

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

RECEIVED
CLERK'S OFFICE

MORTON F. DOROTHY,

Complainant,

vs.

FLEX-N-GATE CORPORATION,
an Illinois Corporation,

Respondent.

JUN 07 2005

STATE OF ILLINOIS
Pollution Control Board

No. PCB 05-049

CERTIFICATE OF SERVICE

I, the undersigned, certify that, on the 6th day of June, 2005, I served the listed documents, by first class mail, upon the listed persons:

MOTION FOR TIME TO RESPOND
MOTION TO WITHDRAW MOTION TO STRIKE ANSWER
MOTION FOR SANCTIONS FOR EVASIVE PLEADING
MOTION TO RECONSIDER HEARING OFFICER ORDER
RESPONSE TO MOTION FOR PROTECTIVE ORDER

Thomas G. Safley
Hodge Dwyer Zeman
3150 Roland Avenue
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Springfield, IL 62705-5776

Carol Webb
Hearing Officer, IPCB
1021 North Grand Avenue East
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Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, Illinois 60601

Morton F. Dorothy
804 East Main
Urbana IL 61802
217/384-1010

Morton F. Dorothy
Morton F. Dorothy, Complainant

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No. PCB 05-049

MOTION FOR TIME TO RESPOND

Complainant Morton F. Dorothy moves that the Board grant additional time to respond to the motions for summary judgment filed by respondent on May 27, 2005, and as reason says as follows:

1. The motions were filed with the Board on May 27, 2005.
2. The motions for summary judgment were received by the complainant on June 4, 2005, eight days after filing.
3. Although the envelope containing the motions was post marked May 27, with sufficient postage for first class, the envelope did not bear a "First Class" or "Priority Mail" notation. In the absence of such notation, the Post Office normally handles large envelopes as third class mail, regardless of the amount of postage affixed.
4. Although complainant has had little time to study them, the motions for summary judgment appear to be mainly a regurgitation of the October 12, 2004, motion to dismiss, which the Board has already denied.
5. The motions are extremely voluminous, comprising 96 pages, plus numerous attachments.
6. Complainant is serving as an unpaid volunteer, seeking to enforce Board rules on behalf of the People of the State, with little hope of compensation.
7. Complainant needs additional time to respond to the motions for summary judgment.

WHEREFORE complainant prays that the Board grant him an extension of time,

until June 24, 2005, to respond to the motions for summary judgment.

Morton F. Dorothy
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Morton F. Dorothy
Morton F. Dorothy, Complainant

STATE OF ILLINOIS)
)
COUNTY OF CHAMPAIGN) ss

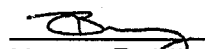
AFFIDAVIT

Complainant Morton F. Dorothy makes the following affidavit in support of his Motion For Time to Respond:

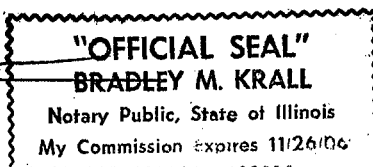
1. The motions for summary judgment were received by the complainant on June 4, 2005, eight days after filing.
2. Although the envelope containing the motions was post marked May 27, with sufficient postage for first class, the envelope did not bear a "First Class" or "Priority Mail" notation. In the absence of such notation, the Post Office normally handles large envelopes as third class mail, regardless of the amount of postage affixed.
3. Although complainant has had little time to study them, the motions for summary judgment appear to be mainly a regurgitation of the October 12, 2004, motion to dismiss, which the Board has already denied.
4. The motions are extremely voluminous, comprising 96 pages, plus numerous attachments.
5. Complainant is serving as an unpaid volunteer, seeking to enforce Board rules on behalf of the People of the State, with little hope of compensation.
6. Complainant needs additional time to respond to the motions for summary judgment.

Morton F. Dorothy
Morton F. Dorothy, Complainant

The undersigned, a notary public in and for the aforesaid County and State, certifies that the above person appeared before me and signed the foregoing document on the 6th day of June, 2005.


Notary Public

Morton F. Dorothy
804 East Main
Urbana IL 61802
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CHAMPAIGN COUNTY, ILLINOIS

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Respondent.

STATE OF ILLINOIS
Pollution Control Board

No. PCB 05-049

MOTION TO WITHDRAW MOTION TO STRIKE ANSWER

Complainant Morton F. Dorothy moves that the Board grant leave to him to withdraw the Motion to Strike Answer filed by him with the Board on April 15, 2005.

