

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

RELIABLE STORES, INC.,            )  
    Petitioner,                    )  
    v.                                )  
                                      )  
OFFICE OF THE STATE FIRE        )  
MARSHAL                            )  
    Respondent.                    )

PCB 2019-002  
(OSFM Appeal)

**NOTICE OF FILING AND PROOF OF SERVICE**

To: Don Brown, Clerk  
Illinois Pollution Control Board  
100 West Randolph Street  
State of Illinois Building, Suite 11-500  
Chicago, IL 60601

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, IL 62794-9274  
Carol.Webb@Illinois.gov

Daniel Robertson  
Assistant Attorney General  
Environmental Bureau  
69 W. Washington St., 18<sup>th</sup> 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, pursuant to Board Procedural Rule 101.302, Petitioner's Motion for Summary Judgment, a copy of which is herewith served upon the above parties of record in this cause. The undersigned hereby certifies that I served the aforementioned document by e-mail to each of the persons listed above at the above e-mail address on the 5<sup>th</sup> day of June 2020, and the number of pages in the e-mail transmission are 15.

RELIABLE STORES, INC., Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw  
LAW OFFICE OF PATRICK D. SHAW  
80 Bellerive Road  
Springfield, IL 62704  
217-299-8484  
pdshaw1law@gmail.com

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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

**PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES Petitioner, RELIABLE STORES, INC., by its undersigned counsel, moves for summary judgment pursuant to Section 101.516(b) of the Board's Procedural Rules (35 Ill. Adm. Code § 101.516(b)), as follows:

**STATEMENT OF UNDISPUTED FACTS.**

On February 14, 2018, a gasoline release was reported at a site commonly known as Roosevelt 66, located at 905 West Roosevelt, Maywood, Cook County, Illinois ("the Site"). (R.25; R.80) The Illinois Emergency Management Agency assigned the release as Incident No. 2018-0158. (R.80) A site area features map can be found in the record. (R.82)

On February 14, 2018, Randal Carben, a Storage Tank Safety Specialist for the Office of the Illinois State Fire Marshal (hereinafter "OSFM"), visited the Site because of a gasoline odor complaint from a neighboring restaurant. (R.4) Carben witnessed gasoline floating on the water in the basement sump of the restaurant. (R.4) On returning to the Site, Carben continued his investigation:

**I went back next door to th[e] station and began to investigate the Veeder Root, records and equipment. I found a leak under dispenser 1/2 and under**

**dispenser 7/8. It appears both dispenser containments are leaking because the gasoline is flowing out the bottom of the dispenser pans.**

(R.4 (emphasis added))

Carben oversaw the repairs to the dispensers and the removal of “gasoline/water from under all dispensers, sumps, observation well, sewers and the sump pit next door at JJ Fish.”

(R.4) On February 15, 2018, Carben returned and while he did not see any leaks, he noticed a rainbow sheen on the water in the sewers and gasoline odors. (R.4)

On February 16, 2018, Carben returned to the Site with representatives from the Illinois Environmental Protection Agency (hereinafter “the IEPA”). (R.4) The JJ Fish sump pit was still receiving gasoline and there was a rainbow sheen on the water in the storm drains in the parking lot between the restaurant and gasoline station. (R.4) The representative of the gasoline station was instructed as to the importance of beginning remediation by the IEPA, including installing extraction wells or an extraction trench between the properties. (R.4) Carben further observed:

**The dispensing containment on pump 1 / 2 was found to have 3 empty pipe chase portholes that were open to the soils below. These portholes are 3" in diameter and allowed the leaking gasoline on pump 1 / 2 to escape before any sensor could alarm.**

(R.4)

On February 20, 2018, Carben observed the leak repairs were still holding, but there was water in the bottom of all the dispenser pans, which the owner promised to repair. (R.4) On this date, Carben issued a notice of violation, requiring the tanks, lines and tank monitor to be tested, as well as the removal and repair of the containments. (R.6 - R.7) The owner subsequently obtained a bid to rebuild all pipe and conduit sump entry boots. (R.11) On May 9, 2018, Carben confirmed that all repairs and tests in the notice of violation had been performed, including repair

of the containments, in determining compliance had been achieved. (R.13 - R.14)

During his investigation of the incident, Carben took a video of one of the dispenser containments with his cell phone. (Ex. A) He showed this video to Petitioner's environmental consultants, and a true and correct copy of this video is attached hereto. (Ex. A)

On May 9, 2018, Eagle Environmental Consultants submitted an eligibility and deductible application for the incident on behalf of Petitioner. (R.25) The application described the release as:

