

**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  
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PLEASE TAKE NOTICE that on the 26th day of August, 2020, I caused to be served with the Clerk of the Illinois Pollution Control Board, Respondent's Motion for Leave to File Reply and Reply in Support of Respondent's Cross-Motion for Summary Judgment *Instantly*, 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  
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**CERTIFICATE OF SERVICE**

I, DANIEL ROBERTSON, an Assistant Attorney General, do certify that I caused to be served this 26th day of August, 2020, the attached Notice of Electronic Filing and Respondent's Motion for Leave to File Reply and Reply in Support of Respondent's Cross-Motion for Summary Judgment *Instante*, upon the persons listed on the Notice of Electronic Filing *via email*.

/s/ Daniel Robertson \_\_\_\_\_  
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v.	)	PCB 19-2
	)	(UST Appeal)
OFFICE OF THE STATE FIRE MARSHAL,	)	
	)	
Respondent.	)	

**RESPONDENT’S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF  
RESPONDENT’S CROSS-MOTION FOR SUMMARY JUDGMENT *INSTANTER***

The Office of the State Fire Marshal (“OSFM”), by Kwame Raoul, the Attorney General of the State of Illinois, moves the Illinois Pollution Control Board, pursuant to 35 Ill. Adm. Code 101.500(e), for leave to file its Reply in support of its Cross-Motion for Summary Judgment, and to accept Respondent’s Reply *instanter*. In support thereof, Respondent states as follows:

**I. MOTION FOR LEAVE TO FILE REPLY**

1. Section 101.500(e) of the Board’s procedural rules provides that a person may reply “as permitted by the Board or the hearing officer to prevent material prejudice.” 35 Ill. Admin. Code 101.500(e).

2. On June 5, 2020, Reliable Stores, Inc. (“Reliable Stores”) filed its Petitioner’s Motion for Summary Judgment. On July 9, 2020, the OSFM filed its Respondent’s Response to Petitioner’s Motion for Summary Judgment. On July 23, 2020, Reliable Stores filed a motion for leave to file a reply, and attached its Petitioner’s Reply in Support of Petitioner’s Motion for Summary Judgment.

3. Also on July 23, 2020, the OSFM filed its Cross-Motion for Summary Judgment (“Cross-Motion”). On August 12, 2020, Reliable Stores filed a Motion for Leave to File Response

in Opposition to Respondent's Cross-Motion for Summary Judgment *instanter* and attached its response.

4. Throughout its response, Reliable Stores attempts to mischaracterize the OSFM's Cross-Motion and supporting affidavit, and introduces new arguments in addition to arguments from its own separate motion for summary judgment.

5. The OSFM would be materially prejudiced if unable to respond to Petitioner's mischaracterizations and expanded allegations.

WHEREFORE, the OSFM respectfully requests that the Board or Hearing Officer enter an Order granting this Motion for Leave to File Reply, and permit the OSFM to enter the below Reply in support of its Cross-Motion for Summary Judgment *instanter*.

OFFICE OF THE STATE  
FIRE MARSHAL

By KWAME RAOUL  
Attorney General of the, State of Illinois

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	)	
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**RESPONDENT’S REPLY IN SUPPORT OF ITS  
CROSS-MOTION FOR SUMMARY JUDGEMENT**

Reliable Stores, throughout its filings in this case and culminating in its Response in Opposition to Respondent’s Cross-Motion for Summary Judgment (“Response”), attempts to cloud this proceeding with red herrings and mischaracterizations that distract from the legal question before the Board: was there a release from an underground storage tank (“UST”) or UST system that is eligible for reimbursement from the Underground Storage Tank Fund (“UST Fund”)? The plain language in the record makes clear that the release at issue came from the above-ground dispensers, and that pursuant to statutory requirements and case law it is therefore not eligible for reimbursement from the UST Fund.

**I. THE RELEASE CAME FROM THE ABOVE-GROUND DISPENSERS.**

Reliable Stores infers that the Office of the State Fire Marshal (“OSFM”) is improperly selective in its presentation of the factual summary of its Respondent’s Cross-Motion for Summary Judgment (“Cross-Motion”), with no support as to why the OSFM must assume in its own motion for summary judgment every fact that Reliable Stores may deem relevant. Response at 1-2.

