

NOV 03 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

MORTON F. DOROTHY,

Complainant,

v.

FLEX-N-GATE CORPORATION,
an Illinois corporation,

Respondent.

PCB No. 05-49

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

Mr. Morton F. Dorothy
804 East Main
Urbana, Illinois 61802
(VIA FIRST CLASS MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original and nine copies each of **RESPONSE TO COMPLAINANT'S MOTION TO ACCEPT FOR HEARING AND FOR EXPEDITED DISCOVERY and RESPONSE TO COMPLAINANT'S MOTION TO JOIN AGENCY AS PARTY IN INTEREST AND TO EXTEND TIME TO RESPOND TO MOTION TO DISMISS**, copies of which are herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

Dated: November 1, 2004

By: 

One of Its Attorneys

Thomas G. Safley
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

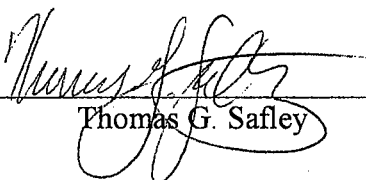
CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached
RESPONSE TO COMPLAINANT'S MOTION TO ACCEPT FOR HEARING AND
FOR EXPEDITED DISCOVERY and RESPONSE TO COMPLAINANT'S MOTION
TO JOIN AGENCY AS PARTY IN INTEREST AND TO EXTEND TIME TO
RESPOND TO MOTION TO DISMISS upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Mr. Morton F. Dorothy
804 East Main
Urbana, Illinois 61802

by depositing said documents in the United States Mail in Springfield, Illinois, postage
prepaid, on November 1, 2004.


Thomas G. Safley

GWST:003/Fil/NOF and COS – Response to Accept for Hearing

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CLERK'S OFFICE

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PCB 05-49

**RESPONSE TO COMPLAINANT'S MOTION
TO ACCEPT FOR HEARING AND FOR EXPEDITED DISCOVERY**

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"),
by and through its attorneys, HODGE DWYER ZEMAN, and for its Response to
Complainant's Motion to Accept for Hearing and for Expedited Discovery
("Complainant's Motion"), states as follows:

I. INTRODUCTION

1. On September 8, 2004, Complainant filed a Complaint against Flex-N-Gate with the Illinois Pollution Control Board ("Board") and mailed that Complaint to Flex-N-Gate. See Complaint, Proof of Service.

2. On October 7, 2004, Flex-N-Gate filed its Motion to Dismiss Complainant's Complaint.

3. The basis for Flex-N-Gate's Motion to Dismiss is that "each Count of Complainant's Complaint fails to state a claim upon which relief can be granted." Motion to Dismiss at 2, ¶5.

4. On October 13, 2004, Complainant mailed Complainant's Motion to counsel for Flex-N-Gate by U.S. Mail. See Complainant's Motion, Certificate of Service.

5. Flex-N-Gate timely files this Response to Complainant's Motion.

II. THE BOARD CANNOT ACCEPT THIS MATTER FOR HEARING BEFORE IT DECIDES FLEX-N-GATE'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM.

6. Complainant first moves the Board to accept this matter for hearing before ruling on Flex-N-Gate's Motion to Dismiss. Complainant's Motion at 1, 3.

7. Section 31(d)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/1, et seq. ("Act"), provides in relevant part that: "[u]nless the Board determines that such complaint [that is, a complaint filed by a party other than the State] is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein." 415 ILCS 5/31(d)(1).

8. "[T]he Board must make a 'frivolous and duplicitous' determination in [a] private citizen enforcement [action] in order to accept th[e] case for hearing pursuant to the Act and the Board's regulations." White Glove of Morton Grove Ill. v. Amoco Oil Co., PCB No. 95-113, 1995 Ill. ENV LEXIS 737, at *1 (Ill.Pol.Control.Bd. July 20, 1995) (citations omitted).

9. "'Duplicitous' or 'Duplicative' means the matter is identical or substantially similar to one brought before the Board or another forum." 35 Ill. Admin. Code § 101.202.

10. “‘Frivolous’ means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief.” Id. (emphasis added).

11. As noted above, the basis of Flex-N-Gate’s Motion to Dismiss is that “each Count of Complainant’s Complaint fails to state a claim upon which relief can be granted.” Motion to Dismiss at 2, ¶5 (emphasis added).

12. If Flex-N-Gate is correct, the Complaint, by definition, is “frivolous,” and the Board cannot accept it for hearing. See 35 Ill. Admin. Code § 101.202; 415 ILCS 5/31(d)(1); White Glove of Morton Grove Ill., 1995 Ill. ENV LEXIS 737, at *1.

13. Complainant asserts that “[t]he Board normally accepts non-citizen enforcement cases for hearing without waiting for resolution of motions to dismiss.” Complainant’s Motion at 1, ¶7.

14. However, Complainant does not cite any precedent or other authority for this assertion. See Complainant’s Motion.

15. Flex-N-Gate has examined numerous opinions of the Board in other citizen enforcement cases in which the Board ruled on Motions to Dismiss, and Flex-N-Gate has not located any decisions in which the Board “accept[ed] . . . [such] cases for hearing without waiting for resolution of motions to dismiss,” as Complainant asserts. See id.

16. This makes sense, because, as noted above, a complaint that fails to state a cause of action is, by definition, frivolous, and must be dismissed, and thus, the Board must decide a motion to dismiss to determine whether a complaint is frivolous before the Board can accept the complaint for hearing.

17. For the reasons stated above, the Board should deny Complainant's Motion to accept this case for hearing before the Board rules on Flex-N-Gate's Motion to Dismiss, and, instead, should rule on Flex-N-Gate's Motion to Dismiss before considering whether to accept this case for hearing.

