

No. 1-21-_____

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

OFFICE OF THE STATE FIRE MARSHAL,)	Petition for Direct Administrative
)	Review of Order of the Illinois
)	Pollution Control Board
Petitioner,)	
)	
v.)	PCB No. 19-02
)	
ILLINOIS POLLUTION CONTROL BOARD and RELIABLE STORES, INC.,)	
)	
)	
Respondents.)	

PETITION FOR DIRECT ADMINISTRATIVE REVIEW

The OFFICE OF THE STATE FIRE MARSHAL hereby petitions this Court for review of the Illinois Pollution Control Board's April 1, 2021 opinion and order in this matter. In that opinion and order, the Board granted summary judgment to Reliable Stores, Inc., and denied summary judgment to the Office of the State Fire Marshal, on the issue of whether the Office of the State Fire Marshal correctly denied Reliable Stores' application for eligibility for reimbursement from the State's Underground Storage Tank Fund.

Respectfully submitted,

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ILLINOIS POLLUTION CONTROL BOARD
April 1, 2021

RELIABLE STORES, INC.,)	
)	
Complainant,)	
)	
v.)	PCB 19-02
)	(UST Appeal)
OFFICE OF THE STATE FIRE)	
MARSHAL,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by B.F. Currie):

Reliable Stores, Inc. (Reliable) filed an appeal asking the Board to review a determination of the Office of the State Fire Marshal (OSFM). OSFM’s determination concerns Reliable’s gas station, located at the corner of West Roosevelt Road and South 9th Avenue in Maywood, Cook County. In 2018, a restaurant next door to Reliable complained of gasoline odors to the local fire department, which asked OSFM for help. An OSFM inspector found gasoline leaking inside two of Reliable’s dispenser pumps, dripping into their respective “under-dispenser containment” sumps. The bottoms of the sumps, however, were allowing the gasoline to escape into the underlying soil.

Reliable repaired the sumps, performed initial cleanup, and investigated the contamination. Reliable also applied with OSFM for a determination of its eligibility to be reimbursed from the State’s Underground Storage Tank (UST) Fund. OSFM issued a written denial, stating that each of the two leaks was a “Non UST related release”. After appealing to the Board, Reliable filed a motion for summary judgment, after which OSFM filed a cross-motion for summary judgment. Both parties assert that there are no genuine issues of material fact necessitating a hearing. The Board agrees. The parties dispute which of them is entitled to judgment as a matter of law.

The Environmental Protection Act (415 ILCS 5 (2018)) allows a UST owner or operator to access the UST Fund for costs incurred in cleaning up a release not only from a UST but also a release from a UST system, which includes any containment system. An under-dispenser containment sump is part of the containment system and therefore part of the UST system. Because the gasoline here leaked from under-dispenser containment sumps into the environment, the leaks constituted “releases” from a UST system under the Act. Accordingly, the Board finds that OSFM erred in denying Reliable’s application for UST Fund eligibility and reverses OSFM’s determination. The Board therefore grants Reliable’s motion for summary judgement and denies OSFM’s cross-motion for summary judgment. The Board also remands the matter for OSFM to determine Reliable’s applicable UST Fund deductible.

In this opinion, the Board first provides this case's procedural history and rules on procedural motions related to the cross-motions for summary judgment. The Board then sets forth the uncontested facts of the case. Next, the Board provides the relevant legal background on UST regulation, appeals of OSFM UST Fund determinations, and the standards for considering motions for summary judgment. That is followed by the Board's analysis and order.

PROCEDURAL HISTORY

On July 3, 2018, Reliable filed a petition for review (Pet.) of the June 12, 2018 OSFM determination. On July 26, 2018, the Board accepted the petition as a timely petition but directed Reliable to file an amended petition correcting specified deficiencies. On August 27, 2018, Reliable timely filed an amended petition (Amended Pet.). On September 6, 2018, the Board accepted the amended petition for hearing and directed OSFM to file the entire record of its determination by September 26, 2018. On September 21, 2018, OSFM timely filed its record (Rec.).

On March 16, 2020, OSFM filed a motion to supplement the record with a portion of a document that had been previously withheld due claimed to attorney-client privilege. On June 18, 2020, the Board granted OSFM's motion to supplement the record over Reliable's opposition.

