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.	)	

NOTICE OF FILING AND PROOF OF SERVICE

To: Don Brown, Clerk
Illinois Pollution Control Board
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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 Leave to File Reply in Support of Petitioner's Motion for Summary Judgment Instanter, 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 23rd day of July 2020, and the number of pages in the e-mail transmission are 12.

RELIABLE STORES, INC., Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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PETITIONER'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT INSTANTER

NOW COMES Petitioner, RELIABLE STORES, INC., by its undersigned counsel, pursuant to Section 101.500(e) of the Procedural Rules of the Illinois Pollution Control Board (35 Ill. Adm. Code § 101.500(e)), and move for leave to file reply instanter in support of Petitioner's Motion for Summary Judgment, stating as follows:

1. On June 5, 2020, Petitioner filed Petitioner's Motion for Summary Judgment, supported by affidavit and citations to the record.

2. On July 9, 2020, Respondent filed Respondent's Response to Petitioner's Motion for Summary Judgment, in which it asks inter alia that the Board "grant summary judgment in favor of the OSFM." (Resp. at p. 15) While this prayer for relief suggests that the filing is a cross-motion for summary judgment, the Response states Respondent "intends to file its own Motion for Summary Judgment" at some future date unknown. (Resp. at p. 1)

3. Petitioner's Motion for Summary Judgment is ripe for decision and there is no just reason to wait for further filings.

4. Since Respondent did not file any counteraffidavit, the facts in Petitioner's Motion for Summary Judgment are not disputed. See also Response, at p. 9 ("The source of the

release is undisputed by the parties."). Any factual dispute involves characterizing evidence, though from Petitioner's view the OSFM wishes the Board to ignore certain evidence.

5. However, the Response raises new legal issues, which Petitioner would be materially prejudiced if it were unable to reply to these new, novel arguments made in the Response.

6. Illinois Pollution Control Board rules authorize the filing of a motion seeking permission to file a reply within 14 days after service of the response. (35 Ill. Adm. Code 101.516(e))

7. This motion is filed 14 days after service of the response and seeks leave to file the reply instanter.

WHEREFORE, Petitioner, RELIABLE STORES, INC., requests that the Board authorize permission to file the attached reply instanter, and such other and further relief as the Board deems meet and just.

Respectfully submitted,

RELIABLE STORES, INC.
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW
Its attorneys

BY: /s/ Patrick D. Shaw

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PETITIONER'S REPLY IN SUPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, RELIABLE STORES, INC., by its undersigned counsel, pursuant to Section 101.500(e) of the Procedural Rules of the Illinois Pollution Control Board (35 Ill. Adm. Code § 101.500(e)), replies in support of Petitioner's Motion for Summary Judgment, stating as follows:

I. OSFM APPEALS ARE NOT LIMITED TO THE RECORD FILED BY OSFM.

Unlike most administrative appeals, all that the Illinois Environmental Protection Act states about these proceedings is that the OSFM determination is "a final decision appealable to the Illinois Pollution Control Board." (415 ILCS 5/57.9(c)(2)) Section 57.9 of the Act does not cite to, nor incorporate, Section 40 of the Act which is the source of the restriction that at least some hearings must "be based exclusively on the record before the Agency." E.g., 415 ILCS 5/40(b) (RCRA hazardous waste permit hearings).

Not all hearings must be based exclusively on the record, and the Board's procedural rules make this distinction in Part 105: Subpart B and Subpart D hearings are to be based upon the record, while Subpart C and Subpart E are not. These proceedings are governed by Subpart E (Appeal of OSFM LUST Decisions), which do not limit the Board's review to the OSFM's

record. Compare 35 Illl. Adm. Code Part 105, Subpart E with 35 Ill. Adm. Code § 105.214(a) and § 105.415. Since Section 40 of the Act does not apply to these proceedings, there are numerous other implications, including the absence of a decision deadline for the Board. See In re Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130 (First Notice), slip op. at p. 10 (March 16, 2000) ("[T]he AGO commented that UST Fund determinations fall under Section 57.9 of the Act, not Section 40; thus they are probably not subject to the decision deadline set forth in Section 40. The Board agrees that certain UST Fund determinations are appealable to the Board pursuant to Section 57.9 rather than Section 40.")

