

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

PART 741
PROPORTIONATE SHARE LIABILITY

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

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SUBPART A: GENERAL

Section 741.100 Purpose

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

Section 741.105 Applicability

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

- e) Subpart C of this Part applies when a petition is filed with the Board under Section 741.305 of this Part to allocate among the participants 100 percent of the performance or costs of a response that results from a release or substantial threat of a release of regulated substances or pesticides. No person may file a petition under Subpart C of this Part when a complaint has been filed in any forum that addresses the same release or substantial threat of a release.

- f) This Part does not apply to:
 - 1) *Any cost recovery action brought by the State under Section 22.2 of the Act to recover costs incurred by the State prior to July 1, 1996 (Section 58.9(f) of the Act);*
 - 2) Sites on the National Priorities List (Appendix B of 40 CFR 300);
 - 3) Sites where a federal court order or a United States Environmental Protection Agency order requires an investigation or response;
 - 4) The owner or operator of a treatment, storage or disposal site:
 - A) For which a current permit has been issued or is required under federal or State solid or hazardous waste laws; or
 - B) That is subject to closure or corrective action requirements under federal or State solid or hazardous waste laws;
 - 5) The owner or operator of an underground storage tank system subject to federal or State underground storage tank laws.

- g) This Part applies to any person or site described in subsections (f)(2) through (f)(5) of this Section to the extent allowed by federal law, federal authorization or other federal approval.

Section 741.110 Definitions

Except as stated in this Section, or unless a different meaning of a word or term is clear from the context, the definition of words or terms in this Part is

the same as that applied to the same words or terms in the Environmental Protection Act [415 ILCS 5].

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

“Agency” means the Illinois Environmental Protection Agency.

“Board” means the Pollution Control Board.

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

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

“Proportionate Share” means a person’s share of the performance or costs of a response based on the degree to which the performance or costs result from the person’s proximate causation of or contribution to the release or substantial threat of a release.

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

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

Regulatory Commission under Section 170 of such Act; and the normal application of fertilizer. (Section 3.33 of the Act)

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

“Remove” or “Removal” means the cleanup or removal of released regulated substances or pesticides from the environment, actions as may be necessary to take in the event of the threat of release of regulated substances or pesticides into the environment, actions as may be necessary to monitor, assess, and evaluate the release or threat of release of regulated substances or pesticides, the disposal of removed material, or the taking of other actions as may be necessary to prevent, minimize, or mitigate damage to the public

health or welfare of the environment, that may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals, and any emergency assistance that may be provided under the Illinois Emergency Management Act or any other law. (Section 3.35 of the Act)

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

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

Section 741.115 Discovery Before an Action is Filed

- a) Any person who wishes to engage in discovery before filing an action seeking proportionate shares may file a petition with the Board for discovery for the sole purpose of identifying persons who may have proximately caused or contributed to a release or substantial threat of release of regulated substances or pesticides.
- b) The petition, which must be supported by affidavits, must be brought in the name of the petitioner and must name as respondents the person or persons from whom discovery is sought. A brief or memorandum and other supporting documents may be filed with the petition. The petition must include:
 - 1) The name and address of the respondents;
 - 2) The reason the proposed discovery is necessary, including why the petitioner could not obtain the information sought by any other reasonable means;
 - 3) A copy of the proposed discovery requests;
 - 4) A statement of the petitioner’s basis for belief that there is a release or substantial threat of a release and that the respondent has or may have the information sought;
 - 5) The petitioner’s proposed time for compliance with the order (not

less than 30 days from the date of issuance of the order);

