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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD **OCT 12 2004**

MORTON F. DOROTHY,

Complainant,

v.

FLEX-N-GATE CORPORATION,
an Illinois corporation,

Respondent.

STATE OF ILLINOIS
Pollution Control Board

PCB No. 05-49

NOTICE OF FILING

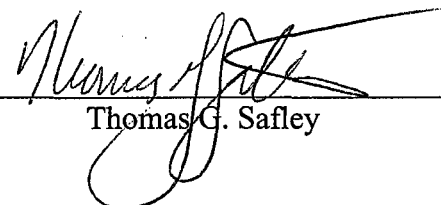
TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

Mr. Morton F. Dorothy
804 East Main
Urbana, Illinois 61802
(VIA FIRST CLASS MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original and nine copies of a MOTION TO DISMISS, copies of which are herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

By: 
Thomas G. Safley

Dated: October 7, 2004

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

CERTIFICATE OF SERVICE

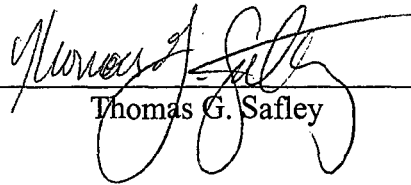
I, Thomas G. Safley, the undersigned, certify that I have served the attached

MOTION TO DISMISS upon:

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

Mr. Morton F. Dorothy
804 East Main
Urbana, Illinois 61802

by depositing said documents in the United States Mail in Springfield, Illinois, postage prepaid, on October 7, 2004.



Thomas G. Safley

GWST:003/Fil/NOF and COS – Motion to Dismiss

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Pollution Control Board

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Respondent.

MOTION TO DISMISS

NOW COMES Respondent, FLEX-N-GATE CORPORATION (“Flex-N-Gate”), by and through its attorneys, HODGE DWYER ZEMAN, and moves the Illinois Pollution Control Board (the “Board”) to dismiss Counts I, II, III, IV, V and VI of Complainant’s Complaint in the above-captioned matter for failure to state a claim upon which relief can be granted. In support of this Motion, Flex-N-Gate states as follows:

I. INTRODUCTION

1. On September 8, 2004, Complainant filed a Complaint against Flex-N-Gate with the Board and served that Complaint on Flex-N-Gate. See Plaintiff's Complaint, Plaintiff's Proof of Service.

2. In summary, Complainant alleges that at Flex-N-Gate's facility at 601 Guardian Drive in Urbana, Illinois ("Facility"), certain "chemicals in water solution" are spilled and enter a treatment system ("Treatment System"). Complaint at 1, ¶¶ 3, 5-6.

3. Complainant further alleges that on August 5, 2004, sulfuric acid was spilled at the Facility and came in contact with some substance associated with this

spillage of chemicals to the Treatment System, "producing hydrogen sulfide gas." Complaint, at 1-2, ¶¶ 3-15.

4. In connection with these alleged facts, Complainant argues that Flex-N-Gate does not have a required permit for its Facility under the federal Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq. ("RCRA"); and that in responding to this alleged incident, Flex-N-Gate violated several Illinois' regulations promulgated under RCRA. Id., Counts 1 to 6.

5. Flex-N-Gate does not admit any factual allegations of Complainant's Complaint; regardless however, as set forth below, even if these allegations were true, each Count of Complainant's Complaint fails to state a claim upon which relief can be granted, and, therefore, the Board should dismiss Complainant's Complaint.

II. LEGAL STANDARD

6. Section 101.506 of the Board's procedural rules provides that parties may file "motions to strike, dismiss or challenge the sufficiency of any pleading within 30 days after the service of the challenged document." 35 Ill. Admin. Code § 101.506.

7. When ruling on a Motion to Dismiss, the Board applies "the same principles applied to Illinois Code of Civil Procedure 2-615 and 2-619 motions to strike or dismiss." County of DuPage v. Waste Management of Ill., AC No. 94-92, 1994 Ill. ENV LEXIS 1488, at *4 (Ill.Pol.Control.Bd. Dec. 1, 1994).

