

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

RELIABLE STORES, INC., )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 19-2  
 ) (UST Appeal)  
 OFFICE OF THE STATE FIRE MARSHAL, )  
 )  
 Respondent. )

**NOTICE OF ELECTRONIC FILING**

To: Patrick D. Shaw Carol Webb  
Law Office of Patrick D. Shaw Hearing Officer  
80 Bellerive Road Illinois Pollution Control Board  
Springfield, Illinois 62704 1021 North Grand Avenue East  
Pdshaw1law@gmail.com P.O. Box 19274  
Springfield, Illinois 62794-9274  
Carol.Webb@Illinois.gov

Don Brown  
Clerk  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601  
Don.Brown@illinois.gov

PLEASE TAKE NOTICE that on the 23rd day of July, 2020, I caused to be served with the Clerk of the Illinois Pollution Control Board, Respondent's Cross-Motion for Summary Judgment, a true and correct copy of which is attached hereto and is hereby served upon you.

OFFICE OF THE STATE FIRE MARSHAL

By: /s/ Daniel Robertson  
Daniel Robertson  
Assistant Attorney General  
Environmental Bureau  
69 W. Washington St., 18<sup>th</sup> Floor  
Chicago, IL 60602  
(312) 814-3532  
drobertson@atg.state.il.us

**CERTIFICATE OF SERVICE**

I, DANIEL ROBERTSON, an Assistant Attorney General, do certify that I caused to be served this 23rd day of July, 2020, the attached Notice of Electronic Filing and Respondent's Cross-Motion for Summary Judgment upon the persons listed on the Notice of Electronic Filing *via email*.

/s/ Daniel Robertson \_\_\_\_\_  
DANIEL ROBERTSON  
Assistant Attorney General  
Environmental Bureau  
69 W. Washington St., 18<sup>th</sup> Floor  
Chicago, IL 60602  
(312) 814-3532  
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**RESPONDENT’S CROSS-MOTION FOR SUMMARY JUDGMENT**

The Office of the State Fire Marshal (“OSFM”) respectfully requests that the Illinois Pollution Control Board (“Board”) grant this cross-motion for summary judgment because the release at issue came from above-ground dispensers, and because Petitioner, Reliable Stores, Inc. (“Reliable Stores”), cannot sustain its burden of proving that granting it eligibility under the Underground Storage Tank Fund (“UST Fund”) would not violate the Illinois Environmental Protection Act (“Act”) or Board regulations.

**I. INTRODUCTION**

Reliable Stores seeks review of a June 12, 2018 determination of the OSFM. The OSFM’s determination concerns Reliable Stores’ leaking underground storage tank (“UST”) site located at 905 W. Roosevelt in Maywood, Cook County. Eligibility for cleanup cost reimbursement from the UST Fund requires a confirmed release from a UST or UST system. In this instance, the OSFM denied Reliable Stores’ application for eligibility because the release came from an above-ground dispenser. On March 16, 2020, the OSFM filed its motion to supplement the record, and on June 18, 2020, the Board granted the motion. Reliable Stores did not file a motion to supplement the record. Instead, on June 5, 2020, Reliable Stores filed a motion for summary judgment wherein it sought to inappropriately introduce new facts to the Board that were not before the OSFM at the

time it made its eligibility determination.<sup>1</sup> On July 9, 2020, the OSFM filed its response requesting that the Board deny Reliable Store's motion, or alternatively grant summary judgment in favor of the OSFM.

Reliable Stores, in its application to the OSFM, its amended petition for review, and its motion for summary judgment, acknowledges that the above-ground dispenser is the source of the release. The OSFM therefore respectfully requests that the Board, consistent with prior decisions, find that the release from the above-ground dispenser is not eligible for reimbursement from the UST Fund, uphold the OSFM's eligibility determination, and grant the OSFM's Cross-Motion for Summary Judgment.