Notably, the facts relied upon by both parties are synchronous with one another.<sup>1</sup> The OSFM does not dispute that gasoline was seen flowing through the dispenser containments. Record (“R.”) at 4. Likewise, Reliable Stores does not dispute the multitude of Record citations that the release originated in the above-ground dispensers. These citations include statements by (1) the OSFM on-site inspector, R4 (B&K Equipment came out “and repaired the dispenser leaks”) and R91 (“there was a leak which [*sic*] found inside dispensers which were located above the shear valve”); (2) Reliable Stores’ consultant, R25 (“Type of Release: Other: Product was observed leaking from the product pump.”) and R91 (“the leak was above the shear valve.”); and (3) Reliable Stores’ owner, R80 (“Cause of Release: Loose nut in the dispenser resulted in a gasoline drip.”).

The OSFM presented an affidavit to support and give additional background to the undisputed facts in the Record. Cross-Motion, Attachment A (“Lock Affidavit”). For all of Reliable Stores’ attempts to discredit Ms. Lock, notably it does not offer any facts in contradiction to Ms. Lock’s statements, and thereby on its own admission agrees that the facts presented in the Lock Affidavit are true. *See* Reliable Stores Reply in Support of Petitioner’s Motion for Summary Judgment (“Reply”) at 4, citing Purtill v. Hess, 111 Ill. 2d 229, 241 (1986) (“[F]acts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion.”). Those facts admitted by Reliable Stores include that piping above the shear valve is considered part of the above-ground dispenser. Lock Affidavit at 3. And both the OSFM’s inspector, who was present at the Site, and Reliable Stores’ consultant, who submitted the eligibility application, stated that the

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<sup>1</sup> Even the facts outside of the Record that Reliable Stores erroneously attempts to introduce do not contradict the established facts in the Record relied upon by the OSFM.

release at issue originated above the shear valve. R91. Because the OSFM, consistent with applicable statutes, looks to the origin of the release (Lock Affidavit at 2), the release at issue here could only have come from the above-ground dispensers and the Board should therefore uphold the OSFM's eligibility determination and grant summary judgment in favor of the OSFM.

**II. RELIABLE STORES MISCHARACTERIZES THE LOCK AFFIDAVIT.**

Reliable Stores offers no support for its contention that Ms. Lock's lack of knowledge of a single conversation somehow means she was unaware of the numerous points in the Record stating that the release at issue made its way through the dispenser containment sumps. Response at 5. As stated above, the Lock Affidavit is presented in support of facts established by the record and provides additional background on how the OSFM reached its eligibility determination. These statements, made by the OSFM employee who reviewed Reliable Stores' application, explain the "information the OSFM relied upon in making its determination" (35 Ill. Adm. Code 105.508(b)(4)) and are properly before the Board. Reliable Stores tries to portray Ms. Lock's statements as conclusions (Response at 5), but the statements cited to by Reliable Stores relating to shear valves and their location within dispensers are clearly factual statements, made under oath, within the personal knowledge of Ms. Lock. As to the telephone conversations Ms. Lock had with the OSFM's inspector and Reliable Stores' consultant, Reliable Stores simply rehashes its attempt to keep this information out of the record, an argument that it already lost. Order of the Board (June 18, 2020), page 4 ("Reliable does not dispute that OSFM relied on this information in reaching its decision . . .").

**III. RELIABLE STORES MISSTATES STATUTORY REQUIREMENTS FOR AN ELIGIBLE RELEASE.**

OSFM eligibility and deductible determinations are made pursuant to 415 ILCS 5/57.9 (2018). Lock Affidavit at 2. The relevant definition of “Release”, as stated in Section 57.2 of the Illinois Environmental Protection Act (“Act”), is “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). An eligible release, therefore, has two necessary statutory requirements: (1) that it comes from a UST, and (2) that it enter into groundwater, surface water or subsurface soils. Reliable Stores’ throughout its own motion for summary judgment and Reply, and now again in its Response, baldly distracts from the first requirement, that the release must come from a UST, and offers no facts or argument as to how the OSFM’s explanation of this requirement, by an employee with over 31 years of experience, is wrong.