III. THE BOARD SHOULD DENY COMPLAINANT'S MOTION FOR EXPEDITED DISCOVERY.

18. Complainant next moves the Board to allow certain expedited discovery in this matter on the grounds that:

- (a) Flex-N-Gate allegedly has lied to the Occupational Safety and Health Administration ("OSHA");
- (b) Flex-N-Gate made these alleged lies "knowingly";
- (c) in light of these alleged lies, Complainant "believes" that Flex-N-Gate "intends" to "alter or destroy" documents relevant to Complainant's claims; and,
- (d) Complainant needs extraordinary expedited discovery to obtain copies of these documents before Flex-N-Gate destroys them.

See Complainant's Motion at 1-3.

19. Specifically, Complainant makes the following allegations against Flex-N-Gate:

- (a) "[t]he incident alleged in the complaint also involved the violation of rules promulgated by [OSHA]";
- (b) Flex-N-Gate made certain statements to OSHA regarding "the incident";
- (c) these statements "are false[,] and respondent knew them to be false at the time they were made";
- (d) "The Occupational Safety and Health Act provides that: 'Whoever knowingly makes any false statement [to OSHA] . . . shall, upon

conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both”;

- (e) Flex-N-Gate’s “response to OSHA implies that respondent intends to deny [certain] allegations of [Complainant’s] complaint in this case”;
- (f) “Complainant knows of the existence of certain documents” allegedly related to “the incident” “which are relevant to the truth” of the allegations which Complainant assumes Flex-N-Gate intends to deny;
- (g) “Complainant has copies of some, but not all of these documents”;
- (h) “Complainant believes that, in light of the false statements made to OSHA, respondent intends to alter or destroy the incriminating documents before they can be seized by OSHA or discovered in this case”; and,
- (i) “Complainant does not wish to list the documents at this time, lest it give respondent a list of documents to destroy or alter.”

Complainant’s Motion at 2-3, ¶¶8-12, 14-16 (emphasis added).

20. In light of these allegations, Complainant moves the Board to:

authorize the hearing officer to preside over an expedited initial round of discovery aimed at securing from respondent [certain] documents . . . without complainant having to disclose the identity of the documents to respondent sufficiently far in advance to allow for the destruction or alteration of the documents, . . . [and to] authorize the hearing officer to conduct an expedited hearing on discovery, at which complainant and respondent’s attorney will meet with the hearing officer to discuss the scope of discovery[, at which hearing] [t] hearing officer would enter an order for the production of documents, which order would be given to respondent’s attorney[,] after which] Complainant and respondent’s attorney would then proceed directly to the facility to obtain the documents, without affording the respondent an advance list of the documents.

Complainant’s Motion at 3, ¶¶17-18.

21. Complainant's allegations are preposterous, prejudicial, and improper, and, for the following reasons, the Board should strike these allegations and deny Complainant's Motion for Expedited Discovery.

A. Flex-N-Gate has Not Made any False Statement to OSHA and would Not Alter or Destroy Documents.

22. First, for the record, Flex-N-Gate specifically denies that it has made false statements to OSHA, as Complainant alleges. See Affidavit of Denny Corbett, attached hereto as Exhibit A,¹ at ¶5.

23. Flex-N-Gate further denies that it would, in any circumstance, alter or destroy documents as Complainant alleges. Id. at ¶6; Affidavit of Jim Dodson, a copy of which is attached hereto as Exhibit B, at ¶15; original attached as Exhibit A to Flex-N-Gate's Response to Complainant's Motion to Join Agency as Party in Interest and to Extend Time to Respond to Motion to Dismiss, filed herewith.

B. Complainant's Allegations are Scandalous, Impertinent, and Prejudicial, and the Board should Strike Them.

24. Second, Complainant's allegations that Flex-N-Gate knowingly made false statements to OSHA, a crime, and that Flex-N-Gate will alter or destroy documents in this case, are scandalous, impertinent, and prejudicial, and the Board should strike them.

25. Illinois Courts have held that it is improper for litigants in Illinois to make accusations in their filings such as Complainant has made against Flex-N-Gate, and that such allegations are "scandalous and impertinent" and should be stricken. See Benitez, et

¹ Flex-N-Gate has filed herewith a facsimile copy of this Affidavit, and the undersigned will substitute the original copy of this Affidavit when it is received.

al v. KFC National Mgmt. Co., 714 N.E.2d 1002, 1037 (2d Dist. 1999) (finding that “plaintiffs’ allegations in their second amended complaint that employee-defendants sold tainted food to customers and spied on female customers were ‘scandalous and impertinent’” and that it was proper to strike those allegations). Accord, Biggs v. Cummins, 158 N.E.2d 58, 59 (Ill. 1959) (striking the appellant’s brief as containing “scandalous and impertinent material,” where the appellant accused a judge of falsifying a court record, the Attorney General of withholding evidence, the Attorney General’s assistant of “altering the record,” and an assistant Attorney General of making “false and untrue statements to the court.”)

26. As discussed below, Complainant’s allegations that Flex-N-Gate made false statements to OSHA, and did so knowingly, are conclusory and are not supported by any facts.

27. Further, Complainant’s “belief” that Flex-N-Gate will alter or destroy documents in this case is based solely on these conclusory, unsupported allegations, and constitutes mere speculation that is insufficient to support a decision by the Board granting Complainant’s Motion. See Affidavit in Support of Complainant’s Motion, at ¶5.

28. Complainant clearly makes these allegations to prejudice Flex-N-Gate before the Board by trying to convince the Board that Flex-N-Gate is deceitful.

29. The Board cannot allow such improper and prejudicial statements, which allege intentional deceit and criminal activity by Flex-N-Gate, with no supporting facts whatsoever, to stand.

30. Therefore, as in Benitez and Biggs, the Board should strike paragraphs 10, 11, 15, and 16 of Complainant's Motion, and paragraphs 3, 5, and 6 of Complainant's Affidavit in Support of that Motion.

C. Complainant's Conclusory Affidavit is Insufficient to Support Complainant's Request for Relief.

31. Third, the central allegation of Complainant's Motion – that statements made by Flex-N-Gate to OSHA “are false, and respondent knew them to be false at the time they were made” – is conclusory and not supported by fact, and therefore, the Board must disregard it.