## **II. SUMMARY OF FACTS**

The facts before the Board, as they appear in the record, are not in dispute. On February 14, 2018, a petroleum release was reported at a site located at 905 West Roosevelt, Maywood, Cook County, Illinois ("the Site"). Record at ("R") 4. The release was not reported by Reliable Stores, but by a restaurant next door that complained of gasoline odors. R4. Based on that complaint, Randal Carben, a Storage Tank Safety Specialist for the OSFM, visited the Site. R4. Mr. Carben found a leak under dispenser 1/2 and under dispenser 7/8. R4. Mr. Carben directed Reliable Stores' owner, Varghese Vallikalam, to hire a contractor to come out and repair the leaks. R4. B&K Equipment came out "and repaired the dispenser leaks." R4. Mr. Carben witnessed the repair work performed by B&K Equipment. R7.

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<sup>1</sup> Cross-Motion for Summary Judgment Exhibit A, Affidavit of Deanne Lock ("Lock Affidavit"), ¶¶6, 7.

Also on February 14, 2018, Mr. Vallikalam contacted the Illinois Emergency Management Agency (“IEMA”). R80. A copy of the IEMA Hazardous Materials Incident Report, prepared by Paul Kattner, is contained in the Record at pp. R80-R81. Mr. Vallikalam stated to Mr. Kattner that the container type involved was “Under ground storage tank (Dispenser [*sic*]”. R80. More specifically, Mr. Vallikalam explained that the “cause of the release” was a “[l]oose nut in the dispenser resulted in a gasoline drip.” R80. Mr. Vallikalam further stated to Mr. Kattner that the “duration of the release” was “[a]t least two weeks.” R80.

On February 16, 2018, Mr. Carben met with representatives of the Illinois Environmental Protection Agency and the Petitioner’s environmental consultant, Brian Morin, at the Site. R4.

The Record does not show that either Reliable Stores or any company representing it applied to the OSFM for a permit for the repair work done to correct the leak. On May 9, 2018, Reliable Stores submitted its eligibility and deductible application to the OSFM. R25. Under “type of release”, Reliable Stores stated “[p]roduct was observed leaking from the product pump. Gasoline was observed going into the soil through a pipe penetration in the dispenser sump.” R25.

At some time prior to June 12, 2018, Deanne Lock, an Administrative Assistant I in the Division of Petroleum and Chemical Safety at the Office of the State Fire Marshal, spoke with Mr. Carben. R91. Ms. Lock’s record of that phone call states that Mr. Carben told her “there was a leak which [*sic*] found inside dispensers which were located above the shear valve.” R91. Ms. Lock then called Mr. Morin to discuss what Mr. Carben told her about the location of the leak. R91. According to Ms. Lock’s record of that phone call, Mr. Morin told her that “the leak was above the shear valve.” R91. On June 12, 2018, Respondent issued its determination, signed by Ms. Lock,

finding that the tanks were ineligible as “Non UST related release[s],” citing 415 ILCS 5/57.9.

R.90. This appeal followed.

### III. STANDARD OF REVIEW/BURDEN OF PROOF

Section 101.516 of the Board’s Procedural Rules provides, in pertinent part, as follows:

- (b) If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.

35 Ill. Adm. Code Section 101.516(b).

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to the relief “is clear and free from doubt.” *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219 (2d Dist. 1994). Where the parties file cross-motions for summary judgment, “they agree that no issues of material fact exist and invite the court to decide the issues presented as questions of law.” Village of Oak Lawn v. Faber, 378 Ill. App. 3d 458, 462 (1st Dist. 2007). “However, the mere filing of cross-motions for summary judgment does not preclude a determination that triable issues of fact remain.” *Id.*