**Product was observed leaking from the product pump. Gasoline was observed going into the soil through a pipe penetration in the dispenser sump.**

(R.25)

Attached to the application were OSFM regulations with portions of a regulatory definition for "Under-dispenser Containment" highlighted. (R.28) The application also included test results of confirmation soil samples from the Site (R.31 - R.79), showing impacts above tier one site remediation objectives near the tanks on the northeast side of the Site and near the dispensers closest to the restaurant on the southwest side. (R.82)

On June 12, 2018, OSFM issued its determination, finding that the tanks were ineligible as "Non UST related release[s]," citing 415 ILCS 5/57.9. (R.90) On July 3, 2018, the Board received a letter from Petitioner's consultants seeking to appeal that decision, which the Board treated as a timely petition, but directed Petitioner to file an amended petition through an attorney. (Board Order of July 26, 2018) On August 27, 2018, an amended petition for review was filed, satisfying these requirements. (Board Order of September 16, 2018)

**STATEMENT OF LAW**

The Leaking Underground Storage Tank Program (hereinafter “LUST”) was created to comply with federal law and further the State’s interest in the protection of Illinois’ land and water resources. (415 ILCS 5/57) To further these objectives, releases of petroleum from underground storage tanks or related tank systems are to be remediated pursuant to procedures adopted by the Pollution Control Board, subject to the oversight of the Illinois EPA, and eligible for access from a State fund. (Id.)

Eligibility and deductibile determinations are made by OSFM, which are appealable to the Illinois Pollution Control Board. (415 ILCS 5/57.9) This determination is to be made by means of a form promulgated as a rule or regulation by OFSM pursuant to the Administrative Procedure Act (Id.), which does not appear to have been performed yet.

**I. A Motion for Summary Judgment Can Be Supported by the Record and Affidavits.**

The Illinois Pollution Control Board has promulgated rules for summary judgments: “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 § 101.516(b)) This procedure has been used in other appeals from OSFM decisions. E.g., Herr Petroleum Corp. v. OSFM, PCB 03-86 (March 20, 2003) (granting the OSFM’s motion for summary judgment).

The evidence in this motion is either found in the current record or in the affidavit

attached hereto.<sup>1</sup> The Board's procedural rules do not address what information can be properly submitted in an affidavit supporting a motion for summary judgment, but has previously ruled that such affidavits must be made on the personal knowledge of an affiant who can competently testify thereto. Heiser v. OSFM, PCB 94-377, slip op. at 4 (Sept. 21, 1995) (denying motion to strike entire affidavit). Still photographs, motion pictures, and videotapes "may be admitted into evidence when authenticated and relevant either to illustrate or corroborate the testimony of a witness, or to act as probative or real evidence of what the photograph depicts. A sufficient foundation is laid for a still photograph, a motion picture, or a videotape by testimony of any person with personal knowledge of the photographed object at a time relevant to the issues that the photograph is a fair and accurate representation of the object at that time." Perry v. Perry, 2012 IL App (1st) 113054, ¶ 48.

The attached affidavit and admissions in the record and in filings before the Board support consideration of OSFM's video of the release created during its emergency response investigation. This video was requested by Petitioner's counsel at the outset (see Hearing Officer Order of Nov. 7, 2018), and given to Petitioner's counsel on January 7, 2020. (See Exhibit B) The relevance of the video is readily apparent: Carben observed the leak, recorded his observations with his cell phone and later reported that "[i]t appears both dispenser containments are leaking because the gasoline is flowing out the bottom of the dispenser pans." (R.4) Furthermore, with respect to foundation, the key points in the affidavit are that Carben, employed

---

<sup>1</sup> Petitioner has objected to the motion to supplement the record, which at this time awaits resolution. Even if the supplement is ultimately allowed, the document does not raise any "genuine issue of material fact" since the documents discovered by OSFM at a date and under circumstances unknown do not dispute that gasoline flowed out of the bottom of dispenser pans.

by OSFM to investigate the incident, represented that he took the video depicting the release (Ex. A, ¶ 6), which is an admission by a party opponent that the video in fact shows the release. Thus, under the rules of evidence in civil proceedings, the video would be admitted into evidence. In the alternative, the video would certainly meet the more relaxed evidentiary requirement in administrative proceedings, allowing admission of anything that “would be relied upon by prudent persons in the conduct of serious affairs.” (35 Ill. Adm. Code § 101.626(a)) It would hardly be prudent when evaluating the nature of a release to refuse to look at video available of said release.

