RECEIVED
JAN - 5 2004
STATE OF ILLINOIS
POLLUTION CONTROL BOARD

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MATE TECHNOLOGIES, INC.	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 2004-075
	)	(Enforcement X)
F.I.C. AMERICA CORPORATION	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: Carey S. Rosemarin
Law Offices of Carey S. Rosemarin, P.C.
500 Skokie Boulevard, Suite 510
Northbrook, IL 60062

PLEASE TAKE NOTICE that on the 5th day of January, 2004 F.I.C AMERICA CORPORATION, by and through its attorneys, Jeremy A. Gibson and Mitchell Chaban of MASUDA, FUNAI, EIFERT & MITCHELL, LTD., shall file its **MOTION OF RESPONDENT TO DISMISS OR, IN THE ALTERNATIVE, STRIKE** with the Office of the Clerk of the Pollution Control Board , a copy of which is hereby served upon you.

One of Its Attorneys

Jeremy A. Gibson
Mitchell S. Chaban
MASUDA, FUNAI, EIFERT & MITCHELL, LTD.
203 N.LaSalle Street, Suite 2500
Chicago, Illinois 60601
(312) 245-7500

PROOF OF SERVICE

I, the undersigned, do hereby state on oath that I served the foregoing **NOTICE OF FILING** upon Carey S. Rosemarin, Law Offices of Carey S. Rosemarin, P.C. 500 Skokie Boulevard, Suite 510, Northbrook, IL 60062 by placing a copy of the same in a properly addressed, postage prepaid, envelopes and depositing the same in the U.S. Mail Chute at 203 N. LaSalle Street Suite 2500, Chicago, Illinois 60601 on this 5 day of January, 2004.

Subscribed and sworn to before me this 5th day of January, 2004.

OFFICIAL SEAL
CHRISTINA M PATTERSON
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. SEPT. 27 2005

Notary Public

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	)	(Enforcement X)
F.I.C. AMERICA CORPORATION	)	
	)	
Respondent.	)	

MOTION OF RESPONDENT
TO DISMISS OR, IN THE ALTERNATIVE, STRIKE

Respondent, F.I.C. AMERICA CORPORATION, by and through its attorneys, Jeremy A. Gibson and Mitchell S. Chaban of Masuda, Funai, Eifert & Mitchell, Ltd., pursuant to 35 Ill. Adm. Code §101.500, hereby presents its Motion to Dismiss or, in the alternative, Strike ("Motion") and states in support as follows:

I. Introduction

Complainant, MATE TECHNOLOGIES, INC. ("Mate"), has commenced a citizen's complaint ("Complaint") against Respondent, F.I.C. AMERICA CORPORATION ("FIC"), pursuant to Section 31(d) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/31(d), for alleged violations of the Act and/or Illinois Pollution Control Board ("Board") regulations thereunder. The Complaint concerns FIC's operations after March 2002 at the industrial real property at 750 Rohlwing Road, Itasca, Illinois ("Property"), which Mate is leasing to FIC.

The Complaint has nine counts, each of which involves substantially the same core allegations: the alleged emission and settlement of certain oily or non-oily particulates in the course of FIC's welding and assembling of metal automotive parts at

the Property.[1] Counts I through VII allege that the settlement of such materials on interior surfaces of an active manufacturing plant creates an illegal solid waste storage or disposal facility. Count VIII alleges that such emissions constitute prohibited air pollution under the Act, even though workplace indoor air emissions are regulated specifically by the federal Occupational Safety and Health Agency ("OSHA") pursuant to the federal Occupational Safety and Health Act ("OSH Act").[2] Count IX alleges that related rinsing of the dusts and truck dock resulted in prohibited drain discharges.

Respondent moves that the Complaint be dismissed in its entirety because it is "frivolous" or "duplicitous" for purposes of Section 31(d), as well as legally and factually insufficient.[3] The Complaint on its face simply depicts the routine operation and maintenance of a metal parts plant, which as a matter of law are outside the scope of the cited authorities. In order to harass FIC into lease concessions, Mate is stretching the Act in unprecedented, unintended, hyper-literal and illogical ways, without taking regulatory context into consideration, and manufacturing "violations" so as to convert a landlord-tenant "ordinary wear and tear" contract disagreement into some sort of public threat. This misuse of the citizen's complaint mechanism should not be tolerated.

