

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

RELIABLE STORES, INC.,)	
Petitioner,)	
v.)	PCB 2019-002
)	(LUST Permit Appeal)
OFFICE OF THE STATE FIRE)	
MARSHAL,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
 Illinois Pollution Control Board
 1021 N. Grand Avenue East
 P.O. Box 19274
 Springfield, IL 62794-9274
 (Carol.Webb@illinois.gov)

Daniel Robertson
 Assistant Attorney General
 Environmental Bureau
 69 W. Washington St., 18th Floor
 Chicago, IL 60602
 (drobertson@atg.state.il.us)

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, MOTION FOR AUTHORIZATION OF PAYMENT OF ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 5th day of May, 2021. The number of pages in the e-mail transmission 14 pages.

RELIABLE STORES, INC.

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
 Law Office of Patrick D. Shaw
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 Springfield, IL 62704
 217-299-8484
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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

RELIABLE STORES, INC.,)	
Petitioner,)	
v.)	PCB 2019-002
)	(LUST Permit Appeal)
OFFICE OF THE STATE FIRE)	
MARSHAL,)	
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**MOTION FOR AUTHORIZATION OF PAYMENT OF
ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION**

NOW COMES Petitioner, RELIABLE STORES, INC., by its undersigned counsel, and pursuant to Section 57.8(1) of the Illinois Environmental Protection Act (hereinfter "the Act") (415 ILCS 5/57.8(1)), petitions the Illinois Pollution Control Board (hereinafter "the Board") for an order authorizing payment of legal costs, and in support thereof states as follows:

1. On April 1, 2021, the Board entered an order, granting Petitioner's motion for summary judgment and denying that of the Office of the State Fire Marshal (hereinafter "the OSFM"). In doing so, the Board found that the OSFM had erred in denying Petitioner's application for UST Fund eligibility and reversed the OSFM's determination otherwise. Reliable Stores v. OSFM, PCB 2019-002, slip op. at 8 (April 1, 2021).

2. Pursuant to the Board's regulations, "[c]osts associated with obtaining an Eligibility and Deductibility Determination from the OSFM" are eligible for payment from the UST Fund as corrective action costs. (35 Ill. Adm. Code § 734.625(a)(15))

3. However, the Act provides in relevant part:

Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or

operator prevails before the Board in which case the Board may authorize payment of legal fees.

(415 ILCS 5/57.8(1))

4. In Illinois Ayers Oil Co. v. Illinois Environmental Protection Agency, PCB 03-214 (Aug. 5, 2004), the Board concluded that a party is “seeking payment under this Title” whenever it appeals a decision under Title XVI of the Act, because “the provisions of Title XVI are necessary steps an owner or operator must first follow in order to later seek reimbursement from the UST Fund.” Id. at 8. In doing so, the Board rejected the argument that the provision only applies strictly to applications for payment and awarded approximately \$45,000.00 in legal fees incurred in an appeal of a corrective action plan and budget. Id. at 9.

5. In order to seek and receive any reimbursement from the UST Fund, an owner/operator must obtain an eligibility and deductibility determination. (415 ILCS 5/57.8) A copy of this determination must be attached to all budgets (35 Ill. Adm. Code § 734.310(b) (site investigation budget); § 734.335(b) (corrective action budget), as well as all applications for payment (415 ILCS 5/57.8(a)(6)(C)), including indemnification payments made to third parties (35 Ill. Adm Code § 734.650(a)(1)(C)). The OSFM is charged with making all eligibility and deductibility determinations, which “shall be a final decision appealable to the . . . Board.” (415 ILCS 5/57.9(c)) Once the OSFM issued final decision denying eligibility, the only way for Petitioner to seek and receive reimbursement for corrective action costs was to file this appeal under Title XVI of the Act. Therefore, pursuant to the holding in Illinois Ayers Oil Co., Petitioner has prevailed before the Board in seeking payment under Title XVI. See also Estate of Slightom v. IEPA, PCB 11-25, slip op. at (Nov. 5, 2015) (authorizing payment of legal costs

after prevailing on appeal of deductible dispute).

6. By its terms, Section 57.8(l) of the Act is a “prevailing party” statute, and thus the proper time to determine whether a party has prevailed is after the decision on the merits. The Board has historically treated this request as a post-judgment motion to modify the Board’s order. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at p. 1 (Oct. 16, 2003). The Board’s procedural rules allow motions to reconsider or modify its final orders within 35 days after the order is received. See Reliable Stores, PCB 2019-002, slip op. at 9 (April 1, 2021). Petitioner received this order on April 6, 2021, and therefore this motion is timely.