The OSFM is charged with the responsibility of determining eligibility for access to the UST Fund. Vogue Tyre & Rubber Company vs. Office of State Fire Marshal, PCB 95-78, Page 3 (Dec. 5, 2002), citing 415 ILCS 5/57.9(c) (2018). “In UST appeals, as in permit appeals, the petitioner bears the burden of proving that the application, as submitted to the Agency, would not violate the Act or the Board’s regulations.” A.F. Moore & Associates v. IEPA, PCB 96-182, slip op. at 5 (Aug. 15, 1996) (internal citations omitted); *see also* 35 Ill. Adm. Code 105.112(a) (“The burden of proof shall be on the petitioner . . .”). The question before the Board, therefore, is whether Reliable Stores proves that its application, as submitted to the OSFM, demonstrated compliance with the Act and the Board’s regulations. *Id.*, *see also* Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (April 1, 2004). On an appeal of denial of eligibility, the scope of the Board’s review is limited to the material relied upon by the agency in making its decision. Greenville Airport Authority v. IEPA, PCB 92-157, slip op. at 3 (Feb. 4, 1993), citing Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731 (5th Dist. 1987); *see also* Sheridan Towers Partnership, Beneficiary Under Trust No. 11862 LaSalle National Trust, N.A., Trustee v. OSFM, PCB 94-106, slip op. at 1 (June 23, 1994) (“[T]he Board will not consider information which was not before the OSFM when it made its eligibility/deductibility determination.”); Illinois Ayers, PCB 03-214, slip op. at 15 (“the Board does not review the Agency’s decision using a deferential manifest-weight of the evidence standard,” but “[r]ather the Board reviews the entirety of the record to determine that the [submittal] as presented to the Agency demonstrates compliance with the Act”).

#### IV. ARGUMENT

##### **The Release is not eligible for reimbursement from the Underground Storage Tank Fund.**

**a. The Release was from the aboveground dispensers.**

The source of the release is undisputed by the parties. Randal Carben, the OSFM's inspector at the Site, stated to Deanne Lock, the OSFM's application reviewer, that "there was a leak which [*sic*] found inside dispensers which were located above the shear valve." R91. Brian Morin, Reliable Stores' environmental consultant, stated to Ms. Lock that "the leak was above the shear valve." R91. Reliable Stores stated in its Eligibility and Deductibility Application that "product was observed leaking from the product pump." R25. Varghese Vallikalam, Reliable Stores' owner, stated to IEMA that the cause of the release was a "[I]oose nut in the dispenser resulted in a gasoline drip." R80.

Title XVI of the Act includes specific regulations and definitions applicable to petroleum underground storage tanks. *See* 415 ILCS 5/57-57.19 (2018). OSFM eligibility and deductible determinations are made pursuant to Section 57.9 of the Act, 415 ILCS 5/57.9 (2018). Lock Affidavit at ¶8. Pursuant to Section 57.9(a) of the Act, the UST Fund "shall be accessible by owners and operators who have a confirmed release *from* an underground storage tank or related tank system." 415 ILCS 5/57.9(a) (2018) (emphasis added). An eligible "release" is defined as "any spilling, leaking, emitting, discharging, escaping, leaching or disposing of petroleum *from* an underground storage tank into groundwater, surface water or subsurface soils." 415 ILCS 5/57.2 (2018) (emphasis added). Therefore, in contrast to the Act's general definition of "release", which simply requires it to enter the environment (415 ILCS 5/3.395 (2018)), the legislature here intended that the release also come *from* the UST.



Merriam-Webster Dictionary defines “from” as “used as a function word to indicate a *starting point* of a physical movement or a starting point in measuring or reckoning or in a statement of limits.” See <https://www.merriam-webster.com/dictionary/from> (as of July 22, 2020) (emphasis added). The Board has previously held that, “[i]n construing the meaning of a statute, the primary objective . . . is to ascertain and give effect to the intention of the legislature.” Wheeling/GWA Auto Shop v. IEPA, PCB 10-70, slip op. at 6 (July 7, 2011). The legislature’s intent is ascertained “by examining the language of the statute, which is the most reliable indicator of the legislature’s objectives in enacting a particular law.” *Id.* (internal citations omitted). By distinguishing a new definition of “release” as it pertains to USTs in Section 57.2 of the Act, the legislature intended not merely that a release enter the environment, but that it come *from* a UST. Pursuant to the statutory language of Title XVI and the plain meaning of the words therein, therefore, it is clear that the legislature intended the source of the release to be relevant when determining whether a release is eligible for reimbursement from the UST Fund. This is consistent with how the OSFM has interpreted the language, and the Board has previously upheld this interpretation. Greenville Airport Authority, PCB 92-157, slip op. at 7 (“the release still came *from* an aboveground *source*.” (emphasis added)).