32. In Motions filed with the Board, “[f]acts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure.” 35 Ill. Admin. Code § 101.504.

33. Complainant does submit an affidavit in support of his Motion, but the operative paragraph of that affidavit, paragraph 10, merely states the conclusion that “statements” allegedly “made to OSHA . . . are false, and respondent knew them to be false.” See Affidavit in Support of Complainant's Motion, ¶10.

34. The Board has long held that it “[can] not grant relief . . . on the basis of a mere conclusion” in an affidavit. EPA v. Rhodes, PCB No. 71-53, 1972 Ill. ENV LEXIS 169, at *1 (Ill.Pol.Control.Bd. Jan. 24, 1972).

35. Indeed, in recent cases, the Board has stricken conclusory allegations from affidavits filed with it. See, e.g., 2222 Elston LLC v. Purex Indus., Inc., et al., PCB No. 03-55, 2003 Ill. ENV LEXIS 359, at **17-19 (Ill.Pol.Control.Bd. June 19, 2003) (striking an affidavit that was “conclusory”); Heiser v. Office of the State Fire Marshal, PCB No.

94-377, 1995 Ill. ENV LEXIS 895, at *9 (Ill.Pol.Control.Bd. Sept. 21, 1995)(striking from an affidavit a statement that was “self-serving and conclusory.”)

36. Complainant does not present any facts to support his self-serving and conclusory assertion that statements allegedly made by Flex-N-Gate to OSHA were “false.” See Affidavit in support of Complainant’s Motion.

37. Complainant likewise does not present any facts to support his self-serving and conclusory assertion that Flex-N-Gate “knew [the alleged statements] to be false at the time they were made.” See id.

38. Thus, the Board should disregard Complainant’s conclusory assertions and deny Complainant’s Motion that relies on them.

D. Complainant Does Not Even Provide the Board Copies of the Documents in which Flex-N-Gate Allegedly Made False Statements.

39. Fourth, Complainant did not even provide the Board with copies of the documents in which Flex-N-Gate allegedly made false statements to OSHA for the Board to review and evaluate.

40. Rather, Complainant merely asserted in his affidavit that Flex-N-Gate made certain statements in documents submitted to OSHA, without attaching copies of those documents. See Affidavit in Support of Complainant’s Motion, at ¶2.

41. It is improper for Complainant to ask the Board to award the extraordinary relief that Complainant requests based on documents that the Board has never seen.

E. The Board should Consider the Background of Complainant's Relationship to Flex-N-Gate.

42. Fifth, in order to make an informed decision regarding Complainant's Motion, the Board further should understand the background of Complainant's relationship to Flex-N-Gate.

43. Complainant is a former employee of Flex-N-Gate. Affidavit of Susan Linville, attached hereto as Exhibit C,² at ¶4.

44. Before the Complaint in this matter was filed, Complainant asked Flex-N-Gate to re-hire him, and Flex-N-Gate declined to do so. Id. at ¶5.

F. There is No Need for Discovery at this Time.

45. Finally, there is no need for discovery in this matter at this time.

46. As set forth above, there is no basis to conclude that Flex-N-Gate intends to destroy or alter documents, so Complainant's Motion for discovery based on that supposition is moot.

47. Further, if the Board grants Flex-N-Gate's Motion to Dismiss, no discovery will be needed in the case.

48. Thus, the Board should not require Flex-N-Gate to incur the costs of the extraordinary discovery that Complainant requests.

G. The Board Should Deny Complainant's Motion.

49. To summarize, Complainant asks the Board to find that:

- (a) Flex-N-Gate lied to a federal governmental agency, OSHA;
- (b) Flex-N-Gate did so knowingly;

² Flex-N-Gate has filed herewith a facsimile copy of this Affidavit, and the undersigned will substitute the original copy of this Affidavit when it is received.

- (c) Flex-N-Gate committed a crime;
- (d) Flex-N-Gate intends to "alter or destroy" documents in this case; and,
- (e) therefore, Complainant should be allowed extraordinary discovery measures, and Flex-N-Gate should bear the costs of those measures, in order to allow Complainant to obtain copies of those documents before they are altered or destroyed.

See Complainant's Motion.

50. Complainant asks the Board to reach these conclusions:

- (a) based only on Complainant's self-serving conclusions that statements allegedly made by Flex-N-Gate to OSHA are "false" and that Flex-N-Gate "knew them to be false," and Complainant's speculation that Flex-N-Gate will destroy documents in this case;
- (b) with no facts to support these conclusions or this speculation; and,
- (c) without providing the Board copies of the documents in which Flex-N-Gate allegedly made false statements.

51. And, Complainant is a disgruntled former employee of Flex-N-Gate.

52. Given these circumstances, Complainant's Motion and Affidavit in support thereof are patently insufficient to allow the Board to make the findings that Complainant urges, and thus, do not support the relief Complainant requests.

53. Section 101.616(g) of the Board's procedural rules provides that "[i]f any person serves any request for discovery . . . for any improper purpose, such as to harass or to cause unnecessary delay or increase in the cost of litigation, . . . the Board . . . may impose sanctions." 35 Ill. Admin. Code § 101.616(g).

54. Flex-N-Gate does not move the Board for sanctions, but does submit that, given the discussion set forth above, Complainant has filed his Motion in order to harass Flex-N-Gate and to increase the cost to Flex-N-Gate of this litigation.

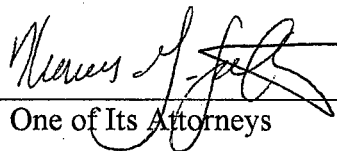
55. For the reasons stated above, the Board should deny Complainant's Motion for Expedited Discovery.

