

ILLINOIS POLLUTION CONTROL BOARD
February 2, 2006

FREEDOM OIL COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 03-54
)	PCB 03-56
ILLINOIS ENVIRONMENTAL)	PCB 03-105
PROTECTION AGENCY,)	PCB 03-179
)	PCB 04-2
Respondent.)	(UST Appeal)
)	(Consolidated)

CONCURRING OPINION (by T.E. Johnson):

I respectfully concur with the majority opinion. As was discussed in the majority opinion, the Board finds, in part, that Freedom Oil Company (Freedom Oil) failed to meet its burden of proof to avoid apportionment of the costs in its second and third reimbursement applications. Accordingly, the Board affirmed the Illinois Environmental Protection Agency (Agency) Agency's second determination concerning cost apportionment, appealed in PCB 03-179, which apportioned \$143,123.59 to ineligible tanks, as well as the Agency's third determination concerning cost apportionment, appealed in PCB 04-2, which apportioned \$22,189 to ineligible tanks.

In reaching this decision, the majority concludes that the primary question is "did Freedom Oil show by a preponderance of the evidence that of the costs *actually incurred*, none were incurred on any contamination from the ineligible tanks?" Freedom Oil Company v. IEPA, PCB 03-54, slip op. at 60 (Feb. 2, 2006). The majority reasons that it is not holding that in every instance a Underground Storage Tank owner or operator must prove that contamination from ineligible tanks did not contribute *at all* to cleanup costs, and that apportionment can be applied by the Agency only when the owner or operator *does not attribute all* costs. *Id.*

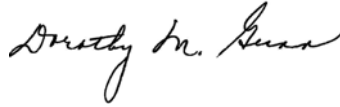
I agree with the ultimate result on this issue. Freedom Oil failed to prove that it incurred no costs removing any soil impacted by the ineligible tanks at issue in the Agency's second and third determination. Because the majority grants the Agency's counter-motion for summary judgment, Freedom Oil is precluded from addressing this issue at hearing. However, as the Board has previously held, Freedom Oil is not precluded from submitting a new application to the Agency should additional evidence or new information become available regarding this issue. See Kean Oil Company v. IEPA, PCB 97-146, (May 1, 1997).

For these reasons, I respectfully concur.

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Thomas E. Johnson
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the above concurring opinion was submitted on February 7, 2006.

A handwritten signature in black ink, written in a cursive style, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board