

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 **RESPONDENT'S MOTION FOR CLARIFICATION OF HEARING OFFICER ORDER OR, IN THE ALTERNATIVE, FOR IMMEDIATE TELEPHONIC STATUS CONFERENCE**, a copy of which is herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

Dated: June 22, 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

CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached
RESPONDENT'S MOTION FOR CLARIFICATION OF HEARING OFFICER
ORDER OR, IN THE ALTERNATIVE, FOR IMMEDIATE TELEPHONIC STATUS
CONFERENCE 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 June 22, 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 June 22, 2006.

/s/ Thomas G. Safley
Thomas G. Safley

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RESPONDENT'S MOTION FOR CLARIFICATION OF HEARING OFFICER ORDER OR, IN THE ALTERNATIVE, FOR IMMEDIATE TELEPHONIC STATUS CONFERENCE

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, pursuant to 35 Ill. Admin. Code §§ 101.500 and 101.502, and for its Motion for Clarification of Hearing Officer Order or, in the Alternative, for Immediate Telephonic Status Conference, states as follows:

1. On June 19, 2006, the Parties participated in a telephonic status conference with the Hearing Officer in this matter. The undersigned participated in that status conference on behalf of Respondent.
2. On that same date, the Hearing Officer issued a Hearing Officer Order regarding that status conference.
3. The undersigned received that Order today, June 22, 2006.
4. That Order states in relevant part as follows:

On June 19, 2006, the parties participated in a telephone status conference with the hearing officer. Complainant plans to file an amended complaint within the next 14 days, and respondent plans to object to the amended

complaint. Additionally, respondent plans to file a motion for summary judgment on the remaining count in this matter.

Order at 1. (Emphasis added.)

5. The underlined language set forth above does not reflect the undersigned's understanding or notes regarding the Parties' arguments and the Hearing Officer's direction during the June 19, 2006 status conference.

6. Rather, it is the undersigned's recollection and understanding that at the status conference:

- a. the Parties and the Hearing Officer discussed the fact that the Hearing Officer had set a deadline of May 19, 2006, for Complainant to file any Motion for Leave to Amend Complaint with the Board;
- b. the Parties and the Hearing Officer further discussed the fact that Complainant had failed to file a Motion for Leave to Amend by that deadline;
- c. Complainant orally moved the Hearing Officer for a 45-day extension of that deadline to two weeks following the June 19, 2006 status conference, or July 3, 2006;
- d. counsel for Respondent orally objected to Complainant's oral motion;
- e. the Hearing Officer asked if Respondent planned to make any written filing in response to Complainant's oral motion; and,
- f. the Parties and the Hearing Officer discussed the procedural posture of the issue and determined that Complainant had made an oral motion for extension of the deadline, and that Respondent should file a written Response to that oral motion, after which filing the Hearing Officer would consider Respondent's filing and then rule on Complainant's oral motion.

7. In light of these occurrences, Respondent has, since the date of the Hearing, been drafting its Response to Complainant's oral motion for Additional Time to

File Motion for Leave to Amend Complaint (“Response to Complainant’s oral motion”), which Response it filed today.

8. The Hearing Officer Order, however, does not reference the fact that Complainant missed the previous deadline to file a Motion for Leave to Amend, Complainant’s oral motion to extend that deadline, or the fact that the Hearing Officer directed Flex-N-Gate to file a written Response to Complainant’s oral motion which the Hearing Officer then would consider before ruling on Complainant’s oral motion.

9. Further, Respondent notes that Complainant cannot, as the Hearing Officer states, “plan[] to file an amended complaint within the next 14 days.” 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). As the Board recently stated:

The Board agrees with [respondent] that the amended complaint the [complainants] wish to file must comply with Section 103.204 (35 Ill. Adm. Code 103.204) of the Board’s procedural rules. *See* 35 Ill. Adm. Code 103.206(d); *see also* Revision of the Board’s Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (Mar. 16, 2000) (Section 103.206 applies to the filing of an amendment to a complaint that sets forth a new or modified claim “whether or not the person against whom the claim is made is already a party to the proceeding.”). The Board further agrees with [respondent] that under Section 103.206(d), the [complainants’] motion for leave to amend should have been directed to the Board rather than the hearing officer.

Kassella v. TNT, PCB 06-1, at 1-2 (Ill.Pol.Control.Bd. Mar. 16, 2006).

10. Further, Respondent notes that its objection is not “to the amended complaint” (as to which no motion for leave to file has been filed or granted), but rather,

that its objection is to Complainant's oral motion for an extension of the deadline for Complainant to file a Motion for Leave. See Respondent's Response to Complainant's oral motion, filed today. If the Hearing Officer grants Complainant's oral motion, and Complainant timely files a Motion for Leave, Respondent will review Complainant's Motion for Leave, consider whether Complainant has complied with the requirements of 35 Ill. Admin. Code §§ 101.204 and 101.206, and at that point consider whether it opposes Complainant's proposed Amended Complaint.

11. The Hearing Officer's Order implies that the Hearing Officer either:

- a. understands that she granted Complainant's oral motion to extend the deadline during the June 19, 2006, telephonic status conference (which would render Respondent's Response to that oral motion filed today moot); or,
- b. understands that the Board already has granted Complainant leave to file an Amended Complaint.

12. As set forth above, it is Respondent's understanding that neither of these is the case.

13. Accordingly, Respondent moves the Hearing Officer to issue a Revised Hearing Officer Order clarifying her June 19, 2006 Hearing Officer Order. Respondent submits that the following revised language (additions and strikeouts indicated) accurately reflects the discussions of the Parties and the Hearing Officer at the status conference:

On June 19, 2006, the parties participated in a telephone status conference with the hearing officer. Complainant orally moved for an extension of the deadline for Complainant to file a motion for leave to ~~plans to~~ file an amended complaint ~~within the next~~ to 14 days following the status conference, or July 3, 2006. ~~and Respondent plans to orally objected to Complainant's oral motion the amended complaint.~~ The hearing officer

directed Respondent to file a written Response to Complainant's oral motion, after which filing the hearing officer will rule on Complainant's oral motion. Additionally, respondent plans to file a motion for sanctions or, in the alternative, for summary judgment on the remaining count in this matter.

14. Alternatively, if the Hearing Officer finds that Respondent's understanding of the Parties' and the Hearing Officer's discussions during the June 19, 2006, status conference as set forth above is incorrect, Respondent moves the Hearing Officer to immediately set another telephonic status conference in this matter so that the Parties and Hearing Officer can discuss and clarify these issues.

WHEREFORE, Respondent FLEX-N-GATE CORPORATION respectfully moves the Hearing Officer to clarify her June 19, 2006, Hearing Officer Order as set forth above, and to grant FLEX-N-GATE CORPORATION such other relief as the Hearing Officer deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

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

Dated: June 22, 2006

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GWST:003/Fil/Motion to Clarify Hearing Officer Order