8. "For purposes of ruling on a motion to dismiss, all well plead facts contained in the pleading must be taken as true[,] and all inferences from them must be drawn in favor of the nonmovant." Lone Star Indus., Inc. v. Illinois Environmental

Protection Agency, PCB No. 03-94, 2003 Ill. ENV. LEXIS 133, at **2-3

(Ill.Pol.Control.Bd. March 6, 2003) (citations omitted).

9. However, while the Board, like a court, “must take all well-pleaded facts as true, [it] must also disregard mere conclusions of law or fact unsupported by the facts alleged.” Oravek by Brann v. Community Sch. Dist. 146, 264 Ill. App. 3d 895, 898 (1st Dist. 1994).

10. Further, “[a]lthough [the Board] must construe pleadings liberally with a view to doing substantial justice between the parties, the plaintiff is not relieved from the duty of including sufficient factual averments in [his] complaint,” and Plaintiff’s Complaint “must allege sufficient facts to bring the plaintiff’s claim within the scope of a legally recognized cause of action.” Id.

III. ANALYSIS

A. Count I of Complainant’s Complaint Fails to State a Claim upon which Relief can be Granted.

11. Count I of Complainant’s Complaint asserts that Flex-N-Gate is “operating a hazardous waste treatment and storage facility without a RCRA permit or interim status, in violation of Section 21(f) of the [Illinois Environmental Protection] Act [(the “Act”) 415 ILCS 5/1 et seq.] and 35 Ill. Adm. Code § 703.121(a).” Complaint, Count 1, ¶1.

12. Section 21(f) of the Act states in relevant part that “[n]o person shall . . . [c]onduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation . . . without a RCRA permit for the site issued by the Agency under subsection (d) of Section 39 of this Act.” 415 ILCS 5/21(f)(1).

13. Section 703.121(a) states in relevant part that “[n]o person may conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal operation . . . [w]ithout a RCRA permit for the HWM (hazardous waste management) facility” 35 Ill. Admin. Code § 701.121(a).

14. However, Section 703.123(e) states that “[t]he following persons are among those that are not required to obtain a RCRA permit: . . . e) [a]n owner or operator of an elementary neutralization unit or wastewater treatment unit, as defined in 35 Ill. Admin. Code 720.110.” 35 Ill. Admin. Code § 703.123(e).

15. Section 720.110 defines “wastewater treatment unit” in relevant part as a device that: (1) “is part of a wastewater treatment facility that has an NPDES [i.e., National Pollutant Discharge Elimination System] permit . . . or a pretreatment permit or authorization to discharge” to a publicly owned treatment works (“POTW”); (2) “receives and treats or stores an influent wastewater that is a hazardous waste” and, (3) “meets the definition of tank or tank system.” 35 Ill. Admin. Code § 720.110.

16. Complainant argues that at the Flex-N-Gate facility, “chemicals fall to the floor, where they accumulate in sumps to be pumped to a hazardous waste treatment unit.” Complaint at 1, ¶ 6.

17. However, taking Plaintiff’s allegations as true, which the Board must for purposes of this Motion, establishes that the Treatment System is a “wastewater treatment unit” exempt from RCRA permitting requirements.

1. Plaintiff Alleges that the Treatment System is Part of a Wastewater Treatment Unit that Discharges to a POTW.

18. Again, the first element of the definition of “wastewater treatment unit” is that a system “is part of a wastewater treatment facility that has an NPDES permit . . . or a pretreatment permit or authorization to discharge” to a POTW. 35 Ill. Admin. Code § 720.110.

19. Plaintiff alleges that “treated wastewater is discharged” from the Treatment System “to a sanitary sewer owned by the Urbana Champaign Sanitary District.” Complaint at 2, ¶10.

20. Thus, taking Plaintiff’s allegations as true, those allegations establish that the first element of the definition of “wastewater treatment unit” is met.