On June 5, 2020, Reliable filed a motion for summary judgment (Reliable Mot. SJ.). On July 9, 2020, with the hearing officer's permission, OSFM filed a response to Reliable's summary judgment motion (OSFM Resp.). On July 23, 2020, Reliable filed a motion for permission to file a reply in support of its summary judgment motion, attaching the reply (Reliable Reply).

Also on July 23, 2020, OSFM filed a cross-motion for summary judgment (OSFM Mot. SJ.). On August 12, 2020, Reliable filed a motion for permission to file its response (Resp.) to OSFM's cross-motion for summary judgment, attaching the response (Reliable Resp.). On August 26, 2020, OSFM filed a motion for permission to file a reply in support of its cross-motion for summary judgment, attaching the reply (OSFM Reply).

PROCEDURAL MOTIONS

Motions for Permission to File

In each of the three motions for permission to file (July 23, 2020 - Reliable; August 12, 2020 - Reliable; and August 26, 2020 - OSFM), the movant claims it would be materially prejudiced should it not be allowed to file. The Board grants all three of the motions for leave to file.

Motion to Admit Video

Contained within Reliable's motion for summary judgement is a request to admit a 37-second video into the record. Reliable Mot. SJ at 7, Exhibit B. Reliable has included an

affidavit from Tim Elmore, a Senior Project Manager with Eagle Environmental Consultants, LLC, testifying that the video is a true and correct copy of a video shown to him by Randy Carben, OSFM inspector, on or about February 15, 2018. *Id.* at Exhibit A.

OSFM opposes the request to enter the video into the record. OSFM Response at 6. OSFM argues that, “neither the video nor the conversation between Mr. Carben and Mr. Elmore were relied upon by OSFM in making its determination.” *Id.* at 7. Additionally, OSFM argues that there has been an insufficient foundation laid for the admission of the video. *Id.* The video purports to show a gas dispenser with its cover removed. Reliable Mot. SJ, Exhibit B. Visible within the dispenser is liquid leaking from a point above ground in the interior of the dispenser, then dripping to a point below ground level. *Id.* Upon request, the attorney for OSFM emailed the video to the attorney for Reliable. *Id.*

As the video adds no further detail to the arguments of either Reliable or OSFM, the Board denies the request by Reliable to enter the video into the record.

UNCONTESTED FACTS

On February 14, 2018, the Village of Maywood Fire Department received a call from a restaurant, JJ Fish & Chicken, complaining of gasoline odors. Rec. at R4. The Maywood Fire Department contacted OSFM for assistance in determining the source of the gasoline odors. *Id.* An inspector from OSFM, after visiting the restaurant, saw gasoline floating in its sump pump. *Id.* The restaurant is next door to Reliable’s gas station, which is located at 905 W. Roosevelt Road, at the corner of Roosevelt and South 9th Avenue. *Id.* and at R82. After inspecting Reliable’s gasoline pumps, the OSFM inspector subsequently found leaks at two gas dispenser pumps that flowed into an under-dispenser containment system. *Id.* The under-dispenser containment system was found to have holes – empty, unplugged, pipe chase portholes – through which the gasoline was leaking into the surrounding soil. *Id.* The inspector shut down the fueling operation and directed Reliable’s owner to hire a contractor to repair the leaks and determine what remedial activities were necessary. *Id.* Reliable owns and operates an active service station containing two gasoline underground storage tanks, assigned number LPC#0311835047 by OSFM. Amended Pet. at 1. Tank 6 had a 12,000 gallon capacity and Tank 7 had an 8,000 gallon capacity. *Id.* at R1, R82. The OSFM inspector found leaks under dispenser 1/2 and dispenser 7/8. *Id.* at R4. Reliable’s dispensers were equipped with under-dispenser containment systems. Rec. at 13; Amended Pet. at 2-3.

Reliable initiated cleanup activities, and a subsequent inspection by OSFM on May 9, 2018, noted that all repairs were completed. Rec. at R13-14. Following cleanup, Reliable filed a Reimbursement Eligibility and Deductible Application for cleanup expenses from the UST Fund. *Id.* at R25. The UST Fund was created pursuant to Section 57 of the Act and its purpose is to reimburse owners and operators of leaking underground storage tanks for expenses incurred in the process of remediating those leaks. 415 ILCS 5/57 *et seq.* (2018). Reliable’s request was denied by OSFM on June 12, 2018. *Id.* at R1-R2. The denial letter from OSFM explained the basis for the denial was that the leaks were “non-UST related” releases. *Id.* at R2.

