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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State of Illinois Building, Suite 11-500
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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 Response in Opposition to Respondent's Cross-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 12th day of August 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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RELIABLE STORES, INC., Petitioner,	)	
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PETITIONER'S MOTION FOR LEAVE TO FILE RESPONSE IN OPPOSITION TO RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT INSTANTER

NOW COMES Petitioner, RELIABLE STORES, INC., by its undersigned counsel, pursuant to Section 101.516(a) of the Procedural Rules of the Illinois Pollution Control Board (35 Ill. Adm. Code § 101.516(a)), and move for leave to file a response instanter opposing Resondent's Cross- Motion for Summary Judgment, stating as follows:

1. On June 5, 2020, Petitioner filed Petitioner's Motion for Summary Judgment.

2. Thirty-four days later, on July 9, 2020, Respondent filed Respondent's Response to Petitioner's Motion for Summary Judgment.

3. On July 23, 2020, Petitioner filed Petitioner's Motion for Leave to File Reply in Support of Petitioner's Motion for Summary Judgment Instanter. As of this date, the motion has not been ruled upon.

4. On the same date, Respondent filed Respondent's Cross-Motion for Summary Judgment.

5. Because of the simultaneous filings, Petitioner did not have time to edit its Reply to separate those issues that might better be addressed in a Response.

6. Illinois Pollution Control Board rules authorize the filing of a response to a

motion for summary judgment within 14 days of service, but the deadline may be extended upon written motion. (35 Ill. Adm. Code 101.516(a))

7. Undersigned counsel inadvertently mis-calendered the deadline by a week and had intended to file a response to the cross-motion on August 13, 2020 because he thought that was the deadline.

8. There are no pending deadlines or hearing scheduled, and Petitioner is unaware of any prejudice that would be caused by a small extension of time to file a response.

9. Petitioner would be significantly prejudiced if not able to respond to the cross-motion for summary judgment, and it would be fundamentally unfair if Respondent is given an extra twenty days to respond to Petitioner's motion for summary judgment, and Petitioner not allowed an extra six days.

10. Many of the matters Petitioner wishes to raise in response, were previously addressed in reply. However, leave to file that reply has not been given as of this date, so Petitioner will not assume it will be granted. To assist the Board, the attached response identifies those arguments that are substantially the same and incorporates them to avoid repetition.

WHEREFORE, Petitioner, RELIABLE STORES, INC., requests that the Board authorize permission to file the attached response 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 RESPONSE IN OPPOSITION TO RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, RELIABLE STORES, INC., by its undersigned counsel, pursuant to Section 101.516(a) of the Procedural Rules of the Illinois Pollution Control Board (35 Ill. Adm. Code § 101.516(a)), responds in opposition to Respondent's Cross-Motion for Summary Judgment, stating as follows:

I. RESPONDENT OMITS MATERIAL FACTS FROM ITS SUMMARY OF FACTS.

Respondent's Summary of Facts is substantially the same as in Respondent's Response to Petitioner's Motion for Summary Judgment. Tellingly, however, Respondent omits two material facts from its previous summary:

> **Mr. Carben stated that "[i]t appears both dispenser containments are leaking because the gasoline is flowing out the bottom of the dispenser pans." R4.**

(Respondent's Response, at p. 2)

> **On that same day, Mr. Carben noted 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.**

(Respondent's Response, at p. 3)

There can be no question that the record demonstrates that product was leaking out of the dispensing containment into the soils, this fact is in the OSFM onsite investigation report as Respondent previously recognized as material in its previous summary.

While Respondent's Cross-Motion recognizes that the application as submitted stated that product was "observed going into the soil through a pipe penetration in the dispenser sump" (Cross-Motion, at p. 3), this concession is entirely ignored in the argument. (Cross-Motion, at p. 3) In particular, Respondent shamelessly argues to the Board:

> **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)**

(Cross-Motion, at p.7)

Petitioner did not raise this contention for the first time in this appeal to the Board, it was raised in the application as submitted to OSFM. (R.25) Morever, OSFM's own investigation disclosed that product had entered the soil through the containment sump, a fact acknowledged by Respondent in its previous filing, but purposefully ignored for its cross-motion for summary judgment.