- 6) A request that the Board enter an order authorizing petitioner to obtain such discovery; and
 - 7) A notice informing the respondent of the opportunity to respond to the petition within 30 days.
- c) The petitioner must serve a notice of filing and a copy of the petition and any supporting documents upon the persons to whom the order is to be directed who must be designated the respondents.
 - d) Within 30 days from the date of service of the petition, the respondent may file a response to the petition supported by affidavits as necessary. The respondent may file a brief or memorandum and other supporting documents with the response. If no response is filed, the respondent is deemed to have waived objection to the discovery sought.
 - e) The petitioner may reply to the response within 7 days after the date of service of the response.
 - f) Petitioner must serve and file the petition in accordance with 35 Ill. Adm. Code 101.Subpart C, except that petitioner must initially serve the petition personally, by registered or certified mail, or by messenger service.
 - g) The Board will review the petition, response, affidavits, and any other supporting documents on file and grant the petition if the Board finds that the requested discovery, or a portion of the requested discovery that the Board specifies, is necessary to identify persons who may have proximately caused or contributed to a release or a substantial threat of a release of regulated substances or pesticides and that the information could not be obtained by any other reasonable means. The order will specify a reasonable time for compliance and the method of compliance.
 - h) Unless extended for cause shown, the Board's order automatically expires 60 days after issuance. If any respondent fails to comply with a discovery request authorized under this Section, the petitioner may seek penalties under Section 42 of the Act.
 - i) The petitioner must bear the respondent's reasonable expenses of providing the discovery (excluding attorney fees).

- j) Nothing in this Section limits the ability of any person to obtain information in any other lawful manner.
- k) No petition under this Section may be brought:
 - 1) Against agencies subject to the Freedom of Information Act [5 ILCS 140]; or
 - 2) For information privileged under 35 Ill. Adm. Code 101 and 103.

Section 741.120 Section 58.9(b) Notice

In the event the State of Illinois seeks to require a person who may be liable pursuant to the Act to conduct a response for a release or threatened release of a regulated substance, the Agency shall provide notice to such person. Such notice shall include the necessity to conduct a response pursuant to Title XVII of the Act and an opportunity for the person to perform the response. (Section 58.9(b) of the Act)

Section 741.125 Notice to Agency

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

Section 741.130 Discovery After an Action is Filed

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

Section 741.135 Allocation Factors

In determining proportionate shares under this Part, the Board will consider any or all factors related to the degree to which the performance or costs of a response result from a person's proximate causation of or contribution to the release or substantial threat of a release. These factors include the following:

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

Section 741.140 Relief from Final Orders

- a) On written motion by any party, the Board, for any of the reasons set forth in 35 Ill. Adm. Code 101.301(b), may provide relief from a final order in which the Board allocated proportionate shares.
- b) Relief under subsection (a) of this Section may include reallocation of proportionate shares.
- c) The Board may decline to reopen an allocation determination if the motion and any supporting materials do not demonstrate that the reopening would result in significant changes in proportionate shares.
- d) A motion under subsection (a) of this Section must be filed with the Board within one year after entry of the order, except that when the response begins during this one-year period, a motion under subsection (a) of this Section must be filed with the Board within three years after entry of the order. Upon written motion, the Board may extend either of these periods for cause shown.

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

Section 741.145 Severability

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

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

Section 741.200 General

This Subpart sets forth the procedures that apply when a complaint is filed with the Board that seeks, under the Act or the Groundwater Protection Act [415 ILCS 55], to require any person to perform a response that results from a release or substantial threat of a release of regulated substances or pesticides, or to recover the costs of a response. This Subpart also sets forth the burden and standard of proof for such actions.

Section 741.205 Burden and Standard of Proof

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

complaint that seeks to require a respondent to perform or pay for a response that results from a release or substantial threat of a release of regulated substances or pesticides.

Section 741.210 Final Orders

- a) Based on the evidence presented at hearing or in a stipulation, the Board will enter a final order that determines whether a respondent proximately caused or contributed to a release or substantial threat of a release.
- b) If the Board determines, under subsection (a) of this Section, that a respondent proximately caused or contributed to a release or substantial threat of a release, the Board will, in its final order, order respondent to perform or pay for a response. The Board will order the respondent to perform or pay for a response only to the degree to which a preponderance of the evidence shows that the performance or costs of the response result from the respondent's proximate causation of or contribution to the release or substantial threat of a release. In making this decision, the Board will consider the allocation factors of Section 741.135 of this Part.
- c) If any party fails to comply with the Board's order under this Section, any party may seek penalties under Section 42 of the Act. The Board may order a party that fails to comply with the Board's order under this Section to pay penalties under Section 42 of the Act.

