

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MORTON F. DOROTHY,)	
)	
Complainant,)	
)	
v.)	PCB No. 05-49
)	
FLEX-N-GATE CORPORATION,)	
an Illinois corporation,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn	Carol Webb, Esq.
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	1021 North Grand Avenue East
Suite 11-500	Post Office Box 19274
Chicago, Illinois 60601	Springfield, Illinois 62794-9274
(VIA ELECTRONIC MAIL)	(VIA ELECTRONIC MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board Flex-N-Gate Corporation's **RESPONSE TO COMPLAINANT'S MOTION FOR LEAVE TO AMEND COMPLAINT**, a copy of which is herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

Dated: October 3, 2006

By: /s/ Thomas G. Safley
One of Its Attorneys

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

THIS FILING SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached
RESPONSE TO COMPLAINANT'S MOTION FOR LEAVE TO AMEND

COMPLAINT upon:

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

Carol Webb, Esq.
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Post Office Box 19274
Springfield, Illinois 62794-9274

via electronic mail on October 3, 2006; and upon:

Mr. Morton F. Dorothy
104 West University, SW Suite
Urbana, Illinois 61801

by depositing said documents in the United States Mail in Springfield, Illinois, postage
prepaid, on October 3, 2006.

/s/ Thomas G. Safley
Thomas G. Safley

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**RESPONSE TO COMPLAINANT'S
MOTION FOR LEAVE TO AMEND COMPLAINT**

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Response to what Flex-N-Gate construes as Complainant's Motion for Leave to Amend Complaint, states as follows:

I. INTRODUCTION

1. On September 19, 2006, Complainant filed an "Amended Complaint" in this matter.

2. As leave of the Illinois Pollution Control Board ("Board") is required for a party to file an amended pleading (see discussion below), Flex-N-Gate construes Complainant's filing as a Motion for Leave to file such "Amended Complaint."

3. As of the date of this Response, Complainant has not served his "Amended Complaint" on the undersigned via regular mail or any other means allowed by the Board's rules (see 35 Ill. Admin. Code § 101.304); therefore, Flex-N-Gate cannot determine the deadline for it to file this Response.

4. However, on September 19, 2006, Complainant did transmit his “Amended Complaint” to the undersigned via electronic mail.

5. Accordingly, Flex-N-Gate hereby files this Response to what it construes as Complainant’s Motion for Leave to Amend Complaint.

II. ARGUMENT

A. Standard for Amended Pleadings

6. A party may not file an amended pleading with the Board unless the Board first gives its permission. 35 Ill. Admin. Code § 103.206(d); Kassella v. TNT Logistics North America, Inc., PCB 06-1 (Ill.Pol.Control.Bd. Mar. 16, 2006).

7. In particular, Section 103.206 of the Board’s regulations provides in relevant part as follows:

- d) If a party wishes to file a counter-complaint, cross-complaint, or third-party complaint, the party must move the Board for leave to file the pleading. If a party wishes to file an amendment to a complaint, counter-complaint, cross-complaint, or third-party complaint that sets forth a new or modified claim against another person, the party who wishes to file the pleading must move the Board for leave to file the pleading.
- e) The pleading sought to be filed pursuant to subsection (d) of this Section must:
 - 1) Set forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding; and
 - 2) Meet the requirements of Section 103.204 of this Subpart.

35 Ill. Admin. Code § 103.206.

8. Section 103.204(c) in turn provides:

The complaint must be captioned in accordance with 35 Ill. Adm. Code 101.Appendix A, Illustration A and contain:

- 1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating;
- 2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense; and
- 3) A concise statement of the relief that the complainant seeks.

35 Ill. Admin. Code § 103.204(c).

9. When considering whether to grant a Motion for Leave to Amend, the Board considers four factors developed by Courts under the Illinois Rules of Civil Procedure, namely:

1. whether the proposed amendment would cure the defective pleading;
2. whether other parties would sustain prejudice or surprise by virtue of the proposed amendment;
3. whether the proposed amendment is timely; and
4. whether previous opportunities to amend the pleading could be identified.

People v. Community Landfill Co., Inc., PCB No. 97-193, 2004 Ill. ENV LEXIS 166, at

*6 (Ill.Pol.Control.Bd. May 18, 2004) (denying Motion for Leave to Amend).