By reason and belief, the video is not in the record because OSFM purports not to have relied upon it in making its decision. Assuming this is true, it does not preclude the Board from considering evidence outside of the administrative record, otherwise there would be no opportunity for hearing. (35 Ill. Adm. Code 105.Subpart E; see also Heiser v. OSFM, PCB 94-377, slip op. at 4 (Sept. 21, 1995) (approving use of affidavits to present evidence not in the record in support of motion for summary judgment)) The Illinois Appellate Court has described the purpose of analogous appeals as providing the petitioner the means of disputing the decision through “consideration of the record before the EPA together with the receipt of testimony and other proofs under the full panoply of safeguards normally associated with a due process hearing.” Environmental Protection Agency v. Pollution Control Board, 138 Ill. App. 3d 550, 551-52 (3<sup>rd</sup> Dist. 1985). OSFM’s video of the release directly challenges OSFM’s apparent interpretation of the release and is properly considered by the Board.

**II. There Was a Release from the Containment System.**

The LUST 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)) A release is further defined as:

**“Release” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . .**

(415 ILCS 5/3.395 (emphasis added))

OSFM’s Storage Tank Safety Specialist observed that “both dispenser containments are leaking because the gasoline is flowing out the bottom of the dispenser pans.” On a later date, he observed that “[t]he dispensing containment on pump 1 /2 was found to have 3 empty pipe chase portholes that were open to the soils below. These portholes are 3" in diameter and allowed the leaking gasoline on pump 1 /2 to escape before any sensor could alarm.” (R.4) OSFM’s video similarly shows an internal leak coming from somewhere above the under-dispenser containment which accumulates in the containment before flowing out into the surrounding soils. The voices recorded in OSFM’s video emphasize the interest and significance of the current flowing in the containment:

**Q. Now see the current you got down there?**

**A. Uh-huh.**

**Q. Look on my phone . . . You see the stuff flowing?**

**A. I can see it flowing right here. I can see it . . .**

(Ex. A (video))

To summarize, there was an internal leak from either the dispenser or piping connected to



the dispenser, which was initially captured by the under-dispenser containment before flowing out through gaps or holes into the environment. The eligibility and deductible application similarly stated that there was product leaking from the pump, and “[g]asoline was observed going into the soils through a pipe penetration in the dispenser sump.” (R.25) Furthermore, the application included confirmation sampling demonstrating the existence of a release (R.82), though OSFM’s decision does not appear to challenge the fact of a release, just that it was not from a UST system. The undisputed facts show that there was a release from the containment system, even if there was also a leak from above the containment system.

**III. A Release from a Containment System Constitutes a Release from an Underground Storage Tank System.**

The LUST 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))

**“UST system” or “Tank system” means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.**

35 Ill. Admin. Code § 731.112 (derived from 40 CFR 280.10) (emphasis added).

A containment system is not defined in the Board’s Part 734 regulations and the Board has previously indicated that the term should be “given its ordinary meaning.” Harlem Township v. Illinois EPA, PCB No. 92-83, slip op. at 5 (Oct. 16, 1992). “A containment system holds or retains a substance.” Id. Based upon this meaning, the Board concluded that a leak from the pump nozzle was not a leak from a containment system because “the function of these parts is to regulate the flow of the product for distribution.” Id.

The Board also referenced “requirements for secondary containment systems in 40 CFR 280.42(b) (1).” Id. FN4. To be clear, these requirements pertain then and now to a “hazardous substance UST system,” as opposed to a “petroleum UST system.” See 40 CFR 280.12 (definitions). This explains why the phrase “containment system, if any” is used – a UST system may not necessarily have a containment system, at least at the time the regulations were initially promulgated. So while the Board may have been willing to reference federal regulations, given the purpose of the LUST program,<sup>2</sup> there was little regulatory guidance in 1992.

Currently, federal regulations contemplate various types of containment, including that at issue here:

***Under-dispenser containment or UDC means containment underneath a dispenser system designed to prevent leaks from the dispenser and piping within or above the UDC from reaching soil or groundwater.***

(40 CFR 280.12 (definitions) (emphasis added))

In other words, under-dispenser containment is supposed to prevent leaks from becoming releases into the environment. “Under-dispenser containment must be liquid-tight on its sides, bottom, and at any penetrations. Under-dispenser containment must allow for visual inspection and access to the components in the containment system or be periodically monitored for leaks from the dispenser system.” (40 CFR 280.20(f) (emphasis added)) Under-dispenser containment is therefore part of the containment system, which is separate from the “dispenser system,” which is defined as “the dispenser and the equipment necessary to connect the dispenser to the underground storage tank system.” (40 CFR 280.12 (definitions)) Under-dispenser containment