7. The award of legal costs are discretionary with the Board. Historically, the Board has initially and fully considered the reasonableness of the claimed legal defense costs before exercising its discretion to authorize their payment. Evergreen FS, v. IEPA, PCB No. 11-5, slip op. at p. 4 (Sept. 6, 2012).

8. Attached hereto is the Affidavit of Patrick D. Shaw, documenting the legal costs in this matter, which are \$15,900.00. This affidavit is modeled on previous affidavits utilized by undersigned counsel and found to have been sufficient by the Board. E.g., Prime Location Properties v. IEPA, PCB No. 9-67, slip op. at p. 5 (Nov. 5, 2009). It sets forth the legal services provided, the identity of the attorney providing the legal services, and itemization of the time expended for the individual service, and the hourly rate charged. Id.

9. The Board has previously recognized undersigned counsel’s experience in underground storage tank appeals. Prime Location Properties v. IEPA, PCB No. 9-67, slip op. at p. 6 (Nov. 5, 2009). His billing rate is \$200 per hour, which is believed to be a reasonable rate for environmental attorneys who practice before the Board, and which has been a billing rate

approved in previous attorney-fee awards. E.g., Knapp Oil v. IEPA, PCB No. 16-103, slip op. at p. 3 (Nov. 17, 2016). All of the legal costs sought herein were incurred “seeking payment under Title XVI and the plain language of Section 57.8(1) of the Act allows for the awarding of legal fees.” Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at p. 8 (Aug 5, 2004).

10. The legal issues presented in this appeal arose from the denial of an application for UST Fund eligibility under a program required by federal and state law to ensure funding available for the remediation of underground storage tank releases. See 415 ILCS 5/57 (Intent and purpose of Title XVI). Title XVI includes a provision for the payment of legal costs when a party prevails before the Board in accessing this funding. Since fee-shifting statutes alter the status quo, the purpose of such provisions is to encourage parties to challenge doubtful claims. Chicago v. Illinois Commerce Comm’n, 187 Ill. App. 3d 468, 470 (1st Dist. 1989). In doing so, money that should be used for the protection of land and water resources is secured to the benefit not only of the owner/operator of the facility, but for neighbors and the community. Payment of legal costs is thus proper and in furtherance of the purposes of Title XVI.

WHEREFORE, Petitioner, RELIABLE STORES, INC., requests that the Board authorize payment from the Leaking Underground Storage Tank Fund the amount of \$15,900.00 in attorney’s fees and litigation costs pursuant to 415 ILCS 5/57.8(1), and such other and further relief as the Board deems meet and just.

Respectfully submitted,

PIASA MOTOR FUELS, INC.
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW
Its attorneys

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
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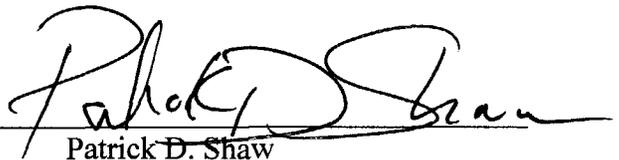
representative of OSFM showed to Petitioner's Consultants, Eagle Environmental Consultants. Undersigned counsel requested the video on November 8, 2018, and after being informed the video did not exist, sought to explore whether its content could be stipulated or the case settled. During this appeal I spoke with various employees of Eagle Environmental Consultants (Brian Morin, Brad Schumacher, and Tim Elmore) regarding the proposed stipulation, the status of the appeal, and the affidavit of Tim Elmore in support of the Motion for Summary Judgment. When the video was discovered, matters proceeded thereafter without stipulation and by means of the various motions which the Board had opportunity to review and rule upon.

5. Exhibit A identifies the legal work performed and the attorney's fees incurred in this matter. It reveals the date the work was performed, the description of the work performed, the amount of time spent, and the total fees incurred.

6. The legal defense costs incurred in seeking payment for corrective action herein total \$15,900.00.

FURTHER AFFIANT SAYETH NOT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.