10 Finally, a Motion for Leave to Amend must be “directed to the Board rather than the Hearing Officer.” Kassella, PCB 06-1, at 2 (Ill.Pol.Control.Bd. Mar. 16, 2006).

B. The Board should Strike Complainant's "Amended Complaint" because Complainant has not Sought or Received Leave to File an "Amended Complaint" from the Board.

11. As a review of the Board's docket in this matter makes clear, Complainant did not file a Motion for Leave to Amend pursuant to Section 103.206(d).

12. Complainant was aware of the requirement that he do so, as Flex-N-Gate recently pointed out in a filing with the Board, stating:

Complainant cannot file an Amended Complaint unless he first moves for leave to do so, and the Illinois Pollution Control Board ("Board") grants him such leave after finding that the Amended Complaint meets the requirements of 35 Ill. Admin. Code § 103.204. 35 Ill. Admin. Code § 103.206(d), (e).

Flex-N-Gate's Motion for Clarification of Hearing Officer Order or, in the Alternative, for Immediate Telephonic Status Conference at 3.

13. Despite the fact that Flex-N-Gate specifically pointed this fact out to Complainant, Complainant failed to comply with the requirement of the Board's rules that he seek permission from the Board before filing an amended pleading.

14. This continues Complainant's pattern of failure to comply with the Board's rules, pointed out by Flex-N-Gate in previous filings with the Board, including, but not limited to, Flex-N-Gate's pending Motion for Sanctions or, in the Alternative, for Summary Judgment ("Motion for Sanctions or Summary Judgment").

15. The Board should deny Complainant leave to amend his Complaint on this ground alone, pursuant to 35 Ill. Admin. Code § 101.800, as a sanction for Complainant's continued failure to comply with the Board's rules.

C. Even if Complainant had Filed a Proper Motion for Leave to Amend, Complainant's Proposed "Amended Complaint" does not Comply with Section 103.204, and Attempts to State Deficient Claims.

16. Further, even if Complainant had filed a Motion for Leave to Amend, as Section 103.206(d) requires, the Board would not be able to grant Complainant leave to amend because Complainant's "Amended Complaint" does not comply with Section 103.204, and because the claims which Complainant attempts to include in his "Amended Complaint" are legally deficient.

1. Proposed Count I of Complainant's "Amended Complaint"

17. Complainant's original Complaint contained six counts.

18. On October 20, 2005, the Board granted Flex-N-Gate summary judgment as to five of those counts.

19. On June 19, 2006, Flex-N-Gate filed its Motions for Sanctions or Summary Judgment as to the remaining count of Complainant's Complaint, Count I, and served that Motion on Complainant. See Flex-N-Gate's Motion for Sanctions or Summary Judgment.

20. On August 29, 2006, the Hearing Officer set a deadline of September 19, 2006, for Complainant to file a Response to Flex-N-Gate's Motion for Sanctions or Summary Judgment. See Hearing Officer Order, August 29, 2006.

21. Complainant did not file a Response to Flex-N-Gate's Motion on that date or otherwise; as noted above, however, Complainant did file his "Amended Complaint" on that date.

22. Proposed Count I of Complainant's "Amended Complaint" is substantively identical to Count I of Complainant's original Complaint, which was the subject of Flex-N-Gate's Motion for Sanctions or Summary Judgment, as:

- both allege that Flex-N-Gate "is operating a hazardous waste treatment and storage facility without a RCRA permit or interim status";
- both relate to alleged "waste under the catwalk" at the facility; and,
- both ask the Board to find that Flex-N-Gate has "violated the RCRA permit requirement of Section 21(f) of the Environmental Protection Act and 35 Ill. Adm. Code 703.121(a)" with regard to such material.

Compare Complainant's original Complaint at 3-4 with Complainant's "Amended Complaint" at 1-2.

23. In fact, some of the language in proposed Count I of Complainant's "Amended Complaint" was copied verbatim from Count I of Complainant's original Complaint. See id.

24. Complainant cannot avoid Flex-N-Gate's Motion for Sanctions or Summary Judgment simply by restating his Count I in an "Amended Complaint"; otherwise, no respondent ever would be able to file a Motion for Sanctions or a Motion for Summary Judgment, because complainants simply would file amended complaints.

25. Further, it would be a waste of time to allow Complainant to file proposed Count I of his "Amended Complaint" when Flex-N-Gate has demonstrated that the claim

that Complainant attempts to state in that count should be stricken. See Flex-N-Gate's Motion for Sanctions or Summary Judgment.