1. On or about May 27, 2005, Respondent made the following admission in response to the Supplemental Request to Admit:

Respondent claims exemption from the RCRA permit requirement pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a) with respect to one or more wastes generated by the Guardian West facility.

2. This admission has rendered moot the Motion to Strike Answer.
3. Complainant is also filing a Motion for Sanctions for Evasive Pleading asking that the Board award complainant the costs of extracting the above admission from respondent.

WHEREFORE complainant prays that the Board allow him to withdraw the Motion to Strike Answer filed by him with the Board on April 15, 2005.

Morton F. Dorothy,
Morton F. Dorothy, Complainant

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MOTION FOR SANCTIONS FOR EVASIVE PLEADING

Complainant Morton F. Dorothy moves that the Board impose sanctions on respondent, Flex-N-Gate Corporation, for evasive pleading, and as reason states as follows:

1. Paragraph 12 of the common allegations of the complaint filed in this case on September 8, 2004 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.

2. On or about March 4, 2005, respondent Flex-N-Gate Corporation filed an answer to the complaint. 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.

3. On April 15, 2005, complainant filed with the Board a Motion to Strike Answer addressing paragraph 12 of the Answer. Complainant has moved to withdraw that motion.

4. The Motion to Strike Answer noted that respondent had filed a motion and affidavits including the following statements:

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).

5. On or about May 27, 2005, Respondent made the following admission in response to complainant's Supplemental Request to Admit:

Respondent claims exemption from the RCRA permit requirement pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a) with respect to one or more wastes generated by the Guardian West facility.

6. In light of the admission of May 27, 2005, the allegation contained in the first sentence of paragraph 12 of the complaint was true, because the allegation contained no specific statement that respondent claimed exemption for the entire facility, or for all wastes.

7. Under the rules of pleading, respondent was required to admit the truth of the first sentence of paragraph 12 of the complaint. If respondent felt it necessary to do so, respondent could have added qualifying language to the effect that it claimed exemption only with respect to certain wastes and/or portions of the facility.

8. Although the Board's rules are not specific as to evasive pleading, Section 2-610 of the Civil Practice Act provides as follows:

Pleadings to be specific. (a) Every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates.

...

(c) Denials must not be evasive, but must fairly answer the substance of the allegation denied. (735 ILCS 5/2-610)

9. Respondent's answer to paragraph 12 of the complaint was evasive, and did not fairly answer the substance of the allegation.
10. Because of respondent's evasive answer to paragraph 12 of the complaint, complainant was forced to file a motion to strike the answer, and forced to engage in a second round of discovery, in order to extract the truth from respondent.

11. Complainant has incurred expenses and unnecessary work as a result of respondent's evasive pleading.

WHEREFORE complainant prays that the Board:

1. Find that the answer to paragraph 12 of the complaint was evasive.
2. Direct the Hearing Officer to determine reasonable compensation for the complainant for expenses and unnecessary work as a result of respondent's evasive pleading.

Morton F. Dorothy
804 East Main
Urbana IL 61802
217/384-1010

Morton F. Dorothy
Morton F. Dorothy, Complainant

STATE OF ILLINOIS)
) ss
COUNTY OF CHAMPAIGN)

AFFIDAVIT

Complainant Morton F. Dorothy makes the following affidavit in support of his Motion for Sanctions for Evasive Pleading:

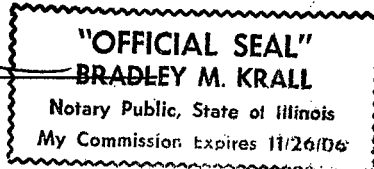
1. In light of the admission of May 27, 2005, the allegation contained in the first sentence of paragraph 12 of the complaint was true, because the allegation contained no specific statement that respondent claimed exemption for the entire facility, or for all wastes.
2. Respondent's answer to paragraph 12 of the complaint was evasive, and did not fairly answer the substance of the allegation.
3. Because of respondent's evasive answer to paragraph 12 of the complaint, complainant was forced to file a motion to strike the answer, and forced to engage in a second round of discovery, in order to extract the truth from respondent.
4. Complainant has incurred expenses and unnecessary work as a result of respondent's evasive pleading.

Morton F. Dorothy
Morton F. Dorothy, Complainant

The undersigned, a notary public in and for the aforesaid County and State, certifies that the above person appeared before me and signed the foregoing document on the 6th day of June, 2005.