Contrary to the prior statements of all parties involved, Reliable Stores now contends that the release is from the underground storage sump. Amended Petition for Review of OSFM Determination, Page 2 (Aug. 27, 2018). But this is not true. A person who travels from Miami to Chicago and passes through Nashville did not start their trip from Nashville. Similarly, a release *from* the dispenser that passes through the dispenser sump on its way into the soil has not come *from* the sump. The release is from the *starting point*, *i.e.* the loose nut in the dispenser above the

shear valve. R80. Had the loose nut in the dispenser caused the leak to spray upwards instead of down, nobody would contend that the release came from the UST System. Further, had the repair work only been performed on the sump, it would not have stopped the release. It was only once repair work was done to the piping in the above-ground dispenser that the release was contained – because that is where the release came *from*.

Under the Environmental Protection Act, the OSFM determines whether persons are eligible to have their cleanup costs reimbursed from the UST Fund. 415 ILCS 5/57.9(c) (2018). Cleanup costs must be in response to a confirmed release of specified types of petroleum from a UST or related tank system. 415 ILCS 5/57.9(a) (2018). To the extent there exists any ambiguity in the definition of “release,” the Board should defer to the OSFM’s interpretation of that definition based on holdings by both the Illinois and United States Supreme Courts. *See Hadley v. Illinois Department of Corrections*, 224 Ill.2d 365, 370-371 (2007) (“[W]here an administrative agency is charged with the administration of a statute, courts may defer to the agency’s interpretation of statutory ambiguities. . . . Thus, ‘[a] court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency charged with the statute’s administration’”); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984). “While a court’s review of an agency’s statutory interpretation is *de novo*, the agency’s interpretation should receive deference because it stems from the agency’s expertise and experience.” *Niles Township High School District 219 v. Illinois Educational Labor Relations Board*, 369 Ill. App. 3d 128, 138 (1st Dist., Nov. 13, 2006).

The OSFM has promulgated definitions regarding underground storage tanks. 41 Ill. Adm. 174.100. The relevant definitions at issue, including “dispenser”, “dispenser system”, “release”,

“underground storage tank” and ““underground storage tank system’ or ‘UST’” are generally consistent with those found in the Code of Federal Regulations at 40 CFR § 280.12. Based on these definitions, the OSFM looks to the cause or origin of the release to determine if the “release” is “from an underground storage tank or related tank system.” Lock Affidavit at ¶9. Here, the Release was not *from* a UST or UST System, but from the piping located in the aboveground dispensers. Lock Affidavit at ¶12, R80, R91.

**b. Aboveground releases are not eligible for reimbursement from the Underground Storage Tank Fund.**

“[T]he Board notes that the Act allows for reimbursement for certain activities, not for all environmental consequences.” Harlem Township v. IEPA, PCB 92-83, slip op. at 6 (Oct. 16, 1992). Owners or operators are only eligible to receive payment from the UST Fund if they “have a confirmed release *from* an underground storage tank or related tank system.” 415 ILCS 5/57.9(a) (2018). “Underground storage tank” shall have the meaning ascribed to it in Subtitle I of the Hazardous and Solid Waste Amendments of 1984, of the Resource Conservation and Recovery Act of 1976. 415 ILCS 5/57.2 (2018). A UST is defined as “any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground.” 42 U.S.C. § 6991(10). The “UST system” consists of “an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.” 40 CFR § 280.12. The UST system does not include the dispenser, which is “equipment located aboveground that dispenses regulated substances from the UST system,” or the dispenser system, which is “the

dispenser and the equipment necessary to connect the dispenser to the underground storage tank system.” 40 CFR § 280.12.

A shear valve is a safety device installed in gasoline dispensers to protect against product flow in the event of damage to the dispenser. Lock Affidavit at ¶10. The piping above the shear valve is part of the dispenser because it is equipment located aboveground that dispenses gasoline from the UST system. Lock Affidavit at ¶11; 41 Ill. Adm. 174.100. Petitioner provides no instance of the OSFM reimbursing a release that originated from piping above the shear valve, because such a release comes from the dispenser and is therefore not eligible for reimbursement from the UST Fund. This view finds support in the “maxim of construction *inclusio unius est exclusio alterius* [which] means that the inclusion of one thing implies the exclusion of another; in other words, ‘where a statute lists the thing or things to which it refers, the inference is that all omissions are exclusions, even in the absence of limiting language.’ This maxim holds true for administrative regulations as well as statutes.” City of St. Charles v. Illinois Labor Relations Bd., 395 Ill. App. 3d 507, 509–10 (2d Dist. 2009) (citations omitted).

