

NOV 15 2004

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

MORTON F. DOROTHY,

Complainant,

vs.

FLEX-N-GATE CORPORATION,
an Illinois Corporation,

Respondent.

No. PCB 05-049

**SUPPLEMENT TO RESPONSE TO MOTION TO DISMISS AND MOTION FOR
LEAVE TO WITHDRAW MOTION TO JOIN AGENCY AS PARTY IN INTEREST**

On October 20, 2004, complainant filed a response to the motion to dismiss filed in this case on October 12, 2004. Complainant requests leave to supplement his response with new information not known at the time of the original response, and to withdraw his motion to join the Agency as party in interest.

1. On November 3, 2004, respondent filed a response to complainant's motion to join Agency as party in interest and to extend time to respond to motion to dismiss.
2. Paragraph 16 of the response states:
 - a. "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)."
3. The response also includes an affidavit of James R. Dodson, including the same statement as paragraph 8.
4. The admission contained in paragraph 16 of the response and paragraph 8 of the affidavit disposes of most of the arguments made in the motion to dismiss.
5. Most of the arguments in the motion to dismiss now admit of an easy response:

Respondent concedes that it claims exemption under Section 722.134(a), as a large quantity generator of hazardous waste which is treated on-site in tanks without a RCRA permit or interim status. Section 722.134(a)(4) requires compliance with Section 725.151 et seq., which provide that the

owner or operator "must have a contingency plan for his facility". The terms "facility" and "unit" are defined in Section 720.110. The "facility" is the entire geographical area which contains one or more "treatment, storage or disposal unit". Respondent was therefore required to prepare and follow a contingency plan for the facility, as alleged in Counts II through VI of the complaint, regardless of any other exemptions it might claim. Furthermore, Section 722.134(b) requires a RCRA permit if the 90-day storage period is exceeded. Respondent is therefore required to have a RCRA permit as alleged in Count I of the complaint, unless it is able to demonstrate compliance with the conditions of Section 722.134(a).

6. On October 14, 2004, complainant filed a motion to join Agency as party in interest.
7. Now that respondent has conceded that it claims exemption pursuant to Section 722.134(a), complainant sees no current need for the Agency to be joined as a party in interest, and therefore withdraws his motion to that effect.

WHEREFORE complainant prays:

- A. That the Board allow complainant to supplement his response to motion to dismiss.
- B. That the Board deny the motion to dismiss.
- C. That the Board allow complainant to withdraw his motion to join Agency as party in interest.

Morton F. Dorothy
Morton F. Dorothy, Complainant

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the listed document, by first class mail, upon the listed persons, on the 12th day of November, 2004.

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