BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
vs.	)	No. PCB 05-049
	)	
FLEX-N-GATE CORPORATION, an Illinois Corporation,	)	
	)	
Respondent.	)	

RESPONSE TO MOTION TO DISMISS

Complainant Morton F. Dorothy says the following for his response to respondent Flex-n-gate Corporation's motion to dismiss filed on or about October 7, 2004:

INTRODUCTION

1. This case involves an accident in which sulfuric acid spilled onto hazardous waste, resulting in a release of hydrogen sulfide, a toxic gas. Several workers were sickened as a result of exposure to unknown levels the gas. The accident demonstrated a weakness in the Section 725.151 contingency plan for the facility in that the workers lacked training, and monitoring and safety equipment, to safely deal with this type of incident. (Complaint, pars 13-27)

2. Complainant has filed a separate motion to join the Illinois Environmental Protection Agency (Agency) as party in interest and to extend time for the Agency to respond to the motion to dismiss. Complainant intends to file his response within the original time limit, but requests leave to revise or supplement his response in light of the Agency's response.

COUNT I: OPERATION WITHOUT A RCRA PERMIT OR INTERIM STATUS
RCRA Permit Requirement

3. Section 21(f) of the Environmental Protection Act (Act) and 35 Ill. Adm. Code 703.121(a) require that any person conducting a hazardous waste treatment, storage or disposal operation have a RCRA permit.

   a. Board rules establish certain specific exceptions to this general rule,

including exclusions for facilities consisting only of "elementary neutralization units" or "wastewater treatment units" (Sections 703.123(e) and 720.110))

b. Board rules also establish an exclusion for large quantity generators of hazardous waste which is treated on-site in tanks. (Sections 703.123(a) and 722.134(a))

c. Complainant's burden is to show that respondent falls within the general rule. If respondent wishes to show that this facility falls within an exclusion, respondent needs to raise that exclusion by way of affirmative defense, and to introduce evidence as to the applicability of the exclusion. (35 Ill. Adm. Code 103.205(d))

4. Paragraph 1 of Count I alleges that "Respondent is operating a hazardous waste treatment and storage facility without a RCRA permit or interim status".

a. This allegation is sufficient to advise respondent of the nature of the complaint without complainant having to list the specific TSD units that cause the facility to be regulated.

b. At hearing complainant intends to show that the facility in fact includes a hazardous waste treatment unit, sludge drying unit and sludge storage unit in which hazardous waste is stored before being shipped off-site for recycling and disposal. Complainant has requested that the Agency provide a complete list of the TSD units.

TSD Unit Exclusions

5. In paragraphs 14 - 32 of the motion to dismiss, respondent is arguing that the facility is not required to have a RCRA permit because it includes a treatment unit that respondent claims is an "elementary neutralization unit" or "wastewater treatment unit".

6. The terms "facility" and "unit" are defined in 35 Ill. Adm. Code 720.110. The "facility" is the entire geographical area which contains one or more "treatment, storage or disposal unit" ("TSD unit").

a. The RCRA permit is a "facility permit" in which a single permit is issued covering the entire geographical area, as opposed to permits for each individual TSD unit.

b. Respondent cannot establish that a facility is exempt from the permit

requirement by arguing that one unit is exempt. Rather, respondent would have to show that all of the TSD units on the facility are exempt, including in this case the units for drying and storing hazardous waste sludge, and the paint line.

c. Once a facility is subject to RCRA, many of the requirements apply to portions of the facility other than the regulated TSD units. Specifically, the contingency plan requirement of 35 Ill. Adm. Code 725.151 provides that the owner or operator "must have a contingency plan for his facility."

i. This was intentionally worded this way so that in an emergency situation, for example an acid spill involving a release of a toxic gas, responders would not need to go to the Supreme Court for a ruling as to whether the release was coming from a regulated unit before deciding what to do.

ii. This approach also allowed the RCRA contingency plan to be used to meet the broader OSHA emergency response plan requirement discussed below.

7. Paragraph 10 of the complaint alleges that: "The facility includes a hazardous waste treatment unit, which includes pH adjustment, reduction of hexavalent chromium with sodium metabisulfite, and precipitation of a nickel and chromium hydroxide sludge.

a. Paragraph10 is a part of the general description of the incident and facility. The purpose of this allegation, in conjunction with paragraph 26, is to advise the Board that, so far as complainant is concerned, the spilled acid was contained and washed down to a treatment unit that was designed to handle this flow.

b. The complaint does not allege that this is the unit which causes the facility to be RCRA regulated, nor does the complaint take a position as to whether the unit might be exempted from regulation as a "wastewater treatment unit" or "elementary neutralization unit".

c. If respondent wishes to pursue the "elementary neutralization unit" and "wastewater treatment unit" defenses, respondent needs to file an answer and raise these as affirmative defenses (although this defense would only work if all units at the facility were excluded.)

