenger service.

i) The Board will review the petition, affidavit(s), and any other supporting documents on file and grant or deny the petition. 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.

j) 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.

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

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 THIS ACT TO CONDUCT a response FOR A RELEASE OR THREATENED RELEASE OF A REGULATED SUBSTANCE, THE AGENCY SHALL PROVIDE NOTICE TO SUCH PERSON. (Section 58.9(b) of the Act) This notice may be combined with a notice under Section 4(q) of the Act.

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

1) Identification of a basis for liability;

2) Identification of the response to be performed; and

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

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

d) The meeting described in subsection (c) of this Section must be held within 30 days of 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

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

a) Within time limits set by the Hearing Officer, all parties to a proceeding in which allocation is sought shall compile any and all documents within their possession or control pertaining to the release or threatened release and shall make the records available for review and copying by the parties.

b) Discovery is governed by 35 Ill. Adm. Code 101 and 103, and all discovery devices identified in 35 Ill. Adm. Code 101 and 103 are available to all parties in a proceeding to allocate proportionate shares of liability. Sanctions for failure to comply with procedural rules, subpoenas, or order of the Board or Hearing Officer shall be as set forth therein and as otherwise available under the Act.

c) Discovery pursuant to this Section is not applicable to mediation proceedings under this Part.

Section 741.135 Conduct of Hearings

a) In any proceeding initiated under Subpart B or C of this Part, the Board will hold a hearing on allocation of proportionate shares of liability, unless the parties have stipulated to allocation of all shares of liability.

b) Unless otherwise provided, hearings will be conducted pursuant to the procedures at 35 Ill. Adm. Code 101 and 103. Sanctions for failure to comply with procedural rules, subpoenas, or orders of the Board or Hearing Officer are as set forth therein and as otherwise available under the Act.

c) All parties and the Agency may present evidence relevant to allocation of proportionate shares of liability at the hearing.

d) If proportionate share liability is raised in an enforcement complaint or as an affirmative defense, the hearing on proportionate share liability may be combined with the hearing on the case in chief.

Section 741.140 Allocation Factors

In determining allocations under this Part, the Board 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, including but not limited to:

1) The volume of regulated substances for which each liable person is responsible;

2) 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 contributed by each liable person;

3) The degree of each liable person's involvement in any activity which caused or contributed to the release of regulated substances at the site; and

4) Any other factors relevant to a liable person's proportionate share of liability.

Section 741.145 Relief from Final Orders

a) On written motion by any person participating in an allocation proceeding, the Board may provide relief from a final order entered in an allocation proceeding for any of the following reasons:

1) Newly discovered evidence which existed at the time of hearing and which 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) may include reallocation of 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 shares of liability.

d) A motion under 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 where remediation of a site has begun before expiration of

this one-year period, a motion under subsection (a) 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.

f) Any response to a motion under this Section must be filed within 30 days of the filing of the motion.

Section 741.150 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 DETERMINATION WHEN A COMPLAINT HAS BEEN FILED

Section 741.200 General

This Subpart sets forth the 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 Initiation of Allocation Determination

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 Proportionate Share Liability as a Defense

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 RESPONSBILITY 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 which may have proximately caused or contributed to a release or threatened release subject to this Part, and which 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 of 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 cause 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 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 provides procedures for mediation and settlements and the requirements and standards 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 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.

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 with regard to the performance of a remedial action at the site following the issuance of a notice under Section 4(q) or Section 58.9(b) of the Act.

c) The petition under subsection (a) and (b) of this Section 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 have agreed to allocate among themselves the entire cost of the response as provided in the Remedial Action Plan or written agreement with the Agency; and

5) A statement that the participants choose to engage in mediation under Sections 741.320 through 741.330 of this Subpart or to proceed with the Board's allocation procedure under Sections 741.310 through 741.315 of this Subpart.

d) Upon determination that the petition contains the required information, the Board shall issue an order accepting the petition and assigning a Hearing Officer.

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.

d) If a proceeding is initiated by the Agency, the State, or any person under Subpart B of this Part against participants to a proceeding under this Subpart C involving the same release or threat of a release, the Board may, upon motion by any participants or at its discretion, stay the Subpart C proceeding pending the outcome of the Subpart B proceeding.

Section 741.310 Allocation Proposals and Hearing Requests

a) Within 60 days following the close of discovery, the participants shall submit a joint proposal to the Board, which must include either or both of the following, as applicable:

1) An agreed allocation of the shares of responsibility for any or all of the participants;

2) A proposal for hearing on all allocations for which the participants have not reached an agreed allocation.

b) If agreed allocations are reached for all participants, the allocated shares must total 100 percent of the costs of the response to be implemented under the Remedial Action Plan of written agreement with the Agency.

c) If a hearing is requested as part of the joint proposal, the Hearing Officer will issue an order for the scheduling and conduct of the hearing and any other matters deemed necessary. The order must include a requirement that, at least 30 days prior to the date of hearing, the participants shall submit pre-hearing memoranda setting forth the share for which they accept responsibility and the issues to be resolved at the hearing.

Section 741.315 Settlements

Nothing shall prohibit the participants from reaching agreed allocations among themselves at any time if the agreed allocations result in 100 percent 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 Appointment of Mediator

a) If the participants have stated in the joint petition that they wish to choose in mediation, the participants may file a joint notice with the Board:

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 of 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 of 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.

d) While mediation is proceeding, the time periods for allocation proposal and hearing requests set forth in Sections 741.310 of this Subpart are suspended.

Section 741.325 Scheduling of Mediation and Mediation Conference

a) The first mediation conference must be held within 30 days of the order appointing a mediator or within 30 days of 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 participants and his 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.

i) Mediation must be completed within 60 days of the first mediation conference unless extended by agreement of the participant.

Section 741.330 Settlement Through Mediation

a) If an agreement is reached, it must be reduced to writing and signed by the participants and their counsel, if any. Within 14 days of the agreement, the participants 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 shall report the lack of an agreement to the Board and file either (1) a joint motion to dismiss the Board action or (2) a joint motion to initiate the Board allocation proceeding under Sections 741.310 through 741.315 of this Subpart.

c) At any time, the participants may jointly file a motion to cease the mediation and begin the Board's allocation proceedings under Sections 741.310 through 741.315 of this Subpart.

Section 741.335 Board Review and Final Orders

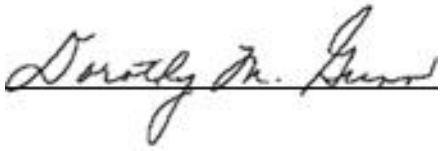
a) Based on the evidence presented at hearing or in a stipulation, the Board will enter a final order allocating proportionate shares of liability for the payment of costs or performance of a response for each participant.

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

c) Penalties may be imposed under Section 42 of the Act if a party fails to comply with a Board order.

IT IS SO ORDERED.

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 September 1998 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board