As explained below:

(a) Counts I through VII are deficient on their face because they attempt to apply solid waste requirements to permitted air emissions that were not wastes, including because such matter had not yet been discarded, stored or disposed;

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[1] Although FIC will contest Mate's factual allegations vigorously if necessary, it treats them as true for purposes of the Motion.
[2] 29 U.S.C. §651.
[3] Unless stated otherwise, the format "Section ___" refers to a section of the Act, 415 ILCS 5/1 *et seq.*

(b) Count VIII is deficient on its face because it fails to allege violations of air pollution control standards or specific air quality samples or impacts and because, with respect to indoor emissions, it is preempted by the OSH Act; and

(c) Count IX is duplicative of an ongoing proceeding by the Illinois Environmental Protection Agency ("Agency"), which action FIC believes was instigated erroneously by Mate; and

(d) Portions of Counts II-VII seek relief that cannot be granted.

Accordingly, the Complaint should be dismissed or, in the alternative, the deficient counts or portions should be stricken.

II. Argument

A. Counts I through VII are Frivolous and Legally and Factually Insufficient

The Complaint alleges the following solid waste violations in connection with the alleged emission and settlement of a "film" of particulates:

Count I; failure to store used oil in tanks or other approved units. §739.122(a);[4]

Count II; failure to obtain a Resource Conservation and Recovery Act ("RCRA") permit for hazardous waste storage or disposal, §703.121(a), or to file non-hazardous waste landfill reports, §815.201. §739.181(b);

Count III; failure to file non-hazardous waste landfill reports. §815.201;

Count IV; failure to determine if waste is hazardous. §722.11;

Count V; failure to obtain a RCRA permit for hazardous waste storage. §703.121(a);

[4] Unless stated otherwise, the format "§___" refers to a cited section of 35 Ill. Adm. Code.

Count VI; failure to obtain a RCRA permit for hazardous waste disposal. §703.121(a); and

Count VII; failure to file non-hazardous waste landfill reports, §815.201, Section 21(e).

In short, Mate alleges that a layer of dust from the intended operations of an active assembly plant has turned the Property into a storage or landfill facility. However, Counts I through VII are deficient on their face because they attempt to apply solid waste requirements to air emissions that were not wastes and, in any event, had not been discarded.

As a matter of law and common sense, the only type of claim that can be stated in Counts I through VII, if any, is one pursuant to the air pollution provisions of the Act, because these allegations all concern air emissions associated with welding or related assembly units. The air and waste regimes are distinct.

For example, the solid waste requirements at issue in Counts I through VII all are premised upon duties that attach to "waste," which is defined in relevant part as follows:

> "'Waste' means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other *discarded* material, including solid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations . . . ."

Section 3.535 (emphasis added). The alleged substances of concern are outside the scope of this definition.

First, air emissions are not expressly included in the above definition of "waste" and are not by definition "waste." Instead air emissions are classified and regulated as "contaminants" without reference to being discarded. *See* Sections 3.115[5], 3.165.[6] In

[5] "'Air pollution' is the presence in the atmosphere of one or more *contaminants* . . . ." (emphasis added).

other words, the mere settlement of air emissions does not constitute waste. Nor should it; otherwise, any point where dust or other air emissions settles would be a waste storage or disposal facility for purposes of the Act. This would be an absurd result and effectively would create a "zero emissions" policy. What would be the point of allowing an emission? Consequently, Counts I through VII cannot involve waste as a matter of law and, as a result, must be dismissed.

Second, settled air emissions cannot constitute waste until such time as they have been "discarded," such as either by being swept or wiped up or, perhaps, by abandonment of the subject property. As there appears to be no relevant statutory, regulatory or reported opinion on point defining or interpreting "discarded," it is relevant to consider the following dictionary entry in pertinent part:

> "discard . . . to get rid of as useless or unpleasant . . . implies *the letting go or throwing away* of something that has become useless or superfluous . . . ."

Webster's Ninth New Collegiate Dictionary (1991) (emphasis added). Thus, the past tense form, "discarded," must mean to have taken the acts of collecting a substance or material and determining that a substance or material will be thrown away.