26. That is, proposed Count I of Complainant's "Amended Complaint" does not "cure [a] defective pleading," as required by the Board's ruling in People v. Community Landfill Co., Inc.; it perpetuates a defective pleading, namely Count I of Complainant's original Complaint.

27. Flex-N-Gate's Motion for Sanctions or Summary Judgment is ripe for decision: Flex-N-Gate filed that Motion more than three months ago, and Complainant has chosen not to file a Response to that Motion. See discussion above.

28. The Board should strike Count I of Complainant's original Complaint as a sanction, or grant summary judgment to Flex-N-Gate as to that Count, for the reasons stated in Flex-N-Gate's Motion for Sanctions or Summary Judgment, and the Board should then deny Complainant leave to file proposed Count I of his "Amended Complaint" for the reasons stated above.

2. Proposed Count II of Complainant's "Amended Complaint"

29. Count II of Complainant's proposed "Amended Complaint" also is deficient.

30. As noted above, in order for the Board to allow an amended complaint, "[t]he pleading sought to be filed ... must: 1) Set forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding; and 2) Meet the requirements of Section 103.204" of the Board's rules. 35 Ill. Admin. Code § 103.206(e).

31. One of the requirements of Section 103.204 is that “[t]he complaint must ... contain ... [t]he dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations” and “must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense.” 35 Ill. Admin. Code § 103.204(c).

32. Complainant’s proposed Count II, however, contains none of this information.

33. That is, Complainant’s proposed Count II alleges that “material accumulated on the floor under the plating line,” but does not allege “[t]he dates, ... events, nature, extent, duration, and strength” of such alleged accumulation. Rather, proposed Count II only incorporates the “Allegations Common to All Counts,” which merely state that “[s]pilled chemicals fall to the floor, where they accumulate to be pumped to a treatment unit.” See “Amended Complaint,” Count II.

34. Likewise, proposed Count II alleges that Flex-N-Gate “failed to determine whether the material [allegedly] accumulated on the floor under the plating line was a ‘hazardous waste,’” but does not allege the timeframe(s) during which Flex-N-Gate allegedly failed to make hazardous waste determinations. See id.

35. Without this information, Flex-N-Gate does not have sufficient information to “advise [it] of the extent and nature of the alleged violations [so as] to reasonably allow preparation of a defense,” as Section 103.204(c) requires. 35 Ill. Admin. Code § 103.204(c).

36. For example, without knowing when it allegedly failed to make hazardous waste determinations, Flex-N-Gate cannot determine whether such alleged failure occurred more than five-years before Complainant filed his “Amended Complaint,” and thus, whether proposed Count II is barred by the statute of limitations that applies to claims brought under the Act by private individuals, 735 ILCS 5/13-205. See Union Oil Co. of Cal. d/b/a Unocal v. Barge-Way Oil Co., Inc., et al., PCB No. 98-169, 1999 Ill. ENV LEXIS 9, at **11-12, n.1 (Ill.Pol.Control.Bd. Jan. 7, 1999).

37. Further, without knowing when it allegedly failed to make hazardous waste determinations, Flex-N-Gate cannot know what witnesses it needs to interview or documents it needs to review to prepare a defense to proposed Count II.

38. Accordingly, for the reasons set forth above, Complainant’s proposed Count II would be subject to a Motion to Dismiss for failure to state a claim if the Board allows it to be filed, and thus would not “cure [a] defective pleading” but create a “defective pleading.” See People v. Community Landfill Co., Inc.

39. For this reason alone, the Board should deny Complainant leave to file his proposed Count II.

40. Further, without knowing what timeframe is at issue in proposed Count II, neither Flex-N-Gate nor the Board can determine whether Count II “[s]ets forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding,” as required by Section 103.206(e). That is, the current “occurrence” that is “the subject of the proceeding” at this time is Flex-N-Gate’s current management of material “on the floor ... under the catwalk” at its facility. See Original Complaint, Count I, ¶ 1 (“Respondent is operating a hazardous waste treatment”) (Emphasis added.) If the

alleged failure to perform a hazardous waste analysis is historical, it may or may not relate to the current “subject of the proceeding.”

41. As Complainant has failed to allege sufficient information in order to allow the Board to make the determination required by Section 103.206(e)(1), the Board should deny Complainant leave to file his proposed Count II on this ground as well.