IV. CONCLUSION

WHEREFORE, Respondent FLEX-N-GATE CORPORATION respectfully prays that the Illinois Pollution Control Board deny Complainant's Motion to Accept for Hearing and for Expedited Discovery, and that the Board award Flex-N-Gate such other relief as the Board deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

By: 
One of Its Attorneys

Dated: November 1, 2004

Thomas G. Safley
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

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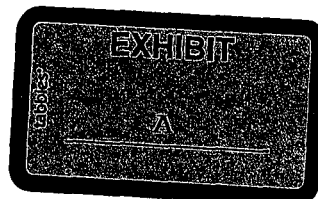
Respondent.

PCB 05-49

AFFIDAVIT OF DENNY CORBETT

Denny Corbett, being first duly sworn, deposes and states under oath, and if sworn as a witness, would testify, as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I am employed as Urbana Safety Manager for Flex-N-Gate Corporation ("Flex-N-Gate").
3. I have reviewed Complainant's Motion to Accept for Hearing and for Expedited Discovery in this matter, and make the following statements in response thereto.
4. As Urbana Safety Manager for Flex-N-Gate, I have made or otherwise been involved in communications with the federal Occupational Safety and Health Administration ("OSHA") with regard to the incident at issue in this matter.
5. Flex-N-Gate specifically denies that it has made false statements to OSHA, as Complainant alleges in his Motion to Accept for Hearing and for Expedited Discovery.
6. Flex-N-Gate takes Complainant's lawsuit, and Flex-N-Gate's obligation to preserve documents related to Complainant's allegations in that lawsuit, very seriously, and

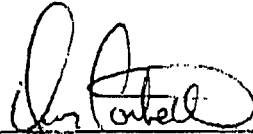


Flex-N-Gate denies that it would, in any circumstance, alter or destroy documents as

Complainant alleges in his Motion to Accept for Hearing and for Expedited Discovery.

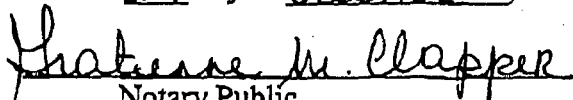
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

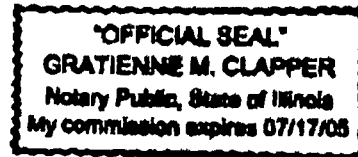
FURTHER AFFIANT SAYETH NOT.



Denny Corbett

Subscribed and sworn to before
me this 29 day of October, 2004.


Notary Public



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Respondent.

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AFFIDAVIT OF JAMES R. DODSON

James R. Dodson, being first duly sworn, deposes and states under oath, and if sworn as a witness, would testify, as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I am employed as Corporate Environmental Director for Flex-N-Gate Corporation ("Flex-N-Gate").
3. I have reviewed Complainant's Motion to Join Agency as Party in Interest and to Extend Time to Respond to Motion to Dismiss ("Motion to Join Agency"), and Complainant's Motion to Accept for Hearing and for Expedited Discovery, filed in this matter, and make the following statements in response thereto.
4. At the facility in question in this matter, Flex-N-Gate produces several different wastestreams, some of which are "hazardous" under RCRA.
5. However, Flex-N-Gate relies on exemptions from RCRA permitting requirements with regard to each of its wastestreams that is "hazardous."
6. Specifically, Flex-N-Gate relies on different exemptions for different wastestreams, as appropriate depending on the circumstances.



7. For example, some wastestreams that Flex-N-Gate produces are treated by what Flex-N-Gate considers to be a “wastewater treatment unit” under RCRA, and thus, Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements.

8. Other wastestreams that Flex-N-Gate produces are stored on-site for less than 90 days and then shipped off-site for disposal, and Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements under 35 Ill. Admin. Code § 722.134(a).

9. Thus, Flex-N-Gate does not now claim, nor has it ever claimed, “that the facility operated” pursuant to just one exemption from RCRA permitting requirements (“Sections 703.123(a) and 722.143(a)” or otherwise), as Complainant alleges in paragraph one his Motion to Join Agency.

10. Likewise, Flex-N-Gate does not now claim, nor has it ever claimed, “that the facility is exempt from the RCRA permit requirements based on the . . . ‘wastewater treatment unit’ exclusion[,]” as Complainant alleges in paragraph five of his Motion to Join Agency.

11. Rather, Flex-N-Gate always has considered different wastestreams at the facility at issue to be exempt from RCRA permitting requirements under different exemptions to those requirements.

12. With regard to the wastestream at issue in this case, Flex-N-Gate has never claimed to the Illinois Environmental Protection Agency (“Illinois EPA”) or to anyone else that its actions relating to such wastestream are exempt from RCRA permitting requirements “pursuant [to] Sections 703.123(a) and 722.134(a).”

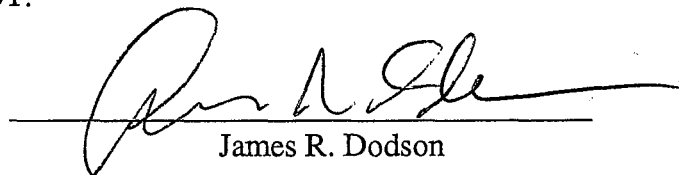
13. Rather, Flex-N-Gate always has considered its actions relating to this wastestream to be exempt from RCRA permitting requirements under the Wastewater Treatment Unit Exemption, and has never claimed otherwise to the Illinois EPA.

14. Further, it is Flex-N-Gate's understanding that the Illinois EPA, if it has not formally determined that Flex-N-Gate's position on this issue is correct, at least understands this to be Flex-N-Gate's position.

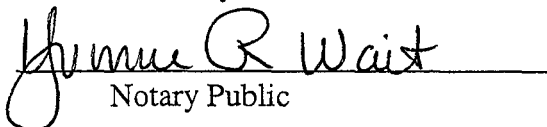
15. Flex-N-Gate takes Complainant's lawsuit, and Flex-N-Gate's obligation to preserve documents related to Complainant's allegations in that lawsuit, very seriously, and Flex-N-Gate denies that it would, in any circumstance, alter or destroy documents as Complainant alleges in his Motion to Accept for Hearing and for Expedited Discovery.

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.

FURTHER AFFIANT SAYETH NOT.