Yet, the core of Mate's allegations is simply the presence of certain particulates in an active manufacturing facility as a result of its intended use. Mate did not (with good reason) allege that the Property has been abandoned, that FIC would not or could not periodically conduct janitorial or maintenance activities at the Property, or that FIC mishandled substances after they had been collected or stored. Instead, Mate is attempting to apply the requirements cited in Counts I through VII before any "waste" has been generated by being discarded. Mate's premature application of regulatory

[6] "'Contaminant' is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source."

duties should be rejected; such duties cannot attach until, at a minimum, the materials of concern have been affirmatively collected and identified and a handling determination has been made.

The mere existence or presence of a material in an active facility that may eventually require certain regulated management does not mean it is a waste or somehow has been "passively" discarded. For example, the Board previously has ruled in a citizen's complaint case that chipped and peeling lead-based paint throughout a structure, which apparently emitted dust or particulate into soil and elsewhere, was not a "waste" because it had not yet been discarded. *Boyer v. Harris*, PCB 96-151 (September 4, 1997). In contrast, FIC has not located any precedent or authority for the proposition that waste management requirements apply to material in a manufacturing facility actively in use, where such material has not yet even been collected and handled for purposes of eventual storage, treatment or disposal. Accordingly, the materials of concern cannot have been discarded and Counts I through VII are deficient as a matter of law.

Third, to the extent that Counts I-VII involve indoor workplace air emissions, they are preempted by the OSH Act as discussed for purposes of Count VIII.

Fourth, Counts II, III, V, VI and VII should be dismissed or stricken to the extent they are based upon "storage" or "disposal" of wastes or upon the Property being a "landfill." The Complaint does not allege any factual basis for inferring that FIC intended to allow settled particulates to remain in place permanently or that FIC operated a waste storage, treatment or disposal facility.

Fifth, Count I should be dismissed or stricken because the cited authorities are premised upon storage of used oil in tanks and tanks are used to stored liquids. However, the Complaint does not allege that the materials of concern are liquids.

B. Count VIII is Frivolous and Legally and Factually Insufficient

Count VIII alleges a violation of the following provision of the Act:

> "No person shall: (a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State *so as to cause or tend to cause air pollution* in Illinois, either alone or in combination with contaminants from other sources, or *so as to violate regulations or standards* adopted by the Board . . . ."

415 ILCS 5/9(a) (emphasis added). In short, the relevant prohibition applies to certain "air pollution" and/or violation of regulations or standards.

The latter issue is not applicable here. Mate has not alleged that emissions at the Property violated any specific permit requirement, emission limitation or other air pollution control law pursuant to the Act. (In fact, the welding and assembly operations of concern are exempt specifically from permitting and related requirements, §§201.146(y),[7] 201.146(aa).[8]) Instead, Mate simply makes superficial, conclusory and legally insufficient allegations that oily particulate emissions from the welding and assembly operations constitute prohibited "air pollution." (¶73) This is insufficient.

The Act provides the relevant definition as follows:

> "'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 as to unreasonably interfere with the enjoyment of life or property."

415 ILCS 5/3.115 (emphasis added). Accordingly, Mate summarily alleges injury to health or property and "unreasonable" interference with enjoyment of property. (¶73)

[7] "Brazing, soldering, wave soldering or welding equipment, including associated ventilation hoods . . . ."
[8] "Equipment for carving, cutting, routing, turning, drilling, machining, sawing, surface grinding, sanding, planning, buffing . . . metals . . . where such equipment is . . . [e]xhausted inside a building . . . ."

These ungrounded allegations of "harm" are legally and factually insufficient to provide the basis for a claim, particularly where, as here, there is no alleged violation of applicable air pollution control regulations or standards and the Board's regulations exempt the relevant activities from air permitting.

For instance, the Act requires specifically that an enforcement complaint describe the manner and extent of the alleged violation, 415 ILCS 5/31(c)(1). Similarly, the Board requires a substantive basis for a case to proceed:

> "The complaint must . . . contain: . . . *The dates, locations, 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.*"

§103.204(c) (emphasis added).