2. Plaintiff Alleges that the Treatment System Receives and Stores Influent Wastewater that is a Hazardous Waste.

21. The relevant part of the second element of the definition of “wastewater treatment unit” is that a system “receives and treats or stores an influent wastewater that is a hazardous waste . . . or generates and accumulates[,] . . . or treats or stores[,] a wastewater treatment sludge that is a hazardous waste.” 35 Ill. Admin. Code § 720.110.

22. Complainant alleges that the materials that enter the System are “various chemicals in water solution,” which are “spilled” on “the floor,” and which “spillage . . . “is hazardous waste.” Complaint at 1, ¶¶ 5-7.

23. Thus, taking Plaintiff’s allegations as true, those allegations establish that the second element of the definition of “wastewater treatment unit” is met.

3. Plaintiff's Alleges that the Treatment System Meets the Definition of Tank or Tank System.

24. The third element of the definition of “wastewater treatment unit” is that a system “meets the definition of tank or tank system.” 35 Ill. Admin. Code § 720.110.

25. Section 720.110 defines “[t]ank” as “a stationary device, designed to contain an accumulation of hazardous waste that is constructed primarily of nonearthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.” Id.

26. Section 720.110 defines “tank system” as “a hazardous waste storage or treatment tank and its associated ancillary equipment and containment system.” Id.

27. Section 720.110 defines “ancillary equipment” as:

any device, including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps, that is used to distribute, meter, or control the flow of hazardous waste from its point of generation to storage or treatment tanks, between hazardous waste storage and treatment tanks to a point of disposal onsite, or to a point of shipment for disposal off-site.

Id.

28. Section 720.110 defines “sump” as “any pit or reservoir that meets the definition of tank and those troughs or trenches connected to it that serve to collect hazardous waste for transport to hazardous waste storage, treatment, or disposal facilities.” Id.

29. Plaintiff alleges that at the Facility, “tanks are mounted on concrete piers above a coated concrete floor,” and “[s]pilled chemicals fall to the floor, where they accumulate in sumps to be pumped to a hazardous waste treatment unit.” Complaint at 1, ¶ 6 (emphasis added).

30. Thus, Plaintiff's allegations establish that the third element of the definition of "wastewater treatment unit" is met, i.e., that the coated floor and sump at the Facility, in connection with the associated wastewater treatment equipment, "meet[] the definition of tank or tank system."

4. *Because the Treatment System is a Wastewater Treatment Unit, No RCRA Permit is Required.*

31. As discussed above, taking Plaintiff's allegations as true, (1) the Treatment System discharges wastewater to a POTW; (2) the Treatment System treats an influent wastewater that is a hazardous waste; and (3) the Treatment System meets the definition of "tank" or "tank system."

32. Accordingly, the Treatment System is a "wastewater treatment unit" that is exempt from RCRA permitting requirements under 35 Ill. Admin. Code § 703.123(e).

33. Therefore, the Board must dismiss Count I of Plaintiff's Complaint, which alleges that Flex-N-Gate is required to obtain a permit for the Treatment System.

B. **Count II of Complainant's Complaint Fails to State a Claim upon which Relief can be Granted.**

34. Count II of Complainant's Complaint asserts that Flex-N-Gate violated Section 725.151(b) by failing to properly carry out its contingency plan in response to the alleged spill of sulfuric acid. Complaint, Count II.

35. Section 725.151(b) states that "[t]he provisions of the [contingency] plan must be carried out immediately whenever there is a fire, explosion or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment." 35 Ill. Admin. Code § 725.151(b).

36. For the reasons stated below, the Board must dismiss Count II of Complainant's Complaint on the grounds that Count II fails to state a claim on which relief can be granted.

1. Section 725.151(b) does Not Apply to Wastewater Treatment Units.

37. As noted above, the Treatment System is a "wastewater treatment unit." See discussion above.

38. Part 725 of the Board's regulations, including Section 725.151(b), "do[es] not apply to [t]he owner or operator of an elementary neutralization unit or a wastewater treatment unit as defined in 35 Ill. Adm. Code 720.110." 35 Ill. Admin. Code § 725.101(c)(10) (emphasis added).¹

39. Accordingly, Flex-N-Gate could not have violated Section 725.151(b), and the Board should dismiss Count II on this basis alone.