LEGAL BACKGROUND

USTs

Title XVI of the Act provides for the administration and oversight of the Leaking Underground Storage Tank Program, which includes requirements for reimbursement from the UST Fund. 415 ILCS 5/57 *et seq.* (2018). The UST Fund was created under the Act and may be accessed by eligible UST owners and operators to pay for the environmental cleanup of leaking USTs. *Id.* Further, Section 57.9 of the Act describes the circumstances under which owners and operators may access the UST Fund. As pertinent to this appeal, Section 57.9(a) states:

The Underground Storage Tank 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).

The Act's Title XVI and OSFM's UST regulations define "release" and other terms using substantively identical language so far as they concern this appeal. *See* 415 ILCS 5/57.2 (2018); 41 Ill. Adm. Code 174.100. These definitions are based largely on the corresponding federal definitions adopted by the United States Environmental Protection Agency (USEPA) in 40 C.F.R. § 280.12 under the Resource Conservation and Recovery Act (42 U.S.C. §§ 6991 *et seq.*).

OSFM defines "release" as "any spilling, overfilling, leaking, emitting, discharging, escaping, leaching or disposing from a UST into groundwater, surface water or subsurface soils." 41 Ill. Adm. Code 174.100; *see also* 40 C.F.R. § 280.12 ("Release"). "Underground Storage Tank System" or "UST" means, in relevant part:

any one or combination of tanks (including connected underground pipes, connected ancillary equipment, connected cathodic protection, and containment system, if any) used to contain an accumulation of regulated substances, the volume of which (including the volume of underground connected pipes) is 10 percent or more beneath the surface of the ground. 41 Ill. Adm. Code 174.100; *see also* 40 C.F.R. § 280.12 ("Underground storage tank or UST"; "UST system or Tank system").

OSFM defines "under-dispenser containment" or "UDC" in pertinent part as "factory manufactured containment underneath a dispenser that will prevent leaks from the dispenser and piping within or above the UDC from reaching soil or groundwater." 41 Ill. Adm. Code 174.100; *see also* 40 C.F.R. § 280.12 ("Under-dispenser containment or UDC"). "Dispenser" means "equipment located above ground that dispenses regulated substances from the UST system." 41 Ill. Adm. Code 174.100; *see also* 40 C.F.R. § 280.12 ("Dispenser"). A "dispenser system" is defined as "the dispenser and the equipment necessary to connect the dispenser to the underground storage tank system." 41 Ill. Adm. Code 174.100; *see also* 40 C.F.R. § 280.12 ("Dispenser system").

Finally, an "under-dispenser containment" is a type of "containment sump," which OSFM defines as:

a factory manufactured liquid-tight container that protects the environment by containing leaks and spills of regulated substances from piping, dispensers, pumps and related components in the containment area. Containment sumps may be single-walled or secondarily contained and located at the top of the tank (tank top or submersible turbine pump), underneath the dispenser (under-dispenser containment sump), or at other points in the piping run (transition or intermediate sump). 41 Ill. Adm. Code 174.100; *see also* 40 C.F.R. § 280.12 (“Containment Sump”).

Appeals of OSFM Eligibility Determinations

Reliable brought this appeal under Section 57.9(c)(2) of the Act, which provides that:

- (c) Eligibility and deductibility determinations shall be made by the Office of the State Fire Marshal.

- (2) Within 60 days of receipt of the “Eligibility and Deductibility Determination” form, the Office of the State Fire Marshal shall issue one letter enunciating the final eligibility and deductibility determination, and such determination or failure to act within the time prescribed shall be a final decision appealable to the Illinois Pollution Control Board. 415 ILCS 5/57.9(c)(2) (2018); *see also* 35 Ill. Adm. Code 105, Subpart E.

The basis for the Board’s review is framed by OSFM’s denial letter. Rock Valley Oil & Chemical Co., Inc. v. Office of the State Fire Marshal, PCB 98-140 (Aug. 6, 1998) (“It is well settled that the denial letter frames the issue on appeal.”).

Standards for Ruling on Summary Judgment Motions

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 35 Ill. Adm. Code 101.516(b); Adames v. Sheahan, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); Dowd & Dowd, Ltd. V. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b). When determining whether a genuine issue of material fact exists, the record “must be construed strictly against the movant and liberally in favor of the opponent.” Adames, 233 Ill. 2d at 295-96, 909 N.E.2d at 754; Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986).