Yet, Count IX contains no allegations regarding air quality, either indoors or outdoors (such as at the property boundary), or description of any injuries caused thereby, whether to persons or property. For example, Count IX identifies no specific individual or public health consequences and effects whatsoever arising from the alleged emissions, such as coughing, wheezing, allergic reactions, hospitalizations, deaths or other identifiable harms. Similarly, Mate has made no allegations of substantial soil or groundwater contamination resulting from alleged emissions. As a landlord, Mate is not in possession of, and has no right to the use or enjoyment of, the Property and, so, cannot complain under the Act about the Property condition. Furthermore, Mate has not alleged that FIC neglected to periodically clean and maintain the Property of any "film" and Mate itself acknowledges FIC's cleaning activities, such as pressure washing. (¶¶9-10)

For instance, FIC has not located any precedent for a landlord filing a citizen's complaint against its tenant regarding indoor conditions, much less where no specific, substantive harm is alleged to health or the environment, or where the subject property is in active use. In contrast, Board citizen air pollution precedents typically involve third-party neighbors who allege direct and significant injuries, such respiratory problems and inabilities to use their properties for their intended uses, and typically provide that actionable property interference does not include "trifling inconvenience, petty annoyance and minor discomfort." *See, e.g., Brill v. Latoria*, PCB 00-219 (June 6, 2002); *Trepanier v. Speedway Wrecking Co.*, PCB 97-50 (January 6, 2000).

In the absence of substantive allegations of property damage or harm to health or the environment, the citizen's complaint process should not become a tool for converting a landlord-tenant dispute into a statutory environmental enforcement proceeding. Where there is no alleged pollution control violation, and there is a permit exemption, the intent of the Act and Board rules to prevent frivolous actions should be exercised with careful scrutiny of the allegations. Count VIII should be dismissed as insufficient.

In any event, as a matter of law, Count VIII should be dismissed or stricken with respect to indoor air emissions and welding because state regulation of such matters is preempted by the OSH Act. OSHA has promulgated specific indoor air contaminant regulations and standards for the workplace, including for general particulates and numerous specific substances, pursuant to the OSH Act. §29 C.F.R. 1910.1000. Similarly, OSHA has regulated specifically welding activities. §29 C.F.R. 1910.25. Count VIII primarily concerns indoor air emissions in a workplace arising from welding. Accordingly, as Illinois has not adopted its own occupational safety regime to supplant

the federal scheme, or had such a regime approved by OSHA, the Act cannot be used for purposes of regulating the indoor air emissions or welding at the Property. *See* 29 U.S.C. 667(a); *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 112 S.Ct. 2374 (June 18, 1992) (U.S. Supreme Court holds that certain Illinois environmental statutes are preempted by the OSH Act and unenforceable where they regulate matters addressed by OSHA standards, even if such state laws have non-workplace objectives and do not expressly conflict with the OSHA standards.)

C. Count IX is Duplicitous

Section 31(d) provides that there should be no hearing for a duplicitous matter. "Duplicitous" means "the matter is identical or substantially similar to one brought before the Board or another forum." §101.202.

Count IX alleges that on October 1, 2003 FIC discharged certain pressure washing rinsate into storm sewers at the Property in violation of Section 12(a), 415 ILCS 5/12(a), and §309.102(a). (¶¶9-10, 75-87.)

On October 1, 2003, the Agency inspected the Property and initiated a formal investigation of the identical or substantially same circumstances and laws alleged by Count IX. Attached to the Motion is a true and correct copy of the Agency's dated November 3, 2003 notice of alleged violation letter, W-2003-00422 ("Notice"), and FIC's December 16, 2003 response thereto. As set forth in Attachment A to the Notice, the Agency alleges that on October 1, 2003 FIC discharged certain pressure washing rinsate into storm sewers at the Property in violation of Section 12(a) and §309.102(a).

Because Count IX is identical or substantially similar to the allegations being prosecuted by the Agency pursuant to its statutory enforcement authority, it should be dismissed as duplicitous for purposes of Section 31(d).

D. Counts II-VIII Seek Relief that cannot be Granted

Certain of the relief requests should be stricken as a matter of law as the requested relief cannot be granted because it bears no relation to the alleged violation of the Act or is unsupported by Board precedent. The "paperwork" violations alleged in Counts II-VII, where the cited authorities do not prohibit the existence, emission or settlement of oily or non-oily particulates in an active industrial facility, cannot be the basis for remediation relief. Similarly, Count VIII cannot be the basis for remediation relief.