Even putting aside the important point that the law relied upon by OSFM does not apply to OSFM appeals, the application of that law has never been so severe as that urged herein. This is because the Board is required to hold a hearing to provide petitioners an opportunity to challenge the underlying decision pursuant to principles of fundamental fairness by submitting evidence and argument. EPA v. PCB , 138 Ill. App. 3d 550, 552 (3rd Dist. 1985) (the Board hearing "includes consideration of the record before the [Agency] together with receipt of testimony and other proofs under the panoply of safeguards normally associated with a due process hearing"). Accordingly, the Board has considered information outside the administrative record even though the Agency asserted it did not rely upon them. See Estate of Slightom v. IEPA, PCB 11-25, slip op. at p. 6 (Jan. 19, 2012) (denying agency motion to reconsider order directing the Agency to file all of its documents, including those the Agency purports to not have relied upon in making its decision); KCBX Terminals Co. v. IEPA, PCB 10-110; PCB 11-43 (Consolidated), slip op. at pp. 5-7 (May 19, 2011) (accepting documents in the Agency file that IEPA did not rely upon, so long as they were in existence at the time of the Agency decision).

Thus even under Section 40 proceedings an administrative agency cannot simply ignore information in its possession at the time it made its decision. Such information was before the agency at that time.[1] Consequently, the Board opinions relied upon by OSFM are not relevant as they involved information that was before some other body and not available or known by OSFM. See Sheridan Towers Partnership v. OSFM, PCB 94-106, slip op. at p. 1 (June 23, 1994) ("the files of the City of Chicago's Department of the Environment"); Heiser v. OSFM, PCB 94-377, slip op. at p. 3 (Sept. 21, 1995) (allowing some evidence that does not appear to have been before OSFM, but denying what appear to have been documents concerning the administration of an estate from a Court of Chancery). The material at issue here was created by OSFM during its investigation of the release and thus was before OSFM even if Deanne Lock did not consider it.

In summary, since this proceeding is not governed by Section 40 of the Act which requires decisions to be based exclusively on the record, OSFM's argument is based upon a legally erroneous presumption, and even if such a standard of general applicability governed this proceedings, the information at issue was before OSFM at the time it made its decision and is thus proper for the Board's consideration.

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[1] Federal courts operating under review limited by the record before the agency have not allowed this limitation to be limited to an opportunistic culling by the agency. "The whole administrative record, however, is not necessarily those documents that the agency has compiled and submitted as 'the' administrative record. The 'whole' administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." Thompson v. United States Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis added). "The court cannot adequately discharge its duty to engage in a substantial inquiry if it is required to take the agency's word that it considered all relevant matters." Asarco, Inc. v. U. S. EPA, 616 F.2d 1153, 1160 (9th Cir.1980).

II. OSFM HAS ADMITTED THE TRUTH OF THE FACTS CONTAINED IN THE AFFIDAVIT OF TIM ELMORE.

OSFM attempts to cast doubt on "a conversation that purportedly occurred between Mr. Carben [of the OSFM] and Tim Elmore of Eagle Environmental Consultants, LLC." (Resp. at pp. 6-7) If OSFM wanted to raise any question of fact with respect to the affidavit of Tim Elmore, particularly as it relates to the conversation and the referenced video, OSFM needed to present a counteraffidavit from a person with knowledge. Purtill v. Hess, 111 Ill. 2d 229, 241 (1986) ("facts 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.") Having not presented such a counteraffidavit, the Board must accept as true that Mr. Carben took this video of the leak with his cellphone while explaining the lack of several plugs in the containment below the dispenser pump (Elmore Affidavit, ¶ 7), and that a copy of that video is filed with the Board. (Elmore Affidavit, ¶ 8).

There is nothing in the affidavit of Deane Locke that contradicts any facts relied upon by Petitioner in its motion for summary judgment. She alleges that she lacked any knowledge about anything in the Elmore affidavit, and therefore could not contradict it. Her contribution appears to be entirely premised on the legally erroneous assumptions discussed in the previous section herein.

This is an appeal of an OSFM decision, and Mr. Carben was an agent of OSFM engaged in investigating the release. As such, the Affidavit of Tim Elmore describes an admission by a party opponent, who personally identified the video he created, and such admissions are substantive evidence that his video depicts the leak. Nastasi v. United Mine Workers of America

Union Hosp., 209 Ill.App.3d 830, 841 (5th Dist. 1991) "Photographs, like any evidence, 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." People v. Smith, 152 Ill.2d 229, 263 (1992). "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." People v. Flores, 406 Ill.App.3d 566, 572 (2nd Dist. 2010). Clearly, Mr. Carben had sufficient personal knowledge to identify that he created this video and what it depicts. As an admission, whether or not Mr. Carben is available is irrelevant.

III. OSFM'S INTERPRETATION OF THE STATUTE AND REGULATIONS IMPROPERLY IGNORES WORDS AND PHRASES IN STATUTES AND REGULATIONS AS MERE SURPLUSAGE.