This Cross-Motion for Summary Judgment is defective for failing to address undisputed facts in the record, including those identified in the application as submitted.

II. STANDARD OF REVIEW

The Board's procedural rules for OSFM appeals are notably sparse, and the Board does not appear to have made a substantive ruling on such appeals for almost twenty years, leaving little precedent. The most recent case appears to have been Herr Petroleum Corporation v.

OSFM, PCB 03-86 (March 20, 2003), in which the Board resolved what it deemed to be a motion for summary based entirely on rules governing summary judgment motions, which can be readily summarized as the movant has the burden to "show" that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, and this motion can be supported by the record, as well as pleadings, depositions, and affidavits. Id., slip op. at p. 5. This is perhaps the best place to leave matters, allowing the question for the Board to simply be whether the evidence shows there was a release from an underground storage tank system.

Petitioner previously disputed Respondent's contention that this proceeding is limited to the record before OSFM, and that argument is incorporated herein without reiteration. See Petitioner's Reply in Support of Petitioner's Motion for Summary Judgment, at pp. 1-3.

Respondent argues that the standard of review in these proceedings is "whether the application, as submitted to OSFM, demonstrates compliance with the Act and Board regulations." (Cross-Motion, at p. 5) Petitioner has no objection to this standard since the application expressly stated that product was "observed going into the soil through a pipe penetration in the dispenser sump" (R.25), and OSFM simply ignored that fact and continues to ignore it. Petitioner does object to any unconventional understanding of "application, as submitted" because OSFM has not promulgated a rule or regulation for the "Eligibility and Deductibility Determination" form, as was required over twenty-five years ago. 415 ILCS 5/57.9(c)(1) (added by P.A. 88-496, § 15 (effective Sept. 13, 1993)) It is not sufficient to submit an affidavit from an OSFM employee asserting a general standard of practice in making determinations without the statutorily required rulemaking. See Ackerman v. Illinois Department of Public Aid, 128 Ill.App.3d 982, 984 (3rd Dist. 1984) (practice of telephone conference in lieu

of hearing was invalid rule).

As with cases involving appeals of Agency decisions, the present process constitutes an "administrative continuum" which is only complete after the Board rules. Illinois E.P.A. v. Illinois Pollution Control Bd., 138 Ill.App.3d 550, 551 (3rd Dist. 1985). The cases cited by Respondent seeking deference are inapposite, as those involve agencies that are the final decisionmaker. OSFM did not issue "detailed findings of fact and conclusions of law" id., and accordingly there is no basis for deference and in particular no basis for deference to what amounts to the Attorney General's Office post hoc rationalizations and an affidavit created for this proceeding.

III. THE AFFIDAVIT OF DEANNE LOCK IS NOT BASED UPON ANY PERSONAL KNOWLEDGE OF ANY RELEVANT FACT.

The Affidavit of Deanne Locke essentially has two components: (1) she is not aware of the conversations between Randal Carben and Tim Elmore and the video Carben took of the release, and (2) she had phone conversations with Randal Carben and Brian Morin.

This is an appeal of an OSFM decision (415 ILCS 5/57.9), not of any particular OSFM employee, and the purpose of hearings before the Board is to challenge the basis of that decision. Environmental Protection Agency v. Pollution Control Board, 138 Ill. App. 3d 550, 551-52 (3rd Dist. 1985). That Locke was not aware of the evidence is not exculpatory, it supports the notion that OSFM's decision was in error at least in part because it failed to consider evidence in its own possession.

Regarding the phone conversations, they are based upon improper hearsay testimony.