Counts II through VII allege violations of requirements that do not prohibit or regulate the existence, emission or settlement of particulates. For instance:

Count II alleges that FIC failed to obtain a RCRA permit for hazardous waste storage or disposal, §703.121(a), or to file non-hazardous waste landfill reports, §815.201, in violation of §739.181(b);

Count III alleges that FIC failed to file non-hazardous waste landfill reports in violation of §815.201;

Count IV alleges that FIC failed to determine if waste is hazardous in violation of §722.11;

Count V alleges that FIC failed to obtain a RCRA permit for hazardous waste storage in violation of §703.121(a);

Count VI alleges that FIC failed to obtain a RCRA permit for hazardous waste disposal in violation of §703.121(a); and

Count VII alleges that FIC failed to obtain a RCRA permit for hazardous waste disposal. §703.121(a).

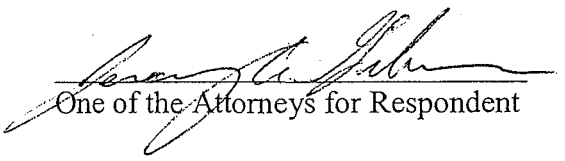
The relief request for remediation in Paragraph C of each of these counts should be stricken because the existence, emission, settlement or handling of oily or non-oily particulates at the Property cannot be related to, or proximately caused by, a failure to undertake any of the cited, alleged obligations.

In addition, Count VIII cannot be the basis for remediation relief with respect to prohibited indoor air pollution injuries because the OSH Act, as set forth above, preempts these matters. Likewise, Count VIII cannot be the basis for remediation relief with respect to prohibited outdoor air pollution injuries to the Property because the Complaint does not allege that FIC violated any specific permit or performance standard requirement or allege any specific outdoor contamination of the Property of any applicable soil standard. Furthermore, FIC has not located any Board precedent for remediation in a prohibited air pollution case involving dust, fumes or particulates. Therefore, the request for remediation relief in Paragraph C of Count VIII should be stricken.

III. Conclusion

For the foregoing reasons, the Complaint is frivolous or duplicitous or legally or factually insufficient and should be dismissed in its entirety. In the alternative, the deficient counts or portions described above should be stricken.

Respectfully submitted,



One of the Attorneys for Respondent

Jeremy A. Gibson
Mitchell S. Chaban
MASUDA, FUNAI, EIFERT & MITCHELL, LTD.
203 North LaSalle Street, Suite 2500
Chicago, Illinois 60601

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601

ROD R. BLAGOJEVICH, GOVERNOR RENEE CIPRIANO, DIRECTOR

217/785-1896

CERTIFIED MAIL # 7002 3150 0000 1226 1361
RETURN RECEIPT REQUESTED

November 3, 2003

Mr. Akria Ohama, President
FIC America
485 E. Lies Road
Carol Stream, IL 60188

Re: Violation Notice: W-2003-00422
Facility I.D.: CAS000015

Dear Mr. Ohama:

This constitutes a Violation Notice pursuant to Section 31(a)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a)(1), and is based upon review of available information and investigation by representatives of the Illinois Environmental Protection Agency ("Illinois EPA").

The Illinois EPA hereby provides notice of violations of environmental statutes, regulations or permits as set forth in Attachment A to this letter. Attachment A includes an explanation of the activities that the Illinois EPA believes may resolve the specified violations, including an estimate of a reasonable time period to complete the necessary activities. However, due to the nature and seriousness of the violations cited, please be advised that resolution of the violations may also require the involvement of a prosecutorial authority for purposes that may include, among others, the imposition of statutory penalties.

A written response, which may include a request for a meeting with representatives of the Illinois EPA, must be submitted via certified mail to the Illinois EPA within 45 days of receipt of this letter. The response must address each violation specified in Attachment A and include for each, an explanation of the activities that will be implemented and the time schedule for the completion of each activity. Also, if a pollution prevention activity will be implemented, indicate that intention in any written response. The written response will constitute a proposed Compliance Commitment Agreement ("CCA") pursuant to Section 31 of the Act. The Illinois EPA will review the proposed CCA and will accept or reject the proposal within 30 days of receipt.