2. Even if Section 725.151(b) did Apply, Section 725.151(b) was not Triggered because No Release of "Hazardous Waste" or "Hazardous Waste Constituents" Occurred.

40. Again, Section 725.151(b) provides that "[t]he provisions of the [contingency] plan must be carried out immediately whenever there is a fire, explosion or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment." 35 Ill. Admin. Code § 725.151(b) (emphasis added).

41. Complainant does not allege that "there [was] a fire." See Complaint.

42. Complainant does not allege that "there [was] an explosion." See *id.*

¹ Note that the minor exception to this rule for wastewater treatment units "diluting hazardous ignitable (D001) wastes (other than the D001 High TOC Subcategory defined in 35 Ill. Adm. Code 728.Table T) or reactive (D003) waste in order to remove the characteristic before land disposal" does not apply here, because, among other reasons, Flex-N-Gate discharges its wastewater to a POTW and does not dispose of it by land disposal. See discussion above.

43. Rather, Complainant alleges that “hydrogen sulfide gas” was emitted (Complaint at 2, ¶15), and that “[t]he hydrogen sulfide emission was a release of hazardous waste or hazardous waste constituents that could threaten human health or the environment within the meaning of Section 725.151(b).” *Id.* at 5, ¶2.

a. Uncontained Hydrogen Sulfide Gas is not a “Waste” for Purposes of RCRA.

44. Uncontained gases are not “wastes” regulated by RCRA.

45. Section 3.220 of Act defines hazardous waste as “a waste, or combination of wastes, which . . . pose[s] a substantial present or potential hazard to human health or the environment . . . and which has been identified, by characteristics or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976, P.L. 94-580 or pursuant to Board regulations.” 415 ILCS 5/3.220 (emphasis added).

46. Section 3.535 of the Act defines waste as “as any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material . . .” 415 ILCS 5/3.535 (emphasis added).

47. “When determining whether material is a ‘waste,’ the Board considers federal court interpretations of the definition of ‘solid waste’ under federal RCRA regulations.” People v. State Oil Company, PCB No. 97-103, 1999 Ill. ENV LEXIS 391, at *9 (Ill.Pol.Control.Bd. Aug. 19, 1999) (citing R.R. Donnelley & Sons Co. v. Illinois Environmental Protection Agency, PCB 88-79, 1989 Ill. ENV LEXIS 530, at *5 (Ill.Pol.Control.Bd. Feb. 23, 1989). Accord, Universal Scrap Metals, Inc. v. Flexi-Van

Leasing, Inc., PCB No. 99-149, 2001 Ill. ENV LEXIS 154, at *15 (Ill.Pol.Control.Bd. Apr. 5, 2001).

48. In Helter v. AK Steel Corp., 1997 U.S. Dist. LEXIS 9852 (S.D.Oh. 1997), the United States District Court for the Southern District Of Ohio dismissed a claim that a release of “coke oven gas” implicated RCRA, noting that “[t]he only gaseous substances included in RCRA’s definition of ‘solid waste’ are ‘contained gaseous materials,’” and holding that: “in order to be considered a solid waste for RCRA purposes, the gaseous material must be both discarded and contained,” and that “the plain language of 42 U.S.C. § 9603(27) excludes the leaked COG, in its gaseous form, from the definition of ‘solid waste’ and, thus, from RCRA’s coverage. Id. at **30, 31, 32 (emphasis added).

49. The United States Environmental Protection Agency also has acknowledged that uncontained gases are not regulated as “wastes” under RCRA. See, e.g., Hazardous Waste Management System: Identification and Listing of Hazardous Waste CERCLA Hazardous Substance Designation; Reportable Quantity Adjustment, 54 FR 50968, at 50973 (Dec. 11, 1989) (“[O]ur authority to identify or list a waste as hazardous under RCRA is limited to containerized or condensed gases (*i.e.*, section 1004(27) of RCRA excludes all other gases from the definition of solid wastes and thus cannot be considered hazardous wastes).”) (Emphasis added).