3. Proposed Counts III and IV of Complainant’s “Amended Complaint”

42. Proposed Counts III and IV of Complainant’s “Amended Complaint” each ask the Board to “determine that respondent has violated 35 Ill. Adm. Code 722.133(a)(1).” See “Amended Complaint” at 4, 5.

43. It appears that Complainant actually intended to cite to 35 Ill. Admin. Code § 722.123(a)(1). See “Amended Complaint” at 4 (Count III, ¶ 4), citing to Section “722.133(a)(1),” but quoting Section 722.123(a)(1).

44. As Complainant notes in ¶¶4 of proposed Counts III and IV, Section 722.123(a)(1) provides as follows:

The generator [of hazardous waste] shall do the following: 1) Sign the manifest certification by hand.

35. Ill. Admin. Code § 722.123(a)(1).

45. However, nowhere in proposed Counts III or IV, or elsewhere in his “Amended Complaint,” does Complainant allege that Flex-N-Gate ever failed to sign a manifest certification by hand.

46. Thus, proposed Counts III and IV do not comply with Section 103.204(c), as Section 103.206(e) requires; that is, they do not set forth “[t]he dates, location, events, nature, extent, duration, and strength of discharges or emissions” – or in this case, failure

to sign manifests – “and consequences alleged to constitute violations of the Act and regulations” so as to “advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense.” See 35 Ill. Admin. Code § 103.204(c).

47. Flex-N-Gate cannot prepare a defense to a claim that it failed to sign manifest certifications by hand if Complainant does not even allege that Flex-N-Gate failed to do so, much less provide the “date, location” and other necessary information regarding when it allegedly failed to do so.

48. Further, the factual allegations contained in proposed Counts III and IV regarding “waste minimization” have nothing to do with the regulation that Complainant cites, Section 722.123(a)(1), which, as noted above, requires only that generators of hazardous waste “[s]ign the manifest certification by hand.”

49. Thus, if the Board allows proposed Counts III and IV to be filed, they would be subject to dismissal by the Board, and thus, they do not “cure [a] defective pleading,” they create a “defective pleading.”

50. Further, proposed Counts III and IV do not appear in any way to set forth “a claim that arises out of the occurrence or occurrences that are the subject of the proceeding,” that is, whether Flex-N-Gate’s current management of material “on the floor ... under the catwalk” at its facility. See Original Complaint, Count I, ¶ 1 (“Respondent is operating a hazardous waste treatment”) (Emphasis added.)

51. That is, the current proceeding relates to Flex-N-Gate’s management of “[s]pilled chemicals [which] fall to the floor, where they accumulate in sumps to be pumped to a hazardous waste treatment unit.” Original Complaint, Common Allegations, ¶6.

52. On the other hand, Complainant's proposed new Counts III and IV relate to alleged "shipments of hazardous waste containing chromic acid and sludges resulting from the treatment of chromic acid pursuant to uniform hazardous waste manifests," and whether Flex-N-Gate signed those manifests by hand. "Amended Complaint," Count III, ¶2.

53. By definition, shipments by Flex-N-Gate of material "pursuant to uniform hazardous waste manifests" were shipments off-site, as opposed to pumping of material to an on-site "hazardous waste treatment unit." See 35 Ill. Admin. Code § 722.120(a)(1) ("A generator that transports hazardous waste or offers a hazardous waste for transportation for off-site treatment, storage, or disposal ... must prepare a manifest") (Emphasis added.)

54. Thus, the alleged shipments at issue in proposed Counts III and IV are of some completely different material than the material "on the floor ... under the catwalk," which is the material that is "the subject of the proceeding" now before the Board.

55. Accordingly, the Board also should deny Complainant leave to file proposed Counts III and IV pursuant to the requirements of 35 Ill. Admin. Code § 103.206(e)(i).

4. Proposed Count V of Complainant's "Amended Complaint"

56. Proposed Count V of Complainant's "Amended Complaint" likewise is deficient.

57. First, it is barred, at least in part, by the applicable statute of limitations.

58. As noted above, the five-year statute of limitations set forth in 735 ILCS 5/13-205 applies to claims brought by private individuals before the Board. See Union Oil Co. of Cal. d/b/a Unocal.

59. Proposed Count V is based on Complainant's allegation that Flex-N-Gate's "contingency plan and amendments did not describe the actions respondent intended to take" in response to specified situations. See "Amended Complaint," Count V.