ATTACHMENT I

If a timely written response to this Violation Notice is not provided, it shall be considered a waiver of the opportunity to respond and meet, and the Illinois EPA may proceed with a referral to the prosecutorial authority.

Written communications should be directed to BEVERLY BOOKER at the ILLINOIS EPA, BUREAU OF WATER, CAS #19, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276. All communications must include reference to this Violation Notice number, W-2003-00422.

Questions regarding this Violation Notice should be directed to GEORGE LAMBERT at 217/785-1896.

Sincerely,

Michael S. Garretson, Acting Manager
Compliance Assurance Section
Bureau of Water

Attachment

ATTACHMENT A

CAS000015

FIC AMERICA **VIOLATION NOTICE: W-2003-00422**

Questions regarding the violations identified in this attachment should be directed to George Lambert at (217) 785-1896.

On October 1, 2003, a representative of the Illinois Environmental Protection Agency conducted an inspection of the subject facility. Based upon the finding of this inspection and a review of Illinois EPA records several violations of the Illinois Environmental Protection Act have been noted.

Unpermitted Discharge
A complaint was referred from Emergency Response regarding FIC America. The complaint centered on the practice of washing the loading dock area. Specifically the runoff is allowed to completely or partially run into an onsite storm water drain. Samples of the water in the drain revealed contaminants. Action should be taken to eliminate any further discharges. Compliance is expected to be achieved immediately.

Violation Date	Violation Description
10/01/2003	Except as in compliance with the provisions of the Act, Board regulations, and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person shall be unlawful.
Rule/Reg.:	Section 12(a) and (f) of the Act, 415 ILCS 5/12(a) and (f) (2002), 35 Ill. Adm. Code 309.102(a)

FIC America Corporation

December 16, 2003

By Certified Mail, Return Receipt Requested

Illinois Environmental Protection Agency
Bureau of Water, CAS #19
P.O. Box 19276
Springfield, IL 62794-9276

Attn: Beverly Booker

Re: November 3, 2003 Letter to FIC America Corporation ("FIC")
Notice: W-2003-00422 ("Notice")
Facility: CAS000015

Dear Ms. Booker:

This is to respond upon behalf of FIC to the Notice, including the allegations set forth in Attachment A thereto ("Attachment").

For the reasons set forth below, FIC respectfully requests the Illinois Environmental Protection Agency ("Agency") to resolve the Notice and this matter at this time without the need for further enforcement activity. FIC would be pleased to, and requests the opportunity to, meet with Agency representatives, if the Agency does not believe that the information below resolves this matter.

The Attachment alleges that, on October 1, 2003, during mopping of the truck dock pavement at 750 Rohlwing Road, Itasca, Illinois ("Facility"), rinsate entered the stormwater drain at the base of the dock. The rinsate allegedly included contaminants. The Attachment further alleges that such a discharge was unpermitted for purposes of the Clean Water Act, Illinois Environmental Protection Act ("Act") and stormwater discharge permit.

In response, FIC comments as follows:

1. FIC disagrees that there was a discharge to the stormwater drain. The activities of concern occurred in connection with FIC's systematic janitorial/maintenance program after termination of its operations at the Facility. Consistent with good housekeeping practices, and in response to previous landlord requests, FIC had been cleaning interior surfaces of the Facility and collecting and containing for off-site disposal resulting materials, such as rinsates, towels, wipes and other items. This work was done in consultation with and under periodic supervision by FIC's environmental, health and safety consultant, Mostardi Platt Environmental, Inc. ("Mostardi Platt").

ATTACHMENT II

485 East Lies Road Carol Stream, IL 60188
Telephone 630-871-7609 Facsimile 630-871-2631

As part of this process, FIC addressed the truck dock. The landlord previously had requested specifically that this surface be cleaned. Accordingly, FIC did so on October 1, 2003. As the dock pavement was cleaned, FIC personnel positioned at the drain mopped up all rinsate as it was created in order to prevent any discharge to the drain. FIC personnel accumulated several buckets of such mopped up rinsate.

In addition, for purposes of possible documentation applications, Mostardi Platt acquired a wipe sample from inside the drain. Accordingly, the grate was removed from the drain for such purposes.

