ILLINOIS POLLUTION CONTROL BOARD
March 2, 2006

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| MORTON F. DOROTHY, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | PCB 05-49 |
| | ) | (Citizens Enforcement – Air, Land) |
| FLEX-N-GATE CORPORATION, an Illinois corporation, | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |

ORDER OF THE BOARD (by N. J. Melas):

On September 9, 2004, Mr. Morton F. Dorothy filed a six-count citizen's enforcement complaint against Flex-N-Gate Corporation (Flex-N-Gate). *See* 415 ILCS 5/31(d) (2004); 35 Ill. Adm. Code 103.204. The complaint concerns Flex-N-Gate's facility, known as Guardian West, located at 601 Guardian Drive, Urbana, Champaign County where Flex-N-Gate produces bumpers for vehicles. The complaint alleges that as a result of an alleged spill of sulfuric acid inside the facility on August 5, 2004, Flex-N-Gate violated the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq*. (2004)) and various provisions of the Board's hazardous waste rules.

On October 20, 2005, the Board granted summary judgment in favor of Flex-N-Gate Corporation (Flex-N-Gate) as to counts II through VI of the complaint and denied both parties' motions for summary judgment on count I, directing the hearing officer to proceed expeditiously to hearing on that count. On November 14, 2005, Mr. Morton Dorothy moved the Board for reconsideration of that order. Flex-N-Gate replied on November 28, 2005. Today the Board grants Mr. Dorothy's motion for reconsideration in part. The Board, however, upholds the October 20, 2005 ruling granting summary judgment in favor of Flex-N-Gate on counts II through VI and directs the hearing officer to proceed to hearing on count I of the complaint.

## STANDARD FOR RECONSIDERATION

In his motion, Mr. Dorothy moves the Board for reconsideration of the Board's October 20, 2005 ruling on the parties' cross motions for summary judgment, arguing that the Board has misapplied caselaw, made findings of fact that are in dispute, and falsely attributed arguments to the complainant. In response, Flex-N-Gate asserts that Mr. Dorothy has "not presented any sufficient justification for reconsideration of the Board's October 20, 2005 Order." Resp. at 15.

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st

Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. A motion to reconsider may specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 5 (Feb. 19, 2004). "Reconsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probably that a different judgment would be reached." Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App. 3d 1, 8, 626 N.E.2d 1066, 1071 (1st Dist. 1993).

## MOTION FOR RECONSIDERATION

In his motion for reconsideration, Mr. Dorothy has presented no newly discovered evidence or changes in the law. Accordingly, the following paragraphs discuss only Mr. Dorothy's arguments as to how the Board allegedly misapplied the law. Flex-N-Gate does not specifically respond to any of Mr. Dorothy's arguments, but states only "in response to Complainant's other arguments, Respondent hereby re-alleges and re-incorporates its Motions for Summary Judgment and its Response to Complainant's Motion for Summary Judgment."

Mr. Dorothy first argues that Section 31(d) of the Act and Section 103.212(b) of the Board's procedural rules do not allow dismissal of a citizen's complaint prior to hearing, except pursuant to a motion alleging the complaint is duplicative or frivolous. 415 ILCS 5/31(d) (2004); 35 Ill. Adm. Code 103.212(b). According to Mr. Dorothy, Section 103.212(b) provides that a motion alleging a complaint is duplicative or frivolous must be filed no later than 30 days following the date of service of the complaint upon the respondent. Mr. Dorothy claims that more than 30 days elapsed between the date Mr. Dorothy filed the complaint and the date Flex-N-Gate filed the motion for summary judgment on counts II-VI. 35 Ill. Adm. Code 103.212(b). Mr. Dorothy contends that "once a citizen complainant is past this [duplicative or frivolous determination], he is entitled to a hearing regardless of the amount of paper the Respondent dumps on him."

Mr. Dorothy's second argument is that the Board misapplied Helter v. AK Steel Corp., 1997 U.S. Dist. LEXIS 9852 (S.D. Oh. 1997). Mr. Dorothy maintains that "the released gas was, however, a 'hazardous waste' because it was derived from material that was already a hazardous waste." According to Mr. Dorothy, the Board's ruling would apply to any toxic gas release from hazardous waste operations regardless of the size of the incident. Mr. Dorothy further opines that the Board's order would extend the Helter decision such that "the Illinois RCRA program is no longer 'identical in substance' with Federal regulations as required by Section 22.4 of the Act." For these reasons, Mr. Dorothy urges the Board to reconsider the Board's October 20, 2005 determination.

## ANALYSIS

The Board grants Mr. Dorothy's motion for reconsideration, finding that the Board did not misapply the law on either of the two points Mr. Dorothy raises. First, the Board finds that nothing prevents the Board from granting summary judgment in any party's favor prior to hearing. This grant of authority is explicitly provided in Section 26 of the Act: "the Board may adopt procedural rules for resolution of such actions by summary judgment prior to hearing upon motion by either party except as otherwise required by federal law." 415 ILCS 5/26 (2004); *see*

*also* DesPlaines River Watershed Alliance, *et al*. v. IEPA, *et al*., PCB 04-88 slip op. at 15-16 (Nov. 17, 2005). The Board's rules governing motions for summary judgment are found at Section 101.516. 35 Ill. Adm. Code 101.516. The Board also notes that by granting summary judgment, the Board does not "dismiss" certain alleged violations, but rather makes findings of violations as a matter of law where no genuine issues of material fact exist.

Second, the Board finds that it correctly interpreted Helter. The court in Helter found that the coke oven gas that leaked from the defendant's pipelines could not be considered a solid waste before it was discarded. Helter, 1997 U.S. Dist. LEXIS 9852 slip op. at 31. The court reasoned that only contained gaseous materials that are discarded could be considered a solid waste for RCRA purposes. It is undisputed that the hydrogen sulfide gas that was allegedly created was not contained at the time it became "discarded." The Board does not find, as Mr. Dorothy contends, that hydrogen sulfide gas is not a toxic waste or derived from a hazardous waste. The Board's October 20, 2005 order found only that the alleged release, of an uncontained gas, did not trigger RCRA because an uncontained gas is not a solid waste within the meaning of RCRA.

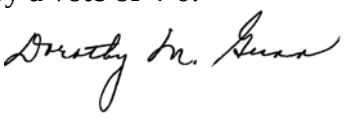
Mr. Dorothy maintains in his motion for reconsideration that "the released gas was, however, a 'hazardous waste' because it was derived from material that was already a hazardous waste." The Board does not agree. Both caselaw and statutory language support the Board's finding that an uncontained gas is simply not considered a hazardous waste within the definitions of RCRA. A release such as the one alleged may nonetheless trigger a contingency plan response under the Occupational Safety and Health Act (OSHA), which is an employee protection law, rather than RCRA, which is an environmental law.

## CONCLUSION

The Board grants Mr. Dorothy's motion to reconsider with respect to the Board's alleged misapplication of the law. The Board, however, upholds the Board's October 20, 2005 ruling granting summary judgment in favor of the Flex-N-Gate Corporation on counts II through VI and directs the hearing officer to proceed to hearing on count I of the complaint.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 2, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board