Patrick D. Shaw

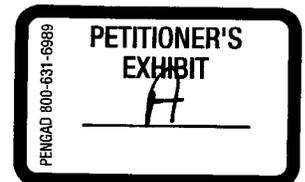
Law Office of Patrick D. Shaw
 80 Bellerive Road
 Springfield, IL 62704

Invoice submitted to:
 Eagle Environmental Consultants
 Attn: Brad Schumacker
 3805 Illinois Avenue
 St. Charles IL 60174

May 5, 2021

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
8/22/2018 Receive & review representation request ltr; tel client Reliable Stores	0.50 200.00/hr	NO CHARGE
Review Board precedent; draft e-mail opinion Reliable Stores	1.50 200.00/hr	300.00
8/24/2018 Telephone consultant Reliable Stores	0.20 200.00/hr	40.00
8/27/2018 Draft and file Petition for Review Reliable Stores	5.60 200.00/hr	1,120.00
9/6/2018 Receive & review Pollution Control Board order accepting petition for hearing; receive & review Hrg Officer order Reliable Stores	0.20 200.00/hr	40.00
9/21/2018 Receive & review appearance of Attorney General's Office; and preliminary review of administrative record Reliable Stores	0.30 200.00/hr	60.00
11/5/2018 Receive OSFM record for phone conference Reliable Stores	0.50 200.00/hr	100.00
11/7/2018 Tel conf. w/ attorney for OSFM; tel conf. w./ Hrg Officer; receive & review Hrg Officer order Reliable Stores	0.40 200.00/hr	80.00
11/8/2018 E-mail request for OSFM video; e-mail record and status of to Brian Morin Reliable Stores	1.20 200.00/hr	240.00