Notary Public

Morton F. Dorothy
804 East Main
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MOTION TO RECONSIDER HEARING OFFICER ORDER

Complainant Morton F. Dorothy moves that the Hearing Officer reconsider the Order entered June 2, 2005, and as reason says as follows:

1. On June 2, 2005, the Hearing Officer, after noting that the respondent had filed a motion for summary judgment with the Board, reserved ruling on outstanding discovery motions until the Board rules on the motion for summary judgment.
2. The two motions for summary judgment were received by the complainant on June 4, 2005.
3. On October 12, 2004, respondent filed a motion to dismiss with the Board, which motion was denied on February 2, 2005.
4. Although complainant has had little time to study them, the motions for summary judgment appear to be mainly a regurgitation of the motion to dismiss which the Board has already denied.
5. Up to now discovery in this case has proceeded quickly, with most of the possible factual issues having already been resolved, to the extent that the parties could now draft an agreed statement of facts covering most of the allegations in the complaint.
6. Upon completion of discovery, complainant expects to file an amended complaint to make the complaint conform with the facts as elucidated in discovery, to eliminate many of the legal objections complainant is raising, to allege continuing violations and to add counts alleging violation of additional Board rules based on the admissions made in discovery.
7. Administrative economy would be better served by completing discovery while

the Board considers the motions for summary judgment. Even if the Board were to grant summary judgment against the complainant, completion of discovery would allow complainant to draft an amended complaint which could move quickly to hearing.

8. This case grew out of a toxic gas release in which several people were nearly killed. Based on the information available to complainant, respondent has taken no steps whatsoever to avoid a repetition of this incident, even though such steps would cost less than \$1,000. This case needs to proceed as quickly as possible to a Board order requiring compliance to avoid a possible fatal accident.

WHEREFORE complainant prays that the Hearing Officer reconsider the order of June 2, 2005, and allow continuation of discovery pending consideration of the motions for summary judgment.

Morton F. Dorothy
804 East Main
Urbana IL 61802
217/384-1010

Morton F. Dorothy
Morton F. Dorothy, Complainant

STATE OF ILLINOIS)
)
COUNTY OF CHAMPAIGN) ss

AFFIDAVIT

Complainant Morton F. Dorothy makes the following affidavit in support of his Motion to Reconsider Hearing Officer Order:

1. The two motions for summary judgment were received by the complainant on June 4, 2005.
2. Although complainant has had little time to study them, the motions for summary judgment appear to be mainly a regurgitation of the October 12, 2004, motion to dismiss which the Board has already denied.
3. Up to now discovery in this case has proceeded quickly, with most of the possible factual issues having already been resolved, to the extent that the parties could now draft an agreed statement of facts covering most of the allegations in the complaint.
4. Upon completion of discovery, complainant expects to file an amended complaint to make the complaint conform with the facts as elucidated in discovery, to

eliminate many of the legal objections complainant is raising, to allege continuing violations and to add counts alleging violation of additional Board rules based on the admissions made in discovery.

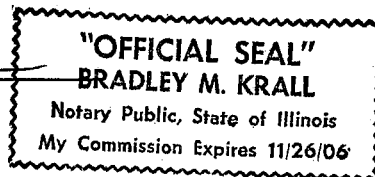
5. Administrative economy would be better served by completing discovery while the Board considers the motions for summary judgment. Even if the Board were to grant summary judgment against the complainant, completion of discovery would allow complainant to draft an amended complaint which could move quickly to hearing.
6. This case grew out of a toxic gas release in which several people were nearly killed. Based on the information available to complainant, respondent has taken no steps whatsoever to avoid a repetition of this incident, even though such steps would cost less than \$1,000. This case needs to proceed as quickly as possible to a Board order requiring compliance to avoid a possible fatal accident.

Morton F. Dorothy

Morton F. Dorothy, Complainant

The undersigned, a notary public in and for the aforesaid County and State, certifies that the above person appeared before me and signed the foregoing document on the 6th day of June, 2005.

Bradley M. Krall
Notary Public



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RESPONSE TO MOTION FOR PROTECTIVE ORDER

Complainant, Morton F. Dorothy, makes the following response to the motion for protective order filed by respondent, Flex-N-Gate Corporation, on or about May 27, 2005, and received by complainant on June 4, 2005, which motion asks that the Hearing Officer allow respondent to avoid responding to the Supplemental Interrogatories propounded by complainant on or about April 25, 2005:

1. Complainant requested leave to conduct supplemental discovery during the status conference of April 21, 2005. Respondent raised no objection. The Hearing Officer granted leave to conduct supplemental discovery without limitation as to the number of questions to be raised by interrogatory.