Paragraphs 10 and 11 of Lock's affidavit appear to be based upon these telephone conversations, as they do not appear anywhere in the record in any independent context from telephone conversations. Locke does not claim to have been to the site, viewed the release, seen a video or had any other basis for alleging knowledge in paragraphs 10 and 11. Statements made by others to Locke are clearly hearsay and should be disregarded as not based upon personal knowledge. Heiser v. OSFM, PCB 94-377, slip op. at 4 (Sept. 21, 1995) (following Supreme Court Rule 191(a), which requires the affiant to allege facts, not conclusions, and if all of the facts "are not within the personal knowledge of one person, two or more affidavits shall be used.")

To the best of Respondent's knowledge, Carben remains an employee of OSFM, and Morin has been employed with OSFM since January 2, 2020. There is little reason to believe that Carben would change his statements from his inspection report, nor Morin change his position from the eligibility and deductibility application he submitted on behalf of Reliable Stores. Both indicated that the leak originated from above the containment sump, and entered the soil through a pipe penetration in the sump. (R.4; R.25) That Lock alleges to have only been told the former, and not the latter does not mean the latter did not happen. Since Lock lacks personal knowledge of what happened, her affidavit is insufficient to contradict the prior statements of Carben and Morin.

Respondent misleadingly claims that Lock made a "record of that phone call." (Cross-Motion, at p. 3) There is no evidence that Lock made a record of any phone call; there is evidence that Lock told OSFM's counsel about the phone calls amidst what appear to be a lengthy exchanges seeking legal advise. (R.91 - R.92) There is no evidence of when the phone conversation took place in respect to the e-mails, and clearly these communications with counsel

were in anticipation of litigation. This context significantly contrasts with Carben's contemporaneous record of his investigation of the release. Lock's redacted e-mails are not records of a telephone conversation, but the type of summary prepared after the event for purposes of litigation generally deemed untrustworthy. People ex rel. Schacht v. Main Ins. Co., 114 Ill.App.3d 334, 344 (1st Dist. 1983). While Respondents are not asking the Board to strike matters previously allowed into the administrative record over Petitioner's objections, the Board should refuse to permit such unreliable hearsay to control over Carben's contemporaneous investigation record and Morin's application as submitted to OSFM.

In summary, Lock's affidavit alleges numerous things she does not know, and things that she was told by Carben and Morin that appear to differ from what they stated previously. The former is reasonable and explains why the OSFM's decision is erroneous. As to the latter, this is simply hearsay that should not be considered.

IV. THE RELEASE ENTERED THE ENVIRONMENT FROM THE "CONTAINMENT SYSTEM," WHICH IS A COMPONENT OF THE UNDERGROUND STORAGE TANK SYSTEM.

In response to Respondent's arguments that the release was not from an underground storage tank system, Petitioner incorporates by reference its arguments in its Motion for Summary, at pages 8 - 11, and in Petitioner's Reply in Support of Petitioner's Motion for Summary Judgment, at pages 5 - 6.

V. BOARD REGULATIONS DETERMINE WHETHER THERE HAS BEEN A RELEASE, AND IF OSFM REGULATIONS APPLY, THEN A LEAK FROM A DISPENSER IS A RELEASE FROM A UST SYSTEM.

In response to the allegations concerning a permit to perform work on a UST system, Petitioner incorporates by reference its arguments in Petitioner's Reply in Support of Petitioner's Motion for Summary Judgment, at pages 7 - 8.

CONCLUSION

As shown in the first section of this Response, OSFM's attempt to demonstrate that there are no genuine issues of material fact is based upon a strategy of ignoring facts in the record as if they did not exist. These facts have not disappeared, nor does the Affidavit of Locke supply any facts based upon personal knowledge. This Cross-Motion should be denied for failure to show that there is no genuine issue of material fact.

WHEREFORE, Petitioner, RELIABLE STORES, prays that the Cross-Motion for Summary Judgment be denied, 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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