SUBPART C: VOLUNTARY ALLOCATION PROCEEDINGS

Section 741.300 General

This Subpart sets forth the procedures that may apply when two or more persons seek to allocate among themselves 100 percent of the performance or costs of a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in, under or from a site. This Subpart also includes procedures for mediation and settlements and the requirements and standards that the Board will use to issue final orders.

Section 741.305 Initiation of Voluntary Allocation Proceeding

- a) Participants that agree to accept 100 percent of liability to perform or pay for a response that results from a release or substantial threat of a release of regulated substances or pesticides on, in, under or from a site, whether or not they stipulate to specific

shares of such liability, may initiate a voluntary allocation proceeding by filing a petition with the Board if:

- 1) There is an Agency-approved Remedial Action Plan for the site under 35 Ill. Adm. Code 740; or
 - 2) There is a written agreement with the Agency regarding the performance of a response at the site following the issuance of a notice under Section 4(q) or Section 58.9(b) of the Act.
- b) The petition under subsection (a) of this Section must include the following information:
- 1) The location and identity of the site for which an allocation of proportionate shares is requested;
 - 2) The identity of all participants;
 - 3) The stipulated shares of specific participants, if any;
 - 4) Certification that the participants agree to allocate among themselves 100 percent of the performance or costs of the response under the Remedial Action Plan or written agreement with the Agency; and
 - 5) A statement that the participants choose to engage in either mediation under Sections 741.320 and 741.325 of this Subpart or to proceed with the Board's allocation proceedings under Sections 741.310 and 741.315 of this Subpart.
- c) Upon determination that the petition contains the required information, the Board will issue an order accepting the petition and assigning a hearing officer as necessary.
- d) The nature of any response agreed to as part of a Remedial Action Plan or written agreement with the Agency cannot be contested during the allocation proceeding.
- e) No person may file a petition under Subpart C of this Part when a complaint has been filed in any forum that addresses the same release or substantial threat of a release. If the Agency, the State, or any person files a complaint in any forum that involves the same release or substantial threat of a release, the Board may, upon motion by any participant or at its discretion, stay the proceedings under this Subpart pending the outcome of the other

proceeding. The State, the Agency or any party to the other proceeding also may appear specially to move the Board to stay the proceedings under this Subpart.

Section 741.310 Allocation Proposals and Hearing Requests

- a) Within 60 days following the close of discovery, the participants must submit a joint proposal to the Board that must include either or both of the following, as applicable:
 - 1) For any or all of the participants, an agreed allocation of proportionate shares;
 - 2) A request for hearing on all allocations of proportionate shares for which the participants have not agreed.
- b) If agreed allocations are reached for all participants, the allocated shares must total 100 percent of the performance or costs of the response under the Remedial Action Plan or written agreement with the Agency.
- c) If a hearing is requested as part of the joint proposal under subsection (a) of this Section, the hearing officer will issue an order to schedule and conduct the hearing and address any other matters as necessary. The order must require that, at least 30 days before the date of hearing, each participant submit a pre-hearing memorandum setting forth the proportionate share that it accepts and the issues to be resolved at the hearing.

Section 741.315 Settlements

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

Section 741.320 Mediation

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

- c) Mediation must be completed within 120 days after the participants have filed notice of their intent to mediate with the Board. Upon written motion, the Board may extend this period for cause shown.

Section 741.325 Settlement Through Mediation

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

Section 741.330 Board Review and Final Orders

- a) Based on the evidence presented at hearing or in a stipulation, the Board will enter a final order allocating a proportionate share to each participant.
- b) The Board's final order will allocate 100 percent of the performance or costs of the response under the Remedial Action Plan or written agreement with the Agency. If the total of the agreed allocations under Section 741.310(a)(1) of this Subpart and the proportionate shares demonstrated during the hearing do not equal 100 percent of the performance or costs of the response, the Board's order will allocate the remaining liability for performance or costs among all of the participants in the same ratio as the shares that have been agreed upon or demonstrated during the hearing.
- c) The Board's final order will include an order to perform or pay for the response based on the proportionate shares determined during the proceeding.

- d) **The Board may impose penalties under Section 42 of the Act if a participant fails to comply with a Board order under this Section.**