The filing of cross-motions for summary judgment does not in itself mean there are no undisputed facts. Nor does it obligate the Board grant summary judgment. “The mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate the Board to render summary judgment.” Prairie Rivers Network v. Illinois Pollution Control Board, 2016 Ill. App. (1st) 150971 (Feb. 26, 2016).

ANALYSIS

In this part of the opinion, the Board begins by explaining why there are no genuine issues of material fact in this case. Next, the Board discusses why Reliable is entitled to judgment as a matter of law. That discussion addresses why a leak from an under-dispenser containment system is a “release” from a “UST system.”

There Are No Genuine Issues of Material Fact in This Case

In this appeal, Reliable seeks review of OSFM’s denial of any reimbursement for cleanup costs Reliable incurred while remedying the February 14, 2018, leak. That June 12, 2018, denial letter from OSFM forms the issues in Reliable’s appeal to Board. An owner or operator is eligible for cleanup cost reimbursement from the UST Fund if there is a confirmed release from a UST or a UST system. Both Reliable and OSFM agree on the central facts in this matter.

Reliable Is Entitled to Judgment as a Matter of Law

OSFM’s determination letter said that Reliable was ineligible for reimbursement from the UST Fund because the release was “non-UST related.” Rec. at R2. The Act describes the kind of releases that would allow owners and operators to access the UST Fund, “The Underground Storage Tank Fund shall be accessible by owners and operators who have a confirmed release *from an underground storage tank or related tank system.*” 415 ILCS5/57.9(a) (emphasis added).

An under-dispenser containment system is part of the “related tank system” as described in the Act. *Id.* USEPA, in its preamble to adopting 2015 revisions to the federal UST regulations says, “UDC is located underground and prevents some releases by containing small leaks that occur inside and underneath the dispenser.” 80 Fed. Reg. 41566, 41575 (July 15, 2015). It is undisputed that the under-dispenser containment sumps at Reliable’s station were located underground.

A leak from the under-dispenser containment system to the surrounding soils is a “release” as that term is defined in the Act. In this case, the leak began in the above-ground dispenser system, dripped into the under-dispenser containment and released from the under-dispenser containment system. USEPA distinguished the term “release” as used in UST regulations from the more general term, “leak” as follows:

A release always reaches the environment. The term leak in this final UST regulation is a more general term that includes both cases of when a regulated substance enters into a contained area (such as secondary containment) but has not yet reached the environment and when a regulated substance reaches the environment (a release). Therefore, the term release is a subset of the more general term leak. 80 Fed. Reg. 41566, 41608 (July 15, 2015).

The purpose of an under-dispenser containment system is to add an extra layer of protection between leaks and the environment. *Id.* at 41573. The under-dispenser containment is designed

to be housed underground and collect leaks from above-ground dispenser elements. “UDC . . . prevents some releases by containing small leaks that occur inside and underneath the dispenser.” *Id.* at 41575. However, USEPA acknowledges that the under-dispenser containment itself can fail and release product to the environment. “Damaged under-dispenser containment (if present) can release regulated substances into the environment.” 76 Fed. Reg. 71708, 71719 (Nov. 18, 2011).

OSFM’s argument hinges on the origin of the leak, not where the leak came in contact with surrounding soils. OSFM Mot. SJ. at 7. “[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 the *starting point*, *i.e.* the loose nut in the dispenser above the shear valve.” *Id.* at 7-8 (emphasis in original). This scenario, OSFM argues, proves the origin of the leak is the main piece of evidence to consider, not where the leak entered the surrounding soils. *Id.* OSFM imagines several hypothetical scenarios with gasoline spraying sideways or entering the soil through other means. The Board need not address these hypotheticals as the facts in this case are clear.

Reliable argues that the release location, for purposes of eligibility for reimbursement from the Fund, should be where the product came into contact with the soil. “By reason and belief, OSFM views the incident as resulting from one or more leaks in the above-ground dispenser. However, as explained herein, any such leaks would have been contained by the underground dispenser sump, but for the fact that it was leaking gasoline into the environment. And more importantly, as a matter of law, such containment discharges are releases from an underground storage tank system.” Amended Pet. at 2. The leak, though originating from above the shear valve, was released into surrounding soils from the UDC. “The release was determined to be from an underground dispenser sump, which was cracked or improperly sealed, allowing gasoline to enter the environment.” Amended Pet. at 1.

