

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

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STATE OF ILLINOIS
Pollution Control Board

MORTON F. DOROTHY,

Complainant,

vs.

FLEX-N-GATE CORPORATION,
an Illinois Corporation,

Respondent.

No. PCB 05-049

MOTION TO STRIKE ANSWER

Complainant Morton F. Dorothy moves that the Hearing Officer strike the answer to paragraph 12 of the common allegations of the complaint filed in this case on or about March 4, 2005, by respondent Flex-N-Gate Corporation, and as reason states as follows:

1. On or about March 4, 2005, respondent Flex-N-Gate Corporation filed an answer to the complaint filed in this case on September 8, 2004
2. Paragraph 12 of the common allegations of the complaint alleges as follows:

Respondent claims that the facility operates pursuant to 35 Ill. Adm. Code 703.123(a) and 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. In the event the Board determines that this claim is valid, Section 722.134(a)(4) requires compliance with 35 Ill. Adm. Code 725.Subpart D, including Sections 725.151 through 725.156. In the event the Board determines that this claim is invalid, respondent is operating an unpermitted hazardous waste treatment and storage facility which is subject to Sections 725.151 through 725.156 directly.

3. Paragraph 12 of the answer states as follows:

Flex-N-Gate denies the allegation contained in the first sentence of paragraph 12 of Complainant's Complaint. The remainder of paragraph 12 states legal conclusions that do not call for a response. To the extent paragraph 12 states any further allegations of fact, Flex-N-Gate denies the same.

4. 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.

5. In paragraph 16 of the November 3 response, respondent stated:

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).

6. The same response also included an affidavit of James R. Dodson, including the same statement as paragraph 8 in the affidavit.

7. Section 703.123(a) provides as follows:

The following persons are among those that are not required to obtain a RCRA permit: ...a) Generators that accumulate hazardous waste on-site for less than the time periods provided in 35 Ill. Adm. Code 722.134;...

8. Respondent has, in this proceeding, admitted the substance of the allegation of paragraph 12 of the complaint, and cannot now deny the same.

9. Respondent is, at a minimum, engaged in evasive pleading.

10. Complainant withdrew his motion to join the Agency as a party in interest in reliance on respondent's admission that it claimed exemption pursuant to Section 722.134(a). As discussed in that motion, in the event respondent is denying that it claims exemption under Section 722.134(a), it is repudiating longstanding regulatory understandings between the Illinois Environmental Protection Agency and itself. In such event, the Agency needs to be joined as a party in interest to this case.

11. Complainant would be prejudiced if respondent were allowed to again reverse itself as to this issue which is central to the complaint.

WHEREFORE complainant prays that the Hearing Officer:

- A. Find that respondent Flex-N-Gate Corporation has admitted in this proceeding that it claims to be exempt from RCRA permitting requirements under 35 Ill. Adm. Code 722.134(a).
- B. Strike as evasive the answer filed by respondent Flex-N-Gate Corporation.
- C. Deem paragraph 12 of the common allegations of the complaint to be admitted.

Morton F. Dorothy
Morton F. Dorothy, Complainant

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FLEX-N-GATE CORPORATION,
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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the listed documents, by first class mail, upon the listed persons, on the 15th day of March, 2005.

REQUEST FOR PRODUCTION OF DOCUMENTS

INTERROGATORIES

REQUEST TO ADMIT THE TRUTH OF CERTAIN FACTS

REQUEST TO ADMIT THE GENUINENESS OF CERTAIN DOCUMENTS

MOTION TO STRIKE ANSWER

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