All of the FIC employees and Mostardi Platt representatives who were on-site believe that no rinsate entered the drain during the janitorial activities, or otherwise, on October 1, 2003, except for discharges arranged by the Agency's representative for purposes of the Agency's inspection. They believe that any wetness observed in the drain before the Agency-directed discharges were residuals from previous wet weather flows.

The statements of Aaron Stapleton, Charles M. Moek, Alex Antu, Zdislaw Dykas and James Zimny are enclosed in support of the above comments.

2. Furthermore, FIC believes that the relevant janitorial activities enhanced protection of the soil and waters of Illinois by removing potential contaminants on the pavement from exposure to future wet weather flows into the stormwater drain. FIC believes that this is consistent with the Agency's policies and preferences.

3. In addition, FIC believes that, to the extent any rinsate entered the drain, it would constitute the following permitted non-stormwater discharge: "waters used to control dust."

4. The activities of concern should not occur again. FIC no longer conducts any operations at the Facility and has no plans to resume any operations there before its lease terminates on or about April 15, 2004. FIC has completed its janitorial/maintenance program at the Facility and does not expect to conduct any further such activity at or near the truck dock or elsewhere at the Facility.

5. Nevertheless, FIC desires to prevent any future similar occurrence at its other facilities. The applicable regulations and requirements have been reviewed with FIC maintenance personnel. Within 30 days of resolving this matter with the Agency, FIC will adopt, and transmit to its maintenance and truck dock personnel, a written policy prohibiting any non-stormwater discharge to a stormwater drain in Illinois except as permitted by the Act, stormwater discharge permit or other applicable law.

FIC is committed to being a good corporate citizen and would like to work cooperatively with the Agency to resolve this matter. Please let us know of any question or concern, or if any further information is desired, regarding this matter.

Sincerely,

FIC AMERICA CORPORATION

William Murakami,
Executive Vice President

Enclosures (Statements of Aaron Stapleton, Charles M. Moek, Alex Antu, Zdislaw Dykas and James Zimny)

Statement of Aaron Stapleton

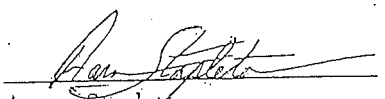
1. My name is Aaron Stapleton. I am Manager, PE/Maintenance, for FIC America Corporation ("FIC").

2. I managed cleaning and janitorial/maintenance activities at 750 Rohlwing Road, Itasca, Illinois ("Facility").

3. On October 1, 2003, FIC personnel mopped the truck dock pavement at the Facility. The persons doing the mopping were Charles Moek, Alex Antu and Zdislaw Dykas. I instructed them to contain and mop up all runoff during the mopping. To the best of my knowledge, they did so and no mopping runoff entered the stormwater drain at the base of the truck dock.

4. To the best of my knowledge, there was no discharge into the truck dock stormwater drain from any other source on October 1, 2003, except for discharges arranged by the Illinois Environmental Protection Agency's representative for purposes of the representative's inspection.

5. FIC personnel removed the grate from the stormwater drain on October 1, 2003 only in order for James Zimny of Mostard Platt Environmental, Inc. to obtain a wipe sample from inside the drain.



Aaron Stapleton

Dated: December 16, 2003

Statement of Zdislaw Dykas

1. My name is Zdislaw Dykas. I am an employee of FIC America Corporation ("FIC").

2. I conducted cleaning and janitorial/maintenance activities at 750 Rohlwing Road, Itasca, Illinois ("Facility").

3. On October 1, 2003, FIC personnel mopped the truck dock pavement at the Facility. The persons doing the mopping were me, Charles Moek and Alex Antu. My manager, Aaron Stapleton, instructed us to contain and mop up all runoff during the mopping. To the best of my knowledge, we did so and no mopping runoff entered the stormwater drain at the base of the truck dock.

4. To the best of my knowledge, there was no discharge into the truck dock stormwater drain from any other source on October 1, 2003, except for discharges arranged by the Illinois Environmental Protection Agency's representative for purposes of the representative's inspection.

5. FIC personnel removed the grate from the stormwater drain on October 1, 2003 only in order for James Zimny of Mostard Platt Environmental, Inc. to obtain a wipe sample from inside the drain.