This case is distinct from Board cases cited by OSFM in its pleadings. The Board agrees with OSFM that “[t]he ‘UST system’ consists of ‘an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.’ 40 CFR Section 280.12” OSFM Mot. SJ at 9. The point of contact of the product and the surrounding soils came from the containment system, a fact that is agreed to by both parties.

OSFM argues, citing City of St. Charles, “‘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.” OSFM Response, citing City of St. Charles v. Illinois Labor Relations Bd., 395 Ill. App. 3d 507, 509-10 (2d Dist. 2009). Rather than supporting OSFM’s claim, this line of argument instead bolsters Reliable’s position. The statute and definitions are clear - releases from the underground system are eligible for reimbursement from the UST Fund. The Board need not infer through silence or absence in the statute or regulations. An under-dispenser containment system is part of the “UST system.” 41 Ill. Adm. Code Part 174.100. The purpose of an under-dispenser containment system is to collect leaks from the piping and dispenser above it. In this instance, the UDC had pipe chase portholes that were open to the surrounding soil. When a leak occurred above the UDC, the product fell to the UDC, then leaked to surrounding soils through holes in the UDC.

But for the unplugged holes, the UDC functioned as was intended by OSFM and USEPA regulations – it captured leaks from above.

OSFM also cites Harlem Township v. IEPA in support of its argument to deny Reliable reimbursement for the leak. Harlem Township v. Illinois EPA, PCB 92-83, slip op. at 1-2 (Oct. 16, 1992). In Harlem, a nozzle was left running on the ground next to a gas pump and approximately 450 gallons of gasoline was discharged onto the ground. *Id.* at 2. In Harlem, the Board held that, “[t]o be eligible to access funds from the underground storage tank fund the release must be from an underground storage tank. The above ground dispensing pump nozzle are not part of the underground storage tank.” *Id.* at 7-8; *see also Id.* at 5 (“The pump and pump nozzle do not constitute part of the containment system.”). The facts in Harlem are distinct from those here, but Harlem supports the plain reading of the statute and UST rules.

In this matter, the plain reading of the statute, the accompanying definitions and the facts of this case show a release of gasoline from the under-dispenser containment system to surrounding soils. This is a release from a UST system that meets the requirements of Section 57.9(a). 415 ILCS 5/57.9(a) (2018).

CONCLUSION

The Board agrees with the parties that there are no issues of material fact in this case. Under 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). The only reason given by OSFM for denying Reliable’s application for UST Fund eligibility was that the leaks of gasoline were not from UST systems. However, the gasoline leaks to the underlying soils from the bottoms of the under-dispenser containment systems were releases from UST systems. OSFM erred in determining otherwise. The Board therefore reverses OSFM’s determination, finds that Reliable is entitled to judgment as a matter of law, grants Reliable’s motion for summary judgment, and denies OSFM’s cross-motion for summary judgment. Further, the Board remands the matter to OSFM for it to determine Reliable’s applicable UST Fund deductible.

This opinion constitutes the Board’s findings of fact and conclusions of law.

ORDER

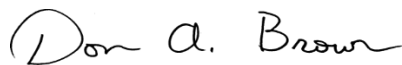
1. The Board grants Reliable’s motion for summary judgment and denies OSFM’s cross-motion for summary judgment.
2. The Board reverses OSFM’s June 12, 2018 determination denying Reliable’s application for UST Fund eligibility.
3. The Board remands this matter for OSFM to determine Reliable’s applicable UST fund deductible.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2018); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Appeal Filed with the Circuit Court	
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I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 1, 2021, by a vote of 4-0.



Don A. Brown, Clerk
 Illinois Pollution Control Board

CERTIFICATE OF FILING AND SERVICE

I certify that on May 4, 2021, I electronically filed the foregoing **Petition For Direct Administrative Review** with the Clerk of the Court for the Illinois Appellate Court, First Judicial District, by using the Odyssey eFileIL system.

I further certify that the other participants in this action are not registered service contacts on the Odyssey eFileIL system, and thus will be served by transmitting a copy from my e-mail address to the e-mail address designated by those participants on May 4, 2021, before 5:00 p.m.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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