“Underground storage tank”, “UST system”, “Dispenser”, and “Dispenser System” are clearly defined federal regulatory terms. Section 57.9(a) of the Act plainly states that the UST Fund is only accessible for releases “from an underground storage tank or related tank system.” 415 ILCS 5/57.9(a) (2018). The intent of the framers of the statute, therefore, was to exclude releases from the dispenser and the dispenser system. The OSFM and Board have consistently taken this view when reviewing eligibility determinations. *See Greenville Airport Authority*, PCB 92-157, slip op. at 7 (Denying release from a ruptured pump hose and nozzle because “the release still came *from an aboveground source*.” (emphasis added)); Harlem Township, PCB 92-83, slip

op. at 4 (Denying a release from a pump nozzle because “[t]he pump and the pump nozzle are not an underground storage tank. *The pump system* is not a tank or part of the underground pipes connecting the tank.” (emphasis added)); Ramada Hotel O’Hare v. IEPA, PCB 92-87, slip op. at 4 (Oct. 29, 1992) (Denying release caused by a malfunctioning overflow release mechanism because “a release of petroleum *from the pump* or the pump nozzle are not eligible for reimbursement.” (emphasis added)).

Because the cause of the release was from the dispensers and not from the UST system, it is therefore ineligible for reimbursement from the UST Fund. The OSFM therefore respectfully requests that the Board uphold the OSFM’s eligibility determination and grant this cross-motion for summary judgment.

**c. A permit is required to perform work on a UST or UST System, and Reliable Stores did not apply for a permit to repair the Release.**

Had the Release come from the UST or UST System, Reliable Stores or its consultant would have been required to apply for a permit to perform the work. Lock Affidavit at ¶4. The Gasoline Storage Act states that:

[the OSFM] shall have the power with regard to underground storage tanks to require any person who tests, installs, repairs, replaces, relines, or removes any underground storage tank system containing, formerly containing, or which is designed to contain petroleum or other regulated substances, to obtain a permit to install, repair, replace, reline, or remove the particular tank system, and to pay a fee set by the Office for a permit to install, repair, replace, reline, upgrade, test, or remove any portion of an underground storage tank system. 430 ILCS 15/2(3)(a) (2018).

The OSFM has promulgated rules for permitted work on a UST. 41 Ill. Adm. Code 175.300, *et seq.* (“OSFM Permit Regulations”). Section 175.300(a)(1) of the OSFM Permit Regulations states that, “[p]rior to the onset of UST activity, a completed permit application, including fee payment of \$200 per permitted activity, shall be submitted to OSFM.” 41 Ill. Adm. Code 175.300(a)(1).

“UST Activity” is defined as a UST:

Installation – including retrofitting and cathodic protection installation;

Repair – including upgrade, which includes retrofitting and cathodic protection installation;

Removal – decommissioning, which includes abandonment-in-place;

Lining;

Lining inspection;

Tank entry;

Precision testing of one or more tanks or lines;

Cathodic protection testing;

Containment sump testing;

Overfill prevention equipment inspection;

Spill prevention equipment testing; or

Release detection equipment and system testing. 41 Ill. Adm. Code 174.100.

Dispenser and dispenser sump boot repair are not listed as a “UST Activity” pursuant to 41 Ill. Adm. Code 174.100. 41 Ill. Adm. Code 175.300(g)(1) lists UST Activity that does not require a permit. “The exceptions listed in subsection (g)(1) are the only exceptions from the permit requirement.” 41 Ill. Adm. Code 175.300(g)(2). Dispenser and dispenser sump boot repair are not listed in the exceptions provided at 41 Ill. Adm. Code 175.300(g)(1), which means that Reliable Stores would have been required to apply for a permit from the OSFM to perform the work if it involved a UST or UST System. Neither Reliable Stores nor anybody acting on their behalf applied for a permit from the OSFM. Lock Affidavit at ¶5.