James R. Dodson

Subscribed and sworn to before
me this 29th day of OCTOBER, 2004.


Notary Public

**YVONNE R WAIT
NOTARY PUBLIC STATE OF INDIANA
FOUNTAIN COUNTY
MY COMMISSION EXP. SEPT 23, 2009**

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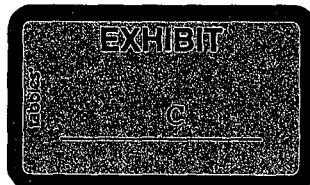
Respondent.

PCB 05-49

AFFIDAVIT OF SUSAN LINVILLE

Susan Linville, being first duly sworn, deposes and states under oath, and if sworn as a witness, would testify, as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I currently am employed as Corporate Benefits Manager for Flex-N-Gate Corporation ("Flex-N-Gate").
3. I previously was employed as Human Resources Manager for Flex-N-Gate.
4. Morton F. Dorothy is a former employee of Flex-N-Gate's facility in Urbana, Illinois.



5. Before September 8, 2004, Mr. Dorothy asked Flex-N-Gate to rehire him,
and Flex-N-Gate declined to do so.

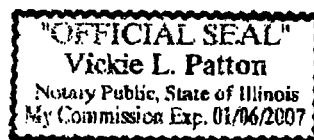
*Under penalties as provided by law pursuant to Section 1-109
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and correct, except as to matters therein stated to be on
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undersigned certifies as aforesaid that he verily believes
the same to be true.*

FURTHER AFFIANT SAYETH NOT.


Susan Linville

Subscribed and sworn to before
me this 1 day of November, 2004.


Notary Public



GWST:003/Fil/Affidavit of Susan Linville

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PCB 05-49

**RESPONSE TO COMPLAINANT'S MOTION TO JOIN AGENCY AS PARTY IN
INTEREST AND TO EXTEND TIME TO RESPOND TO MOTION TO DISMISS**

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"),
by and through its attorneys, HODGE DWYER ZEMAN, and for its Response to
Complainant's Motion to Join Agency as Party in Interest and to Extend Time to
Respond to Motion to Dismiss ("Motion to Join Agency"), states as follows:

I. INTRODUCTION

1. On September 8, 2004, Complainant filed a Complaint against Flex-N-Gate with the Illinois Pollution Control Board ("Board") and mailed that Complaint to Flex-N-Gate. See Complaint, Proof of Service.

2. On October 7, 2004, Flex-N-Gate filed its Motion to Dismiss Complainant's Complaint.

3. The basis for Flex-N-Gate's Motion to Dismiss is that "each Count of Complainant's Complaint fails to state a claim upon which relief can be granted." Motion to Dismiss at 2, ¶5.

4. On October 13, 2004, Complainant mailed Complainant's Motion to Join Agency to counsel for Flex-N-Gate by U.S. Mail. See Complainant's Motion to Join Agency, Certificate of Service.

5. Flex-N-Gate timely files this Response to Complainant's Motion to Join Agency.

II. THE BOARD SHOULD DENY COMPLAINANT'S MOTION TO JOIN THE AGENCY AS A PARTY IN INTEREST.

6. Complainant first moves the Board to join the Illinois Environmental Protection Agency ("Illinois EPA") in this matter "as a party in interest . . . pursuant to 35 Ill. Adm. Code 101.404." Motion to Join Agency at 2, ¶10.

7. Section 101.404 of the Board's procedural rules provides that:

Pursuant to Section 30 of the Act, the Board may request that the Agency investigate any alleged violation of the Act, the regulations, any permit granted by the Agency, or any term or condition of any such permit and any such other investigations as the Board may deem advisable. Upon such request, the Board may designate the Agency as a party in interest in any ongoing proceeding in that matter. The designation of the Agency as a party in interest does not require the Agency to take a position on the merits of the proceeding.

35 Ill. Admin. Code § 101.404.

8. Section 30 of the Illinois Environmental Protection Act provides that:

The Agency shall cause investigations to be made upon the request of the Board or upon receipt of information concerning an alleged violation of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and may cause to be made such other investigations as it shall deem advisable.

415 ILCS 5/30.

9. For the reasons set forth below, the Board should deny Complainant's Motion.

A. **Complainant's Motion is Premised on a Fundamental Misunderstanding of Flex-N-Gate's Operations and Interaction with Illinois EPA.**

10. The factual allegations and conclusions on which Complainant relies in support of his Motion to Join Agency are as follows:

- (a) "prior to the incident alleged in the complaint, respondent claimed that the facility operated pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a) as a large quantity generator of hazardous waste";
- (b) Flex-N-Gate "has claimed exemption pursuant [to] Sections 703.123(a) and 722.134(a) at least since March, 2001";
- (c) in its Motion to Dismiss, Flex-N-Gate "claims that the facility is exempt from the RCRA permit requirement based on the 'elementary treatment unit'¹ and 'wastewater treatment unit' exclusions";
- (d) by its Motion to Dismiss, Flex-N-Gate "appears to be repudiating longstanding regulatory interpretations arrived at between the Agency and the respondent"; and,
- (e) "The Agency needs to be notified of this."

Motion to Join Agency at ¶¶ 1, 2, 5, and 6 (emphasis added).

11. These statements reveal that Complainant fundamentally misunderstands Flex-N-Gate's operations and Flex-N-Gate's interaction with Illinois EPA.

¹ Flex-N-Gate did not argue in its Motion to Dismiss that the equipment at issue in this matter constitutes an "elementary neutralization unit." See Flex-N-Gate's Motion to Dismiss.

12. At the facility in question, Flex-N-Gate produces several different wastestreams, some of which are “hazardous” under RCRA. Affidavit of Jim Dodson, attached hereto as Exhibit A (“Dodson Aff.”), at ¶4.

13. However, Flex-N-Gate relies on exemptions from RCRA permitting requirements with regard to each of its wastestreams that is “hazardous.” Id. at ¶5.