Zdislaw Dykas

Dated: December 16, 2003

Statement of Charles Moek

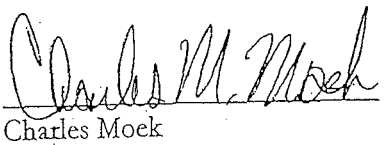
1. My name is Charles Moek. I am Supervisor, Facility Maintenance, for FIC America Corporation ("FIC").

2. I supervised and conducted cleaning and janitorial/maintenance activities at 750 Rohlwing Road, Itasca, Illinois ("Facility").

3. On October 1, 2003, FIC personnel mopped the truck dock pavement at the Facility. The persons doing the mopping were me, Alex Antu and Zdislaw Dykas. My manager, Aaron Stapleton, instructed us to contain and mop up all runoff during the mopping. To the best of my knowledge, we did so and no mopping runoff entered the stormwater drain at the base of the truck dock.

4. To the best of my knowledge, there was no discharge into the truck dock stormwater drain from any other source on October 1, 2003, except for discharges arranged by the Illinois Environmental Protection Agency's representative for purposes of the representative's inspection.

5. FIC personnel removed the grate from the stormwater drain on October 1, 2003 only in order for James Zimny of Mostard Platt Environmental, Inc. to obtain a wipe sample from inside the drain.



Charles Moek

Dated: December 16, 2003

Statement of Alex Antu

1. My name is Alex Antu. I am an employee of FIC America Corporation ("FIC").

2. I conducted cleaning and janitorial/maintenance activities at 750 Rohlwing Road, Itasca, Illinois ("Facility").

3. On October 1, 2003, FIC personnel mopped the truck dock pavement at the Facility. The persons doing the mopping were me, Charles Moek and Zdislaw Dykas. My manager, Aaron Stapleton, instructed us to contain and mop up all runoff during the mopping. To the best of my knowledge, we did so and no mopping runoff entered the stormwater drain at the base of the truck dock.

4. To the best of my knowledge, there was no discharge into the truck dock stormwater drain from any other source on October 1, 2003, except for discharges arranged by the Illinois Environmental Protection Agency's representative for purposes of the representative's inspection.

5. FIC personnel removed the grate from the stormwater drain on October 1, 2003 only in order for James Zimny of Mostard Platt Environmental, Inc. to obtain a wipe sample from inside the drain.

Alex Antu

Dated: December 16, 2003

Statement of James Zimny

1. My name is James Zimny. I am an Environmental Technician for Mostardi Platt Environmental, Inc.

2. I provided consulting and related services to FIC America Corporation ("FIC") for purposes of cleaning and janitorial/maintenance activities at 750 Rohlwing Road, Itasca, Illinois ("Facility").

3. On October 1, 2003, I observed FIC personnel mopping the truck dock pavement at the Facility. I told Aaron Stapleton that FIC personnel should contain and mop up all runoff during the mopping. To the best of my knowledge, the FIC personnel did so and no mopping runoff entered the stormwater drain at the base of the truck dock.

4. To the best of my knowledge, there was no discharge into the truck dock stormwater drain from any other source on October 1, 2003, except for discharges arranged by the Illinois Environmental Protection Agency's representative for purposes of the representative's inspection.

5. FIC personnel removed the grate from the stormwater drain on October 1, 2003 in order for me to obtain a wipe sample from inside the drain.

James Zimny

Dated: December 16, 2003

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PROOF OF SERVICE

I, the undersigned, do hereby state on oath that I served the foregoing **MOTION OF RESPONDENT TO DISMISS OR, IN THE ALTERNATIVE, STRIKE** upon Carey S. Rosemarin, Law Offices of Carey S. Rosemarin, P.C. 500 Skokie Boulevard, Suite 510, Northbrook, IL 60062 by placing a copy of the same in a properly addressed, postage prepaid, envelopes and depositing the same in the U.S. Mail Chute at 203 N. LaSalle Street Suite 2500, Chicago, Illinois 60601 on this 5th day of January, 2004.

Subscribed and sworn to before me this 5th day of January, 2004.

OFFICIAL SEAL
CHRISTINA M PATTERSON
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. SEPT. 27,2005

Notary Public