A condition precedent of a "release" is that it enter "into the environment," (415 ILCS 5/3.395). There is no material difference with this and the definition in Title XVI which requires the product to enter "into groundwater, surface water or subsurface soils." (415 ILCS 5/57.2) It is not disputed that "[g]asoline was observed going into the soil through a pipe penetration in the dispenser sump." (R.25)

OSFM is asking the Board to adopt a novel interpretation of "release" that reads the phrases "into the environment" or "into groundwater, surface water or subsurface soils" as mere surplusage, "violat[ing] a fundamental rule of statutory interpretation: no paragraph, sentence, clause, or word should be ignored." Polyvend, Inc. v. Puckorius, 88 Ill.App.3d 778, 782 (1st Dist.

1980). There is no textual support or rationale for the LUST Fund to be concerned with leaks that do not enter the environment.

OSFM does not appear to dispute that releases from a "containment system" are covered under the LUST Program, nor could it. See Township of Harlem v. E.P.A., 265 Ill.App.3d 41, 43 (2nd Dist. 1994) (affirming Board's interpretation of the applicable law and regulations). The purpose of containment systems is to prevent leaks from reaching soil or groundwater. (40 CFR 280.12) OSFM's argument is tantamount to not only disregarding language in the definitions of "release," but removing containment systems entirely from coverage, as no containment system is itself the original source of petroleum products, but is designed to contain leaks originating elsewhere. The phrase "containment system, if any" should not be rendered mere surplusage as well.

The LUST Program is a remediation program, and one of the justifications given for not covering leaks from dispenser nozzles is that they are visible and can be cleaned-up quickly. Township of Harlem v. E.P.A., 265 Ill.App.3d 41, 45 (2nd Dist. 1994). As a practical matter, it would make little sense to utilize the significant planning and investigation activities for such surface spills, let alone internal leaks that never enter the environment. Yet, the absurdity of OSFM's position is to pretend that the LUST Fund's focus is more on the internal leaks that may never reach the environment, as opposed to underground releases from containment systems, which can, as they did here, migrate underground to neighboring property. A statutory interpretation that leads to such absurd results should also be avoided strenuously.

IV. OSFM REGULATIONS INCLUDE DISPENSERS WITHIN THE DEFINITION OF UST SYSTEMS.

OSFM issued a notice of violation, ordering the tanks, lines and tank monitor to be tested, as well as the removal and repair of the containments. (R.6 - R.7) Petitioner engaged a contractor to comply with the order. (R.10 - R11) The obvious conclusion to draw from this is that the containments were the source of the release and needed to be repaired immediately. Indeed, Board regulations require the owner/operator to "[t]ake immediate action to prevent any further release of the regulated substance to the environment." (35 Ill. Adm. Code §734.210(a)(1)) Petitioner's actions are entirely consistent with understanding the containments had been the source of a release and must be addressed to prevent any future recurrence.

OSFM argues that because OSFM regulations require a permit to repair an underground storage tank system, and unless a permit was obtained for this work, it cannot be argued that there was a release from an underground storage tank system. The fallacious reasoning here appears to be if a person does not register his or her car, then its not a car.

The larger issue here is that Board regulations are those relevant to whether or not there has been a release from a UST system. Township of Harlem v. E.P.A., 265 Ill.App.3d 41, 45 (2nd Dist. 1994). OSFM's regulations, on the other hand, include dispensers within its definition of "underground storage tank systems." Specifically, an "underground storage tank system" includes connected "ancillary equipment" which includes "pumps" and "dispensers." (41 Ill. Adm. Code 174.100 (definitions)) If OSM regulations and compliance therewith are relevant in deciding whether there has been a release from an underground storage tank system, then the distinction OSFM seeks to draw between the dispenser and the containment system is

meaningless. According to OSFM regulations dispensers are part of the underground storage tank system, and its decision would be erroneous nonetheless.

CONCLUSION

The issue for the Board to decide is whether the record and affidavit demonstrate there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. (35 Ill. Adm. Code § 101.516(b)) This procedure is authorized by the Board's rules and by its terms is not limited to the record filed by OSFM. There are no material factual disputes, and at most there are competing characterizations of the facts in the record, which the Board can easily read itself without extended explanations from the parties. While OSFM may or may not file its motion some day, there is no just reason for the Board to wait for it to do so.

By urging this motion for summary judgment, Petitioner does not waive any future right to conduct discovery or subpoena witnesses for hearing in the event the motion is denied. It strongly appears to Petitioner that whether there has been a release from an underground storage tank system can be determined from this motion for summary judgment, and if so, engagement in the Leaking Underground Storage Tank program can proceed.

WHEREFORE, Petitioner, RELIABLE STORES, 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

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