14. Specifically, Flex-N-Gate relies on different exemptions for different wastestreams, as appropriate depending on the circumstances. Id. at ¶6.

15. For example, some wastestreams that Flex-N-Gate produces are treated by what Flex-N-Gate considers to be a “wastewater treatment unit” under RCRA, and thus, Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements. Id. at ¶7.

16. Other wastestreams that Flex-N-Gate produces are stored on-site for less than 90 days and then shipped off-site for disposal, and Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements under 35 Ill. Admin. Code § 722.134(a). Id. at ¶8.

17. Thus, Flex-N-Gate does not now claim, nor has it ever claimed, “that the facility operated” pursuant to just one exemption from RCRA permitting requirements (“Sections 703.123(a) and 722.143(a)” or otherwise), as Complainant alleges in paragraph one of his Motion to Join Agency. Id. at ¶9.

18. Likewise, Flex-N-Gate does not now claim, nor has it ever claimed, “that the facility is exempt from the RCRA permit requirements based on the . . . ‘wastewater

treatment unit' exclusion[]," as Complainant alleges in paragraph five of his Motion to Join Agency. Id. at ¶10.

19. Rather, Flex-N-Gate always has considered different wastestreams at the facility at issue to be exempt from RCRA permitting requirements under different exemptions to those requirements. Id. at ¶11.

20. With regard to the wastestream at issue in this case, Flex-N-Gate has never claimed to the Illinois EPA or to anyone else that its actions relating to such wastestream are exempt from RCRA permitting requirements "pursuant [to] Sections 703.123(a) and 722.134(a)." Id. at ¶12.

21. Rather, Flex-N-Gate always has considered its actions relating to this wastestream to be exempt from RCRA permitting requirements under the Wastewater Treatment Unit Exemption, and has never claimed otherwise to the Illinois EPA. Id. at ¶13.

22. Further, it is Flex-N-Gate's understanding that the Illinois EPA, if it has not formally determined that Flex-N-Gate's position on this issue is correct, at least understands this to be Flex-N-Gate's position. Id. at ¶14.

23. Thus, the Illinois EPA need not be named a party in interest in order to be made aware of Flex-N-Gate's position regarding the regulatory status of the process at issue here, as the Illinois EPA already is well aware of Flex-N-Gate's position. See discussion above.

B. Complainant's Motion to Join Agency Also is Premised on a Fundamental Misunderstanding of RCRA.

24. Complainant's Motion to Join Agency also is premised on a misunderstanding of RCRA.

25. Specifically, Complainant argues that Flex-N-Gate, in its Motion to Dismiss, "claims that the facility is exempt from the RCRA permit requirements based on the . . . 'wastewater treatment unit' exclusion[]," and that "[i]f accepted by the Board, this argument would allow the facility to operate outside the RCRA program, without complying with the conditions of Section 722.134(a)." Motion to Join Agency at 1, ¶5.

26. Again, Flex-N-Gate does not now claim, and has never claimed, that "the facility" is exempt from RCRA permitting requirements under any one exemption from those requirements. Dodson Aff. at ¶9.

27. To the extent that Complainant means to argue that if one wastestream at the facility is exempt from RCRA permitting requirements under the Wastewater Treatment Unit exemption, Flex-N-Gate will be relieved of complying with the requirements of 35 Ill. Admin. Code § 722.134(a) as to other wastestreams that otherwise would be subject to those requirements, Flex-N-Gate disagrees.

28. If Flex-N-Gate's activities with regard to other wastestreams are not exempt under the Wastewater Treatment Unit exemption, Flex-N-Gate still must comply with the requirements of Section 722.134(a) if it wishes to rely on that exemption as to those other wastestreams. See 35 Ill. Admin. Code § 722.134(a).

29. That is, Flex-N-Gate is allowed to rely on different exemptions from RCRA permitting requirements for different wastestreams at its facility, as appropriate

under the circumstances, and if the Board grants Flex-N-Gate's Motion to Dismiss, that decision would have no effect on the status of other wastestreams that are not at issue in this case.

C. **Complainant's Motion Also is Premised on a Fundamental Misunderstanding of the Board's Procedures when Deciding a Motion to Dismiss.**

30. Additionally, Complainant's Motion to Join Agency is premised on a misunderstanding of the Board's procedures when deciding a motion to dismiss.

31. When deciding a motion to dismiss, "the Board may consider only the well-pleaded allegations of the complaint," and cannot consider "facts [that] are not alleged in the complaint." Johnson v. ADM-Demeter, Hoopeston Division, PCB 98-31, 1998 Ill. ENV LEXIS 356 , at *5 (Ill.Pol.Control.Bd. July 8, 1998).

32. Complainant, however, argues that the Board should make the Illinois EPA a party in interest in this case because "[d]etermining whether the facility is exempt from RCRA permit requirement[s] pursuant to the 'elementary neutralization unit' and 'wastewater treatment unit' exclusions requires an overall assessment of all the units at the facility, which would require inspections and input from the Agency." Motion to Join Agency at 2, ¶8 (emphasis added).

33. An "overall assessment of all the units at the facility," and "inspections and input from the Agency" regarding such units, would be irrelevant to the legal questions raised by Flex-N-Gate's Motion to Dismiss, and would constitute facts outside the Complaint which the Board could not consider when ruling on that Motion.

34. To put it another way, the question before the Board when deciding Flex-N-Gate's Motion to Dismiss is whether, taking the Complainant's allegations as true, Complainant has alleged that the equipment at issue is a "wastewater treatment unit" under RCRA. See Complainant's Motion to Dismiss.

35. Flex-N-Gate's position is that Complainant has alleged that the equipment at issue is a "wastewater treatment unit," and therefore that Complainant's Complaint fails to state a cause of action, because the provisions of RCRA that Complainant alleges Flex-N-Gate violated do not apply to wastewater treatment units. See id.

36. Additionally, Complainant argues that "[t]he Agency has an interest in the proper application of the RCRA permit requirement to the facility, which interest may be determined by the Board's order in this case." Motion to Join Agency at 2, ¶9.