2. The complaint alleged, in the first sentence of allegation 12:

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.

3. Respondent first filed a motion to dismiss which appeared to deny the allegation, then filed affidavits that appeared to admit the allegation, and then an answer denying the allegation.

4. Complainant prepared the initial round of discovery requests without a clue as to what respondent meant by all this evasive pleading.

5. On or about May 27, 2005, Respondent made the following admission in response to the Supplemental Request to Admit:

Respondent claims exemption from the RCRA permit requirement

pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a) with respect to one or more wastes generated by the Guardian West facility.

6. Supplemental interrogatories 1(a) -(j) ask a series of follow-up questions regarding respondent's claim of exemption under Section 722.134 for only a portion of the facility and wastestreams. Complainant could not possibly have asked these questions in the initial discovery request because of respondent's evasive pleading on this issue.
7. In paragraph 10 of the Motion for Protective Order, respondent argues that the issue of whether there was a hydrogen sulfide release is irrelevant. Paragraph 15 of the complaint, however, alleges a release of hydrogen sulfide, and the answer denies that allegation.
8. In response to the initial discovery request, respondent advanced a technical theory claiming that the hydrogen sulfide release could not have happened. (Response to Request for Production of Documents, Statement of Mike Trueblood, dated 3/3/05) Although complainant intends to object to introduction of this theory at hearing, he has asked a series of questions seeking to clarify the evidence respondent may be intending to introduce in support of this theory (Supplemental Interrogatories 3, 6-12, and 14). Complainant could not have asked these questions with the initial round of discovery, since respondent only disclosed this theory during that initial round.
9. Supplemental Interrogatories 2, 4, 5, 13, 15, 16, 19, and 20 are direct follow-up questions to responses (or admissions) made during the initial round of discovery.
10. Supplemental Interrogatories 17 and 18 address the plant's ventilation system. This information is relevant and necessary to explain the distribution of the odor observed in the event respondent is claiming that the odor originated from a different source than the acid spill, as would appear to be necessary in light of the position that the acid spill could not have produced hydrogen sulfide.
11. In its Response to Supplemental Request to Admit, respondent has made admissions which render immaterial the following questions, which Complainant withdraws: 3(a), 7(intro), 8(intro), and 11(a through f). Complainant still requests a response to 3(intro), 7(a and b), 8(a) and 11(i through q), and the remaining Supplemental Interrogatories.

WHEREFORE complainant prays that the hearing officer deny the motion for a protective order, and order respondent to answer the supplemental interrogatories propounded by complainant on or about April 25, 2005.

Morton F. Dorothy
Morton F. Dorothy, Complainant

Morton F. Dorothy
804 East Main
Urbana IL 61802
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STATE OF ILLINOIS)
) ss
COUNTY OF CHAMPAIGN)

AFFIDAVIT

Complainant Morton F. Dorothy makes the following affidavit in support of his Response to Motion For Protective Order:

1. Complainant requested leave to conduct supplemental discovery during the status conference of April 21, 2005. Respondent raised no objection. The Hearing Officer granted leave to conduct supplemental discovery without limitation as to the number of questions to be raised by interrogatory.
2. Complainant prepared the initial round of discovery requests without a clue as to what respondent meant by the evasive pleading with respect to paragraph 12 of the complaint.
3. Supplemental interrogatories 1(a) -(j) ask a series of follow-up questions regarding respondent's claim of exemption under Section 722.134 for only a portion of the facility and wastestreams. Complainant could not possibly have asked these questions in the initial discovery request because of respondent's evasive pleading on this issue.
4. In response to the initial discovery request, respondent advanced a technical theory claiming that the hydrogen sulfide release could not have happened. Although complainant intends to object to introduction of this theory at hearing, he has asked a series of questions seeking to clarify the evidence respondent may be intending to introduce in support of this theory (Supplemental Interrogatories 3, 6-12, and 14). Complainant could not have asked these questions with the initial round of discovery, since respondent only disclosed this theory during that initial round.
5. Supplemental Interrogatories 17 and 18 address the plant's ventilation system. This information is relevant and necessary to explain the distribution of the odor observed in the event respondent is claiming that the odor originated from a different source than the acid spill, as would appear to be necessary in light of the position that the acid spill could not have produced hydrogen sulfide.

Morton F. Dorothy

Morton F. Dorothy, Complainant

The undersigned, a notary public in and for the aforesaid County and State, certifies that the above person appeared before me and signed the foregoing document on the 6th day of June, 2005.

Notary Public

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