50. Plaintiff alleges that the alleged hydrogen sulfide gas release was uncontained. Complaint at 3.

51. Taking Plaintiff’s allegations as true, the alleged hydrogen sulfide gas was not a “waste” regulated by RCRA.

b. The alleged Hydrogen Sulfide Gas was not a "Hazardous Waste Constituent."

52. The alleged hydrogen sulfide gas was not a "hazardous waste constituent."

53. The term "hazardous waste constituent" is not defined in the Act but is defined in Section 720.110 as "a constituent that caused the hazardous waste to be listed in 35 Ill. Adm. Code 721.Subpart D, or a constituent listed in 35 Ill. Adm. Code 721.124." 35 Ill. Admin. Code § 720.110.

54. Hydrogen sulfide is not listed as a constituent that caused any hazardous waste to be listed in Part 721 Subpart D. See 35 Ill. Admin. Code, Part 721, Appendix G ("Basis for Listing Hazardous Wastes").

55. Hydrogen sulfide is not a "constituent listed in 35 Ill. Adm. Code 721.124." See 35 Ill. Admin. Code § 721.124.

56. Thus, hydrogen sulfide is not a "hazardous waste constituent" for purposes of RCRA.

c. Because Uncontained Hydrogen Sulfide Gas is not a "Waste" Regulated by RCRA, and is not a "Hazardous Waste Constituent," Section 725.151(b) was not Triggered.

57. Again, the requirements of Section 725.151(b) are only triggered in the event of a "fire, explosion or release of hazardous waste or hazardous waste constituents." 35 Ill. Admin. Code § 725.151(b).

58. As discussed above, Plaintiff has not alleged any fire or explosion, and any release of uncontained hydrogen sulfide gas is not a "release of hazardous waste or hazardous waste constituents."

59. Accordingly, even if a release of hydrogen sulfide gas had occurred as Complainant alleges, that release did not implicate Section 725.151(b), because (1) Section 725.151(b) does not apply to Flex-N-Gate's wastewater treatment unit, and (2) even if it did apply, the prerequisites for applying Section 725.151(b) – i.e., a “fire, explosion or release of hazardous waste or hazardous waste constituents” – did not occur.

60. Thus, the Board should dismiss Count II of Complainant's Complaint.

C. **Count III of Complainant's Complaint Fails to State a Claim upon which Relief can be Granted.**

61. Count III asserts that Flex-N-Gate violated Section 725.156(j) by “fail[ing] to report the incident to the Agency within fifteen days.” Complaint at 6, Count III, ¶2.

62. Section 725.156(j) states that “[t]he owner or operator shall note in the operating record the time, date, and details of any incident that requires implementing the contingency plan,” and “[w]ithin 15 days after the incident, it shall submit a written report on the incident to the Director.” 35 Ill. Admin. Code § 725.156(j).

63. As discussed above, Part 725 does not apply to Flex-N-Gate's wastewater treatment unit. See discussion above.

64. Further, by its own terms, Section 725.156(j) only applies to an “incident that requires implementing the contingency plan.”

65. As discussed above, the alleged release of hydrogen sulfide gas did not “require[] implementing the contingency plan” because no fire or explosion occurred, and hydrogen sulfide gas is not a “waste” or “hazardous waste constituent” under RCRA. See discussion above.

66. For the reasons stated above, the Board also should dismiss Count III of Complainant's Complaint.

D. Count IV of Complainant's Complaint Fails to State a Claim upon which Relief can be Granted.

67. Count IV asserts that Flex-N-Gate violated Section 725.154(b) by "fail[ing] to immediately amend [its] contingency plan to address the possibility of an acid spill resulting in a hydrogen sulfide release." Complaint at 6-7.