Further, Reliable Stores, in all three of its summary judgment pleadings, fails to address why it believes that the Board should be using the general definition of “release”, and not the relevant, two-part definition of “release” presented in Section 57.2 of the Act. 415 ILCS 5/57.2 (2018); *see also* Petitioner’s Motion for Summary Judgment at 8. Indeed, the under-dispenser containment system will not become “mere surplusage” from which a release cannot originate, as Reliable Stores contends. Reply at 6. Pipes within an under-dispenser containment system could potentially be a source of a release. But in arguing that a release’s origin-point is irrelevant in determining reimbursement eligibility from the UST Fund, Reliable Stores here seeks a result that would disregard relevant statutory requirements and definitions, as well as well-established Board precedent in interpreting those statutory requirements and definitions. 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)); *see also* Lock Affidavit at 2 (“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.”).

Reliable Stores also argues that the OSFM’s own definitions somehow infer that all dispenser leaks are eligible for reimbursement (Response at 7), a position that would turn the UST program on its head. Fortunately, pursuant to the Act, it is the federal definition of “underground storage tank” that controls reimbursement under Title XVI. 415 ILCS 5/57.2 (2018).

#### **IV. THE BOARD SHOULD DEFER TO THE OSFM’S READING OF THE STATUTE.**

Pursuant to the plain language in the statutory definition of “release” at 415 ILCS 5/57.2 (2018), it is clear that the origin point determines where that release comes from. To the extent the Board construes more than one reading of the statutory language, it should defer to the OSFM.

Reliable Stores portrays OSFM’s determination as an “administrative continuum.” Response at 4. But this inaccurately reflects the case law relied upon by Reliable Stores as well as the OSFM’s role for two reasons. First, IEPA v. PCB, 138 Ill. App. 3d 550 (3rd Dist. 1985), involved whether the Illinois Pollution Control Board should apply a manifest weight of the

evidence standard to an Illinois Environmental Protection Agency permit denial. *Id.* at 551. The OSFM asserts no such manifest weight of the evidence standard here, but instead asks the Board to apply precedent established by the Illinois and United States Supreme Courts regarding statutory interpretation. *See, e.g., 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.”). Similarly, Reliable Stores relies on Ackerman v. Illinois Dept. of Public Aid, 128 Ill. App. 3d 982, 984 (3rd Dist. 1984), a case that held an Agency’s own administrative hearing practice conflicted with that required by statute. Here, the OSFM’s reliance on the origin point of a release is not an agency rule in lieu of a statutory requirement, but simply applies the statute as written using common sense principles of ordinary meaning.

Second, Section 57.9(c) of the Act, 415 ILCS 5/57.9(c) (2018), states that “Eligibility and deductibility determinations shall be made by the Office of the State Fire Marshal.” It is the OSFM, therefore, that is the final decision-maker on eligibility. This is further reinforced by statutory language which states that the OSFM’s determination “shall be a *final decision* appealable to the Illinois Pollution Control Board.” 415 ILCS 5/57.9(c)(2) (2018) (emphasis added). Reliable Stores’ heightened standard (that deference on a statutory definition can only be afforded to an agency that issues a detailed finding of fact and conclusions of law) is unsupported by its own citations and conflicts with the cases cited in the Cross-Motion. Cross-Motion at 8.

The OSFM, as the administrator of eligibility determinations pursuant to the Act, has utilized its expertise and experience to conclude that it is the origin point of a release that determines the statutory requirement of where the release came “from.” Reliable Stores introduces

no new argument as to why the OSFM's reading of the statute is inconsistent with the relevant definitions in the Act.

**V. CONCLUSION**

Based on the Record before the Board, including statements made by Reliable Stores' owner and consultant, it is clear that the release at issue came from piping in the above-ground dispensers. Because a release from an above-ground dispenser is not eligible for reimbursement from the UST Fund, the Board should grant the OSFM's Cross-Motion for Summary Judgment.

OFFICE OF THE STATE  
FIRE MARSHAL

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