37. Again, however, an Order by the Board granting Flex-N-Gate's Motion to Dismiss merely would constitute a finding that Complainant has alleged that the equipment at issue is a "wastewater treatment unit," and, therefore, that Complainant's Complaint fails to state a cause of action.

38. Such a finding regarding what Plaintiff alleged in his Complaint would have no effect whatsoever on the Illinois EPA.

39. Further, the Board does not need the Illinois EPA's input to be able to decide the questions of law raised by Flex-N-Gate's Motion to Dismiss.

D. Complainant's Affidavit is Insufficient to Support Complainant's Motion to Join Agency.

40. Flex-N-Gate further notes that Complainant has not provided the Board with copies of the "correspondence" and "Agency records" that allegedly support

Complainant's Motion to Join Agency. See Motion to Join Agency at 1, ¶2; Affidavit in Support of Motion to Join Agency, ¶¶2, 3.

41. In Complainant's Motion to Join Agency, and his Affidavit in Support thereof, Complainant concludes that in the alleged "correspondence," Flex-N-Gate claimed certain exemptions to RCRA permitting requirements, but Complainant does not provide copies of the "correspondence" at issue or any other facts to support this conclusion. See id.

42. Likewise, in his Affidavit, Complainant concludes that "Agency records" demonstrate that "respondent is repudiating longstanding regulatory interpretations arrived at between the Agency and the respondent," but, again, Complainant does not provide copies of the "Agency records" at issue or any other facts to support this conclusion. See id.

43. For the reasons stated at pages 8 to 9 of Flex-N-Gate's Response to Complainant's Motion to Accept for Hearing and for Expedited Discovery, which is filed herewith, Complainant's statements in paragraphs 2 and 3 of his Affidavit in Support of his Motion to Join Agency on these issues are conclusory, and the Board cannot rely on these statements in ruling on Complainant's Motion to Join Agency.

44. Further, Flex-N-Gate submits that the Board should not take the extraordinary step of naming the Illinois EPA as a Party in Interest in this matter based on these alleged "correspondence" and "records," documents that the Board has never seen.

E. The Illinois EPA does not Need to be Made a Party in Interest so as to “Be Notified” of this Matter, as Complainant Already Notified the Illinois EPA of this Matter.

45. Finally, again, Complainant argues that the Board should name the Illinois EPA as a Party in Interest in this matter because “[t]he Agency needs to be notified” of Flex-N-Gate’s “repudiat[ion] [of] longstanding regulatory interpretations arrived at between the Agency and the respondent.” Motion to Join Agency at 1-2, ¶6.

46. However, Complainant already served a copy of his Complaint and his Motion to Join Agency, and Flex-N-Gate’s Motion to Dismiss, on the Illinois EPA. See Complainant’s Motion to Join Agency at 2, ¶12; Certificate of Service for Complainant’s Motion to Join Agency.

47. Thus, the Illinois EPA already has been “notified” of this matter and can take whatever action it deems appropriate, if any, in response to that notification.

F. The Board Should Deny Complainant’s Motion.

48. Thus, for the following reasons, the Board should deny Complainant’s Motion to Join Agency as an interested party in this matter.

49. First, Flex-N-Gate is not changing its position with regard to why the equipment at issue in this matter is exempt from RCRA permitting requirements.

50. Second, the Illinois EPA already knows Flex-N-Gate’s position as to why the equipment at issue in this matter is exempt from RCRA permitting requirements.

51. Third, Flex-N-Gate’s management of different wastestreams can be exempt from RCRA permitting requirements under different exemptions from those requirements.

52. Fourth, there is no need to make the Illinois EPA a Party in Interest to provide the Board facts relating to Flex-N-Gate's facility, as the Board could not consider any such facts when deciding Flex-N-Gate's Motion to Dismiss.

53. Fifth, the Board does not need the Illinois EPA's input to decide the questions of law raised by Flex-N-Gate's Motion to Dismiss.

54. Sixth, paragraphs 2 and 3 of Complainant's Affidavit in Support of his Motion to Join Agency, which contain conclusions that Flex-N-Gate took a certain position in correspondence to the Illinois EPA, and that Flex-N-Gate is changing that position, are unsupported and conclusory, and the Board cannot rely on these paragraphs on ruling on Complainant's Motion to Join Agency.

55. Seventh, the Board should not take the extraordinary step of naming the Illinois EPA as a Party in Interest in this matter based on alleged statements in documents that the Board has never seen.

56. Eighth, Complainant already notified the Illinois EPA of this matter, so there is no need for the Board to name the Illinois EPA as a Party in Interest in order to notify the Illinois EPA of this matter.

57. Accordingly, the Board should deny Complainant's Motion to Join Agency as a Party in Interest.

III. THE BOARD SHOULD DENY COMPLAINANT'S MOTION TO EXTEND TIME FOR THE ILLINOIS EPA TO RESPOND TO FLEX-N-GATE'S MOTION TO DISMISS.

58. Complainant next moves the Board to "request that the Agency respond to the motion to dismiss . . . specifically addressing the question of RCRA permit status,

which exemptions from the RCRA permit requirement apply, and listing the treatment, storage and disposal units at the facility,” and to “extend the time for responding to the motion to dismiss to allow the Agency reasonable time to respond.” Motion to Join Agency at 2, ¶¶B, C.²

59. For the reasons set forth below, the Board also should deny this Motion.

60. First, if the Board declines to name the Illinois EPA as a Party in Interest, for the reasons stated above or otherwise, Complainant’s Motion to Extend Time is moot.

61. Second, for the reasons stated above, the Board could not consider the information that Complainant requests from the Illinois EPA when the Board decides Flex-N-Gate’s Motion to Dismiss, because such information would constitute facts outside the Complaint, so there is no reason to name the Illinois EPA as a Party in Interest.