---

<sup>2</sup> The LUST Program is intended to meet “the requirements of the Hazardous and Solid Waste Amendments of 1984 of the Resource Conservation and Recovery Act of 1976.” (415 ILCS 5/57)

“is located underground and prevents some releases by containing small leaks that occur inside and underneath the dispenser.” Revising Underground Storage Tank Regulations—Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training, 80 Fed. Reg. 41566, 41575 (July 15, 2015).<sup>3</sup>

These new regulations also include a definition of “containment sumps” which applies to various forms of containment besides under-dispenser containment:

**Containment Sump means a 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 tank (tank top or submersible turbine pump sump), underneath the dispenser (under-dispenser containment sump), or at other points in the piping run (transition or intermediate sump).**

(40 CFR 280.12 (definitions) (emphasis added))

From the perspective of giving the term “containment system” its ordinary meaning, OSFM’s Storage Tank Safety Specialist expressly stated that the release came from the “dispenser containments” (R.4), recognizing in the clearest way possible that the release came from part of the “containment system.” Moreover, USEPA regulations also expressly identify under-dispenser containment as part of the containment system. As a matter of law, the release unquestionably came from the UST system.

---

<sup>3</sup> Thus, under-dispenser containment satisfies the Board’s dictum that “for a containment system to be part of a UST system it must be at least partially located underground.” Harlem Township, slip op. at 5.

**CONCLUSION**

The undisputed facts are that there was a release into the environment from one or more containment systems and that as a matter of law, this constituted a release from a UST system. The significance of this issue goes beyond access to the State fund for cleanup because finding this release exempt from the LUST Program would mean that other objectives of the LUST Program will not be advanced either, such as oversight of the cleanup by the IEPA pursuant to procedures adopted by the Board. The purpose of the program reaches beyond any given owner or operator.

WHEREFORE, Petitioner, RELIABLE, prays that the Board find OSFM erred in its decision, that OSFM be directed to issue a new eligibility and deductibility determination forthwith, and the Board grant such other and further relief as it deems meet and just.

Respectfully submitted,

RELIABLE STORES, INC., Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw  
LAW OFFICE OF PATRICK D. SHAW  
80 Bellerive Road  
Springfield, IL 62704  
217-299-8484  
pdshaw1law@gmail.com

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

RELIABLE STORES, INC.,            )  
    Petitioner,                    )  
    v.                                )  
                                      )  
OFFICE OF THE STATE FIRE        )  
MARSHAL                            )  
    Respondent.                    )

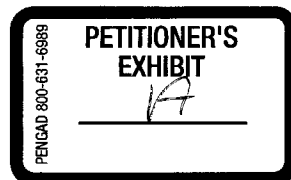
PCB 2019-002  
(OSFM Appeal)

**AFFIDAVIT OF TIM ELMORE**


Affiant, Tim Elmore, being first duly sworn, states as follows:

1. The statements made herein are based upon my personal knowledge, and I am competent to testify hereto.
2. I am Senior Project Manager with Eagle Environmental Consultants, LLC, working in the field of underground storage tank assessments and remediation, site assessments, corrective action plans and site closures.
3. Eagle Environmental Consultants, LLC has been hired to provide environmental consulting services for Reliable Stores, Inc. in relation to Incident No. 2018-0158 at the Roosevelt 66 site in Maywood, Illinois.
4. I have been involved in various aspects relating to Incident No. 2018-0158, and am familiar with the site and its environmental issues.
5. On or about February 15, 2018, I visited the site and discussed the incident with Randy Carben of the Office of the State Fire Marshal.
6. Randy Carben showed me a video he had taken with his cellphone of the leak while explaining the lack of several plugs in the containment below the dispenser pumps.
7. Attached hereto is a true and correct copy of the video shown to me by Randy Carben on or about February 15, 2018.

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.

  
Tim Elmore



Patrick Shaw <pdshaw1law@gmail.com>

## Reliable Stores Video

1 message

Robertson, Daniel <DRobertson@atg.state.il.us>  
To: Patrick Shaw <pdshaw1law@gmail.com>

Tue, Jan 7, 2020 at 10:01 AM

Good morning Patrick, we had previously discussed a video in this matter taken by the OSFM inspector that had been deleted. The inspector has been able to recover that video through cloud storage. I'll be sending you a separate email shortly that includes a link for you to download that video. Speak to you soon.

Regards,

Daniel Robertson  
Assistant Attorney General  
Environmental Bureau  
Illinois Attorney General's Office  
69 W. Washington Street, 18th Floor  
Chicago, IL 60602  
(312) 814-3532