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	<u>Hrs/Rate</u>	<u>Amount</u>
11/15/2018 Receive & review reply from Attorney General Reliable Stores	0.20 200.00/hr	40.00
1/9/2019 E-mail Asst. A.G. and Hrg Officer re discovery issues; receive Hrg Officer order Reliable Stores	0.20 200.00/hr	40.00
3/11/2019 E-mail reply to client re status Reliable Stores	0.10 200.00/hr	20.00
3/12/2019 E-mail and tel. call w/ OSFM attorney Reliable Stores	0.20 200.00/hr	40.00
6/3/2019 E-mail to Asst. A.G. regarding proposed stipulation and query about whether appeal settleable Reliable Stores	0.30 200.00/hr	60.00
6/4/2019 Conference with Hrg Officer and Asst. A.G.; receive & review Order Reliable Stores	0.20 200.00/hr	40.00
8/5/2019 Review record; draft proposed stipulations; e-mail to client w/ comments Reliable Stores	3.50 200.00/hr	700.00
8/6/2019 Tel OSFM atty Reliable Stores	0.10 200.00/hr	20.00
8/7/2019 Receive & review response from client re stipulations Reliable Stores	0.10 200.00/hr	20.00
8/15/2019 Revise proposed stipulation per client's instructions; e-mail to OSFM attorney Reliable Stores	0.30 200.00/hr	60.00
8/23/2019 E-mail from Asst. A.G.; reply Reliable Stores	0.10 200.00/hr	20.00
10/23/2019 Tel Asst. A.G. re status of OSFM review of stipulations; tel conf. w/ Hrg Officer and Asst. A.G.; receive and review Hrg Officer order Reliable Stores	0.30 200.00/hr	60.00
12/24/2019 E-mail to Asst. A.G. regarding stipulated fact question; e-mail status to client Reliable Stores	0.20 200.00/hr	40.00
12/31/2019 E-mail update to Schumacher et al.; review reply Reliable Stores	1.00 200.00/hr	200.00
1/2/2020 E-mail responding to Schumachar regarding statuts Reliable Stores	0.20 200.00/hr	40.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
1/7/2020 Receive & review e-mail from A.G. w/ video; e-mail video to client; tel conf. w/ Hrg Officer and A.G.; receive & review Hrg Officer order Reliable Stores	0.70 200.00/hr	140.00
1/13/2020 Research procedural rules for admission of videotape and/or to supplement the record Reliable Stores	2.80 200.00/hr	560.00
1/15/2020 Research Board precedent on OSFM record; e-mail to client positions of the OSFM at status conf. w/ opinions on going forward Reliable Stores	2.80 200.00/hr	560.00
2/24/2020 Review e-mail from Elmore; respond Reliable Stores	0.30 200.00/hr	60.00
3/3/2020 Telephone conf. call w/ Hrg Officer and Asst. A.G. Reliable Stores	0.20 200.00/hr	40.00
3/17/2020 Receive & review OSFM's Motion to Supplement; review procedural rules; e-mails to/from client Reliable Stores	1.70 200.00/hr	340.00
3/19/2020 Receive & review e-mail, reply to Schumacher	0.10 200.00/hr	20.00
3/24/2020 Review file and start preparing motion for summary judgment Reliable Stores	1.50 200.00/hr	300.00
3/25/2020 Draft affidavit for Elmore; draft statement of facts for motion Reliable Stores	3.00 200.00/hr	600.00
3/26/2020 Draft motion for summary judgment Reliable Stores	2.50 200.00/hr	500.00
3/27/2020 Research state and federal regulations for motion for summary judgment Reliable Stores	1.50 200.00/hr	300.00
3/30/2020 Research, draft and file response to motion to supplement record Reliable Stores	4.70 200.00/hr	940.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
4/1/2020 Draft motion for summary judgment Reliable Stores	3.90 200.00/hr	780.00
4/2/2020 Revise motion for summary judgment; e-mail draft to client for review Reliable Stores	2.00 200.00/hr	400.00
4/3/2020 Review e-mail from Elmore; e-mail reply Reliable Stores	0.10 200.00/hr	20.00
4/6/2020 Review reply in support of supplementing administrative record; e-mail to client w/ comments; tel conf. w/ Hrg Officer Reliable Stores	0.70 200.00/hr	140.00
6/4/2020 E-mail to Schumacher re review of motion for summary judgment Reliable Stores	0.20 200.00/hr	40.00
6/5/2020 Receive & review e-mail; revise and file motion for summary judgment; receive & review e-mails from A.G. and Hrg Officer; reply Reliable Stores	2.40 200.00/hr	480.00
6/8/2020 Tel conference call w/ Hrg Officer; e-mail status to client; receive & review hrg officer order Reliable Stores	0.80 200.00/hr	160.00
6/18/2020 Receive & review Board Order re supplementing record Reliable Stores	0.30 200.00/hr	60.00
7/9/2020 Receive & review OSFM's Reponse to Petitioner's Motion for Summary Judgment; e-mail to client w/ comments Reliable Stores	1.00 200.00/hr	200.00
7/13/2020 Research and begin draft reply to Petitioner's Resonse Reliable Stores	2.80 200.00/hr	560.00
7/14/2020 Draft reply to Petitioner's Resonse Reliable Stores	1.60 200.00/hr	320.00
7/22/2020 Draft Reply Reliable Stores	3.90 200.00/hr	780.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
7/23/2020 Draft and file Reply; receive & tentative review of OSFM's Cross-Motion for Summary Judgment Reliable Stores	4.50 200.00/hr	900.00
7/27/2020 E-mail to client recent filings w/ comments Reliable Stores	0.40 200.00/hr	80.00
8/10/2020 Review cross-motion for summary judgement and begin preparing response Reliable Stores	1.00 200.00/hr	200.00
8/11/2020 Draft motion for leave to file response Reliable Stores	1.00 200.00/hr	NO CHARGE
8/12/2020 Draft and file response to cross-motion for summary judgment Reliable Stores	5.50 200.00/hr	1,100.00
8/13/2020 E-mail recent filing to client Reliable Stores	0.10 200.00/hr	20.00
8/26/2020 Receive & review OSM's motion for leave to file reply in support of cross-motion Reliable Stores	1.00 200.00/hr	200.00
8/28/2020 Receive & review e-mail Tim Elmore thoughts; e-mail reply; e-mail copy of recent and final OSFM filing w/ comments Reliable Stores	1.90 200.00/hr	380.00
9/8/2020 E-mails w/ Asst. A.G. and Hrg Officer re cancelling status conference Reliable Stores	0.10 200.00/hr	20.00
1/11/2021 E-mail Hrg Officer re status; receive response Reliable Stores	0.10 200.00/hr	20.00
3/12/2021 E-mail status to client Reliable Stores	0.10 200.00/hr	20.00

Eagle Environmental Consultants

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	<u>Hrs/Rate</u>	<u>Amount</u>
4/1/2021 Receive & review Board opinion; e-mail to client Reliable Stores	0.40 200.00/hr	80.00
4/2/2021 Receive & review e-mail regarding opinion; respond Reliable Stores	0.30 200.00/hr	60.00
4/19/2021 E-mail opinion to client regarding legal fees Reliable Stores	1.70 200.00/hr	340.00
4/27/2021 Receive & review directions Reliable Stores	0.10 200.00/hr	NO CHARGE
5/3/2021 Review bills; draft affidavit verifying attorney fees Reliable Stores	0.90 200.00/hr	180.00
5/4/2021 Draft motion for authorization of attorney fees Reliable Stores	2.50 200.00/hr	500.00
5/5/2021 Revise and file motion Reliable Stores	0.60 200.00/hr	120.00
For professional services rendered	<u>81.10</u>	<u>\$15,900.00</u>