Respondent's Argument is Inconsistent with Exclusion for Large Quantity Generators of Hazardous Waste Which Is Treated On-site in Tanks

8. In its dealings with the Agency, respondent has declared that this facility operates pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a), as a large quantity generator of hazardous waste which is treated on-site in tanks, without a RCRA permit or interim status. (Complaint, par 12). At hearing, complainant intends to show:

   a. The Agency has issued Illinois EPA ID#0191055145 for the facility.

   b. On March 21, 2001, respondent sent the Agency a copy of its Emergency Response and Contingency Plan with a cover letter stating that it was "required in 40 CFR 265, subpart D", the federal equivalent to 35 Ill. Adm. Code 725, Subpart D. The March 21, 2001 version of the plan stated that: "This Contingency Plan as been prepared to fulfill the requirements of 40 CFR 265, Part D and 35 Illinois Administrative Code 725".

   c. The current version of the Emergency Response and Contingency Plan, dated May, 2001, revised October, 2003, also states that: "This Contingency Plan as been prepared to fulfill the requirements of 40 CFR 265, Part D and 35 Illinois Administrative Code 725".

   d. The Emergency Response and Contingency Plan does not state that it was prepared to meet the Occupational Safety and Health Administration (OSHA) emergency response planning requirements. (29 CFR 1910.120(p)(8)(i)).

   e. Complainant has requested that the Agency provide the Board with additional information as to the exclusion claimed by respondent.

9. The contingency plan was required for a facility exempt pursuant to Sections 703.123(a) and 722.134(a), but would not have been required if the facility were exempt as "elementary neutralization units" or "wastewater treatment units".

10. If respondent wants to assert exclusion as a large quantity generator of hazardous waste which is treated on-site in tanks under Sections 703.123(a) and 722.134(a), it needs to raise this by way of affirmative defense, and to prove that it qualifies.

   a. Section 722.134(a)(4) requires compliance with the contingency plan requirements of Section 725.151 et seq,

b. Section 722.134(a) limits hazardous waste accumulation to 90 days.

c. Section 722.134(b) requires a RCRA permit if the 90-day storage period is exceeded.

COUNT II: FAILURE TO CARRY OUT CONTINGENCY PLAN AS REQUIRED BY SECTION 725.151
Applicability of Section 725.151

11. In paragraph 37 and 38 of the motion to dismiss, respondent contends that Section 725.151(b) does not apply to a "wastewater treatment unit" or "elementary neutralization unit".

    a. As discussed above, Section 725.151 provides that the owner or operator "must have a contingency plan for his facility". The contingency plan applies to the entire facility, not just to regulated TSD units.

    b. As is also discussed above, respondent would have to prove that each and every TSD unit of the facility is excluded to defeat the requirement to have a contingency plan.

    c. As is also discussed above, respondent has declared to the Agency that this facility as exempt pursuant to Section 703.123(a) and 722.134(a), which requires compliance with Section 725.151.

12. In paragraph 38 of the motion to dismiss, respondent contends that the contingency plan requirements of Section 721.151 do not apply to a "wastewater treatment unit" or "elementary neutralization unit" because Section 725.101(c)(10) provides that Part 725 does not apply to the owner or operator of such units.

    a. However, if there is a non-excluded TSD unit on the same facility, Section 725.151 requires a contingency plan for the entire facility.

13. OSHA rules require the preparation of a similar "Emergency Response Plan". Those rules allow the owner or operator of a RCRA facility to use the contingency plan prepared pursuant to Board rules to meet the OSHA requirement.(29 CFR 1910.120(p)(8)(i)).

    a. At hearing, complainant intends to show that respondent elected to prepare a RCRA contingency plan, and to use the RCRA contingency plan to meet the OSHA requirement.

b. In now arguing that the facility was not subject to the RCRA contingency plan requirement, respondent is arguing that it intentionally violated the requirement to prepare an OSHA Emergency Response Plan. Respondent is estopped to claim that it intentionally violated the OSHA rules by preparing a sham RCRA contingency plan.

Hydrogen Sulfide Was a Release of Hazardous Waste or Hazardous Waste Constituents

14. Paragraph 40 and 43 of the motion to dismiss claim that the contingency plan was not activated because the release of hydrogen sulfide was not a "release of hazardous waste or hazardous waste constituents"

15. Hydrogen sulfide is a hazardous waste, listed as U135 in Part 721.

16. Hydrogen sulfide is a hazardous constituent listed in Appendix H of Part 721.

17. Hazardous waste D003 is reactive waste: "a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5 can generate toxic gases, vapors, or fumes in a quantity sufficient to present a danger to human health or the environment". (Par. 17 of the Complaint).

    a. This type of D003 is listed because of its propensity to evolve toxic gasses, hydrogen cyanide or hydrogen sulfide, when mixed with acid in accidents exactly like the incident alleged in the complaint.