60. However, Complainant alleges that Flex-N-Gate filed its contingency plan at issue in "May, 2001." "Amended Complaint," Count V, ¶1. (Emphasis added.)

61. As this date is more than five years before Complainant filed his "Amended Complaint," Complainant's proposed Count V, to the extent it relates to Flex-N-Gate's original filing of its contingency plan, is time-barred. See Union Oil Co.

62. Second, proposed Count V fails to comply with the requirement of Section 103.204(c) that an amended complaint "must ... contain ... [t]he dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations." 35 Ill. Admin. Code § 103.204(c).

63. With regard to Complainant's allegation that after May 1, 2006, Flex-N-Gate "filed amended contingency plans" which were improper, Complainant does not allege "the dates" of such filings.

64. Therefore, Complainant has not provided Flex-N-Gate or the Board the information required by Section 103.204(c), necessary to determine whether proposed Count V, as it relates to these later filings, also is barred by the statute of limitations.

65. In addition, proposed Count V merely alleges that “[t]he contingency plan and amendments did not describe the actions respondent intended to take,” without indicating what portion of the contingency plan is at issue, and what other actions Flex-N-Gate allegedly did “intend[] to take.”

66. Thus, proposed Count V does not “advise [Flex-N-Gate] of the extent and nature of the alleged violations to reasonably allow preparation of a defense.” 35 Ill. Admin. Code § 103.204(c).

67. Third, Complainant’s proposed Count V does not “[s]et forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding,” as required under 35 Ill. Admin. Code § 103.206(e)(1).

68. Proposed Count V alleges that Flex-N-Gate prepared “false contingency plans.”

69. At most, this allegation appears to relate to Counts II through VI of Complainant’s original Complaint, as to which the Board has granted Flex-N-Gate summary judgment.

70. This allegation does not relate in any way to the question raised by Count I of the current Complaint, namely, whether Flex-N-Gate is required to have a permit for its management of alleged hazardous waste.

71. Thus, for the reasons stated above, the Board should deny Complainant leave to amend his Complaint to include proposed Count V.

5. Proposed Counts VI and VII of Complainant's "Amended Complaint"

72. Finally, proposed Counts VI and VII of Complainant's "Amended Complaint" allege that Flex-N-Gate violated Section 9(b) of the Illinois Environmental Protection Act ("Act") by allegedly emitting hydrogen sulfide without "an air pollution permit allowing the emission of hydrogen sulfide." See "Amended Complaint," Counts VI, VII.

73. Section 9(b) of the Act provides that:

No person shall ... (b) Construct, install, or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit.

415 ILCS 5/9(b).

74. For purposes of Section 9(b):

"Air pollution" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

415 ILCS 5/3.115.

75. Complainant did not in proposed Counts VI or VII even allege that Flex-N-Gate emitted hydrogen sulfide "in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property," much less allege any facts to support such an allegation.

76. The Board has previously held that it will strike claims alleging violations of Section 9(b) where a complainant “fails to allege any facts to support the allegation.” Loschen v. Grist Mill Confections, Inc., PCB No. 97-174, 1997 Ill. ENV LEXIS 316, at *11 (June 5, 1997) (striking an allegation in a complaint that the respondent violated Section 9(b) where the “complainant fail[ed] to allege any facts to support the allegation in her complaint.”)

77. Accordingly, proposed Counts VI and VII also would only create a defective complaint subject to dismissal, and the Board should deny Complainant leave to file them on that grounds.

78. In addition, as with some of the other counts of Complainant’s “Amended Complaint,” Complainant has failed to provide any information from which the Board could conclude that proposed Counts VI and VII are related to Complainant’s current case – involving whether Flex-N-Gate is required to have a hazardous waste permit – as required by 35 Ill. Admin. Code § 103.206(e).

79. The Board should deny Complainant leave to file proposed Counts V and VI on this ground as well.

WHEREFORE, the Respondent, FLEX-N-GATE CORPORATION, respectfully prays that the Board strike Complainant’s document entitled “Amended Complaint” from

the record, grant Flex-N-Gate's outstanding Motion for Sanctions or Summary Judgment as to Count I of Complainant's Complaint, and award FLEX-N-GATE CORPORATION such other relief as the Board deems just and proper in the premises.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

By: /s/ Thomas G. Safley
One of Its Attorneys

Dated: October 3, 2006

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

GWST:003/Fil/Response to Motion for Leave to Amend