68. Section 725.154(b) states that "[t]he contingency plan must be reviewed and immediately amended, if necessary, whenever: . . . b) [t]he plan fails in an emergency. . . ." 35 Ill. Admin. Code § 725.154(b).

69. As discussed above, Part 725 does not apply to Flex-N-Gate's wastewater treatment unit. See discussion above.

70. Further, by its own terms, Section 725.154(b) only applies where a contingency plan "fails."

71. As discussed above, the alleged release of hydrogen sulfide gas did not require implementing the contingency plan because no fire or explosion occurred, and hydrogen sulfide gas is not a "waste" or "hazardous waste constituent" under RCRA. See discussion above.

72. If Flex-N-Gate's contingency plan was not required to have been implemented, it could not have "failed."

73. Thus, for the reasons stated above, the Board also should dismiss Count IV of Complainant's Complaint.

E. Count V of Complainant's Complaint Fails to State a Claim upon which Relief can be Granted.

74. Count V asserts that Flex-N-Gate violated Section 725.154(c) because "the facility has changed in a way that materially increases the potential for releases of hazardous waste constituents, specifically, the hydrogen sulfide emission incident . . . demonstrated that an acid spill could result in a release of hydrogen sulfide," and "has changed in a way that changes the response necessary in an emergency," and Flex-N-Gate "has not amended the contingency plan." Complaint at 7-8, Count V, ¶¶ 3-5.

75. Section 725.154(c) states that:

[t]he contingency plan must be reviewed and immediately amended, if necessary, whenever . . . [t]he facility changes--in its design, construction, operation, maintenance or other circumstances--in a way that materially increases the potential for fires, explosions or releases of hazardous waste or hazardous waste constituents or changes the response necessary in an emergency.

35 Ill. Admin. Code § 725.154(c).

76. As discussed above, Part 725 does not apply to Flex-N-Gate's wastewater treatment unit. See discussion above.

77. Further, as also discussed above, the alleged hydrogen sulfide gas was not a "waste" or a "hazardous waste constituent." See discussion above.

78. Further, as discussed above, the alleged release of hydrogen sulfide gas did not require implementing the contingency plan, so, by definition, no "emergency" for purposes of Section 725.154(c) occurred. See discussion above.

79. Thus, for the reasons stated above, the Board also should dismiss Count V of Complainant's Complaint.

F. Count VI of Complainant's Complaint Fails to State a Claim upon which Relief can be Granted.

80. Count VI alleges that Flex-N-Gate violated Section 725.151(b) by “fail[ing] to carry out the [contingency] plan in response to th[e] [alleged sulfuric acid] spill.” Plaintiff’s Complaint at 9, ¶19.

81. Section 725.151(b) states that “[t]he provisions of the [contingency] plan must be carried out immediately whenever there is a fire, explosion or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.” 35 Ill. Admin. Code § 725.151(b).

82. As discussed above, however, Part 725 does not apply to Flex-N-Gate’s wastewater treatment unit. See discussion above.

83. Further, as also discussed above, Plaintiff has not alleged any fire or explosion, and any release of uncontained hydrogen sulfide gas is not a “release of hazardous waste or hazardous waste constituents.” See discussion above.

84. Thus, even if Section 725.151(b) did apply to the wastewater treatment unit, no “fire, explosion or release of hazardous waste or hazardous waste constituents” occurred, and the requirement to carry out “[t]he provisions of the plan” was not triggered.

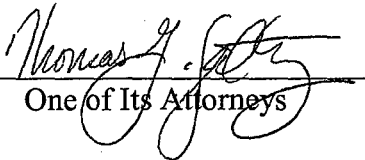
85. Thus, the Board also should dismiss Count VI of Complainant’s Complaint.

IV. CONCLUSION

WHEREFORE, the Respondent FLEX-N-GATE CORPORATION respectfully moves the Illinois Pollution Control Board grant this Motion to Dismiss and to award Flex-N-Gate such other relief as the Illinois Pollution Control Board deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

By: 
One of Its Attorneys

Dated: October 7, 2004

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