62. Third, as noted above, Section 101.404 of the Board’s procedural rules provides that “[t]he designation of the Agency as a party in interest does not require the Agency to take a position on the merits of the proceeding.” 35 Ill. Admin. Code § 101.404 (emphasis added).

63. Complainant states that he “is not requesting that the Agency take a position on the merits of the case.” Motion to Join Agency at 2, ¶11.

² Complainant does not ask the Board to request that the Illinois EPA respond to (1) Flex-N-Gate’s argument that Complainant’s allegations that a release of gas constituted a release of hazardous waste do not state a cause of action because an uncontained gas, by definition, is not a “hazardous waste” regulated by RCRA, or (2) Flex-N-Gate’s argument that the gas allegedly released at the facility did not constitute a hazardous waste constituent. See Flex-N-Gate’s Motion to Dismiss Counts II through VI of Complainant’s Complaint.

64. However, by asking for an extension of time for the Illinois EPA to respond to Flex-N-Gate's Motion to Dismiss, Complainant assumes that the Illinois EPA would oppose Flex-N-Gate's Motion, and therefore wish to respond to it.

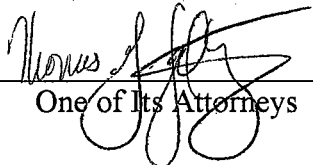
65. However, there is no reason to believe that the Illinois EPA would oppose Flex-N-Gate's Motion to Dismiss.

IV. CONCLUSION

WHEREFORE, Respondent, FLEX-N-GATE CORPORATION respectfully prays that the Illinois Pollution Control Board deny Complainant's Motion to Join Agency as Party in Interest and to Extend Time to Respond to Motion To Dismiss, and that the Board award Flex-N-Gate such other relief as the Board deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

By: 
One of Its Attorneys

Dated: November 1, 2004

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GWST:003/Fil/Response to Motion to Join Agency

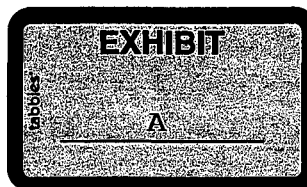
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MORTON F. DOROTHY,)
)
 Complainant,)
)
 v.) PCB 05-49
)
 FLEX-N-GATE CORPORATION,)
 an Illinois corporation,)
)
 Respondent.)

AFFIDAVIT OF JAMES R. DODSON

James R. Dodson, being first duly sworn, deposes and states under oath, and if sworn as a witness, would testify, as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I am employed as Corporate Environmental Director for Flex-N-Gate Corporation ("Flex-N-Gate").
3. I have reviewed Complainant's Motion to Join Agency as Party in Interest and to Extend Time to Respond to Motion to Dismiss ("Motion to Join Agency"), and Complainant's Motion to Accept for Hearing and for Expedited Discovery, filed in this matter, and make the following statements in response thereto.
4. At the facility in question in this matter, Flex-N-Gate produces several different wastestreams, some of which are "hazardous" under RCRA.
5. However, Flex-N-Gate relies on exemptions from RCRA permitting requirements with regard to each of its wastestreams that is "hazardous."
6. Specifically, Flex-N-Gate relies on different exemptions for different wastestreams, as appropriate depending on the circumstances.



7. For example, some wastestreams that Flex-N-Gate produces are treated by what Flex-N-Gate considers to be a “wastewater treatment unit” under RCRA, and thus, Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements.

8. Other wastestreams that Flex-N-Gate produces are stored on-site for less than 90 days and then shipped off-site for disposal, and Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements under 35 Ill. Admin. Code § 722.134(a).

9. Thus, Flex-N-Gate does not now claim, nor has it ever claimed, “that the facility operated” pursuant to just one exemption from RCRA permitting requirements (“Sections 703.123(a) and 722.143(a)” or otherwise), as Complainant alleges in paragraph one his Motion to Join Agency.

10. Likewise, Flex-N-Gate does not now claim, nor has it ever claimed, “that the facility is exempt from the RCRA permit requirements based on the . . . ‘wastewater treatment unit’ exclusion[,],” as Complainant alleges in paragraph five of his Motion to Join Agency.

11. Rather, Flex-N-Gate always has considered different wastestreams at the facility at issue to be exempt from RCRA permitting requirements under different exemptions to those requirements.

12. With regard to the wastestream at issue in this case, Flex-N-Gate has never claimed to the Illinois Environmental Protection Agency (“Illinois EPA”) or to anyone else that its actions relating to such wastestream are exempt from RCRA permitting requirements “pursuant [to] Sections 703.123(a) and 722.134(a).”

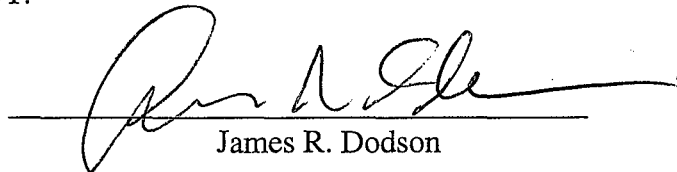
13. Rather, Flex-N-Gate always has considered its actions relating to this wastestream to be exempt from RCRA permitting requirements under the Wastewater Treatment Unit Exemption, and has never claimed otherwise to the Illinois EPA.

14. Further, it is Flex-N-Gate's understanding that the Illinois EPA, if it has not formally determined that Flex-N-Gate's position on this issue is correct, at least understands this to be Flex-N-Gate's position.

15. Flex-N-Gate takes Complainant's lawsuit, and Flex-N-Gate's obligation to preserve documents related to Complainant's allegations in that lawsuit, very seriously, and Flex-N-Gate denies that it would, in any circumstance, alter or destroy documents as Complainant alleges in his Motion to Accept for Hearing and for Expedited Discovery.

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.

FURTHER AFFIANT SAYETH NOT.


James R. Dodson

Subscribed and sworn to before
me this 29th day of OCTOBER, 2004.


Notary Public

**YVONNE R WAIT
NOTARY PUBLIC STATE OF INDIANA
FOUNTAIN COUNTY
MY COMMISSION EXP. SEPT 23, 2009**