

ILLINOIS POLLUTION CONTROL BOARD

June 22, 2000

MATTESON WHP PARTNERSHIP,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-121
	)	(Enforcement - RCRA, Citizens)
JAMES W. MARTIN and EVA D. MARTIN,	)	
individually and d/b/a MARTIN'S OF	)	
MATTESON,	)	
	)	
Respondents.	)	

DISSENTING OPINION (by M. McFawn):

The majority orders James W. Martin and Eva D. Martin jointly to perform the remedial action in this case. Yet, “[i]n 1995 the Illinois General Assembly repealed joint and several liability in actions involving environmental remediation and replaced it with proportionate share liability. See Pub. Act 98-443, eff. July 1, 1996. This new proportionate share scheme is contained in Section 58.9 of the Environmental Protection Act (Act) 415 ILCS 5/58.9 (1998).” See *In re Proportionate Share Liability*, (December 3, 1998 (Second Notice)), (December 17, 1998 (Adopted Rule)), R97-16. According to that legislation, the Board is precluded from ordering a party to conduct remedial activity “beyond remediation of releases of regulated substances that may be attributed to being proximately caused by such person’s act or omission.” Still, the majority holds these two persons jointly and severally liable for the remedial action ordered in this case by ignoring these provisions of Section 58.9 of the Act. Because that holding is contrary to the Section 58.9 of the Act, I must dissent.

In the same 1995 legislation, the Board was charged with adopting rules and procedures to determine proportionate share. These rules and procedures were adopted by the Board at Part 741. See *In re Proportionate Share Liability*, (December 17, 1998), R97-16. The majority fails to comply with at least two of these rules governing proportionate share liability.

First is the rule governing applicability. According to Section 741.105(a):

This Part applies to proceedings before the Board in which any person seeks . . . to require another person to perform . . . a response that results from a release . . . of regulated substances . . . on, in, under or from a site . . . 35 Ill. Adm. Code 741.105(a).

Thus, the Board’s own rule clearly requires that proportionate share liability apply to this case. A person, Matteson WHP Partnership, seeks to require James W. Martin and Eva D. Martin to

perform a response that results from the release of perchloroethylene on, in, under, or from the dry cleaners.

Second, the Board's rule at Section 741.210: Final Orders provides that:

- (a) Based on the evidence presented at hearing . . . the Board will enter a final order that determines whether a respondent proximately caused or contributed to a release . . . .
- (b) If the Board determines, under subsection (a) of this Section, that a respondent proximately caused or contributed to a release . . . the Board will in its final order order the respondent to perform or pay for a response. The Board will order the respondent to perform . . . only to the degree to which a preponderance of the evidence shows that the performance . . . of the response result[s] from the respondent's proximate causation of the release . . . . 35 Ill. Adm. Code 741.210(a) and (b).

The majority does not find that acts or omissions by either respondent proximately caused or contributed to the release involved in this case. Also, the majority does not address the degree to which the preponderance of the evidence shows that the performance of the response result from either respondent's proximate causation of the release. In so doing, the majority has failed to comply with the Board's own rules governing proportionate share liability.

This case is the first one before the Board requiring interpretation of proportionate share liability under the Act and Board rules. Furthermore, the parties did not address apportionment of liability for the contamination in their briefs. (The applicability of proportionate share liability to this case may not have been evident to them prior to the Board's ruling that the respondents were not subject to RCRA permitting as alleged at count II of the complaint. That finding eliminates the applicability exemption from the proportionate share rules found at 35 Ill. Adm. Code 741.105(f)(4).) In light of these factors, I would have invited the parties to submit additional briefs discussing the appropriate apportionment of liability in this case.

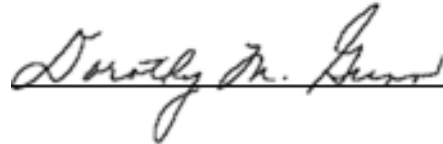
In sum, the majority failed to comply with Section 58.9 of the Act when it issued the remediation order in this case. Instead, the majority's order holds James W. Martin and Eva D. Martin jointly and severally liable for the remedial action ordered therein. That order is contrary to the 1995 legislation repealing joint and several liability and replacing it with proportionate share liability at Section 58.9(a) and to the Board's regulations governing proportionate share liability adopted at Part 741 as mandated under Section 58.9(d) of the Act.

For the reasons set forth herein, I respectfully dissent from today's majority opinion.

A handwritten signature in cursive script, reading "Marili McFawn", written over a horizontal line.

Board Member  
Marili McFawn

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was submitted on the 29th day of June 2000.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board