**V. CONCLUSION**

For all the reasons stated above, the OSFM respectfully requests that the Board enter an order finding that the OSFM is entitled to summary judgment as a matter of law, and grant summary judgment in favor of the OSFM because (1) the release from the dispensers is not eligible for reimbursement from the UST Fund, and (2) Reliable Stores cannot sustain its burden of proving that granting it eligibility under the UST Fund would not violate the Act or Board regulations.

OFFICE OF THE STATE  
FIRE MARSHAL

By KWAME RAOUL  
Attorney General of the State of Illinois

/s/ Daniel Robertson  
Daniel Robertson  
Assistant Attorney General  
Environmental Bureau  
69 W. Washington Street, Suite 1800  
Chicago Illinois, 60602  
312-814-3532  
drobertson@atg.state.il.us

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**RESPONDENTS CROSS- MOTION FOR SUMMARY JUDGMENT**

**EXHIBIT A**



**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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**AFFIDAVIT OF DEANNE LOCK**

I, DEANNE LOCK, certify under penalty of perjury pursuant to Section 1-109 of the Illinois Code of Civil Procedure, 735 ILCS 5/1-109 (2018), that the statements set forth in this affidavit are true and correct, and further state that if called upon to testify in this matter, I would competently testify as follows:

1. I am employed by the Office of the State Fire Marshal (“OSFM”) as an Administrative Assistant I in its Division of Petroleum and Chemical Safety in the OSFM’s Springfield Office, which is located at 1035 Adlai Stevenson Drive, Springfield, Illinois. I have been employed by the OSFM in this capacity for 31 years and 11 months.

2. As part of the Division of Petroleum and Chemical Safety of the OSFM, my duties include, but are not limited to, reviewing applications for eligibility and deductible determinations for the Illinois Underground Storage Tank Fund, including compliance with the Illinois Environmental Protection Act [415 ILCS 5/1 *et. seq.*] and the Gasoline Storage Act [430 ILCS 15/0.01 *et. seq.*], and issuing eligibility and deductible determinations on behalf of the OSFM. I also review and process underground storage tank registration and status change notifications, as well as site assessments for temporary and permanent closure of underground storage tank systems.

3. In my capacity as an Administrative Assistant I, I reviewed a Reimbursement Eligibility and Deductible Application (“Application”) received by the OSFM on May 9, 2018, for an occurrence docketed as IEMA Incident No. 20180158, at Facility No. 2025658, commonly referred to as Roosevelt 66, 905 West Roosevelt, Maywood, Cook County, Illinois 60153.

4. Pursuant to 41 Ill. Adm. Code 175.300, the OSFM requires a permit for any repair work performed on an underground storage tank or underground storage tank system.

5. The Application did not include, and I am not aware of, any work permit issued by the OSFM for repair work performed in response to IEMA Incident No. 20180158.

6. I did not review, was not aware of, and did not rely on the video referenced in Reliable Stores’ Motion for Summary Judgment at the time the OSFM issued its determination on the Application.

7. I did not review, was not aware of, and did not rely on the alleged conversation between Randal Carben and Tim Elmore referenced in Reliable Stores’ Motion for Summary Judgment at the time the OSFM issued its determination on the Application.

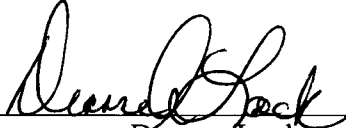
8. OSFM eligibility and deductible determinations are made pursuant to 415 ILCS 5/57.9 (2018).

9. When I review an eligibility and deductible application, I look to the cause or origin of a release to determine if the release is eligible for reimbursement from the Underground Storage Tank Fund.

10. A shear valve is a safety device installed in gasoline dispensers to protect against product flow in the event of damage to the dispenser.

11. The piping above the shear valve is located within the aboveground dispenser and assists in dispensing gasoline.

12. Based on my review of the Record and telephone conversations with Randal Carben and Brian Morin, I determined that the release at issue came from the piping located above the shear valve in the aboveground dispensers.

  
Deanne Lock

Subscribed and Sworn to  
Before me this 8<sup>th</sup> day of  
July, 2020

  
NOTARY PUBLIC