The Contingency Plan Requirements apply to Releases of Gasses from Hazardous Waste whether the Gasses are Contained or Not.

18. In paragraphs 44 - 51 respondent argues that the contingency plan requirements did not apply because un-contained hydrogen sulfide is not a 'waste' for purposes of RCRA.

19. In paragraphs 45 - 47 of the motion, respondent argues that the statutory definitions of "waste" and "hazardous waste" control the scope of the RCRA program in Illinois. (415 ILCS 5/3.220 and 3.535). The Board implemented the rulemaking directive of Section 22.4 of the Act by adopting extensive definitions of these terms in Part 721. In order to keep the program "identical in substance" with the federal program, the definitions in Part 721 control the scope of the regulatory program, rather than the definitions in the Act.

20. By arguing that the contingency plan requirements do not apply to spills that result in releases of un-contained gasses, respondent is advancing an absurd

argument that would render a large portion of contingency planning meaningless. Respondent is contending that RCRA facilities handling reactive waste would never have to plan for a hydrogen cyanide or hydrogen sulfide release incident, since these releases would never be "contained". One of the main purposes of the RCRA program was to protect workers and the environment from toxic gas releases caused by accidents involving the handling of reactive waste capable of releasing hydrogen cyanide or hydrogen sulfide.

21. The cases cited by respondent in paragraphs 48 and 49 of the motion involve attempts to extend the RCRA rules to "gaseous process emissions" on the grounds that the emissions are "hazardous waste". Complainant is not contending that this facility should be regulated under RCRA because of gaseous process emissions. The facility was already subject to RCRA for reasons unrelated to this incident. The owner or operator was therefore required to prepare a contingency plan for the facility, and to follow that plan in the event of accidental release of toxic gas from hazardous waste.

    a. Respondent cites Helter v. AK Steel, 1997 U.S. District LEXIS 9852 (S.D. Ohio 1997), an unreported trial court decision. That case involved a leak of coke oven gas ("COG") from a pipe which was carrying the gas for use as a fuel:

        "Plaintiffs do not contend that the COG in Defendant's pipes is solid waste. That COG has not been discarded and the pipelines do not constitute a means of disposal."

    b. The plaintiff in that case argued that RCRA applied because the gas became a waste at the point at which it leaked. This case is different in that the gas was generated from a hazardous waste in a handling accident.

Respondent waived the Applicability Argument when it actually prepared a Contingency Plan pursuant to Section 725.151

22. Respondent in fact prepared a contingency plan pursuant to Section 725.151.

    a. Page 6-4 of the plan requires that it be implemented when there is "a spill that could cause a release of toxic liquids or fumes".

    b. The respondent has waived any argument to the effect that it was not required to have prepared the plan that it actually prepared, and is estopped from arguing that it has intentionally failed to prepare an OSHA emergency response plan by relying on a sham RCRA plan.

COUNT III: FAILURE TO NOTIFY AGENCY

23. In paragraph 61 et seq. of the motion, respondent argues that it was not required to notify the Agency because it was not required to have a contingency plan and because this incident did not trigger the plan. For the reasons discussed above, respondent was required to have a contingency plan, and was required to implement it in this incident.

24. At hearing, complainant intends to prove that respondent in fact prepared a contingency plan pursuant to Section 725.151. Page 6-10 of the plan requires reporting of sulfuric acid spills larger than 100 pounds.

    a. More than 1000 pounds of concentrated sulfuric acid was spilled in this incident. (Complaint, pars 7-11)

25. The respondent has waived any argument to the effect that it was not required to have prepared the plan that it actually prepared, and is estopped from arguing that it has intentionally failed to prepare an OSHA emergency response plan by relying on a sham RCRA plan.

COUNT IV: FAILURE TO AMEND THE CONTINGENCY PLAN FOLLOWING FAILURE OF THE PLAN

26. In paragraph 67 et seq. of the motion, respondent argues that it was not required to amend the plan because it was not required to have a contingency plan and because this incident did not trigger the plan. For the reasons discussed above, respondent was required to have a contingency plan, and was required to implement it in this incident.

27. The plan failed in this incident regardless of whether the incident triggered the plan.

    a. When workers suspected a hydrogen sulfide release, the failure of the safety officer to know what a hydrogen sulfide meter was or whether the facility had one showed that the plan needed to be amended to require training in this area and the availability of a hydrogen sulfide meter. (Complaint, pars 23-25)

    b. When workers suspected a hydrogen sulfide release but did not have proper training or protective equipment to respond, the plan needed to be amended to provide the training and equipment so that workers could address the possible release safely.

c. By arguing that an incident in which workers were merely sickened did not show the need to amend the plan, respondent is arguing that the need to amend the contingency plan would be triggered only if a worker was actually killed attempting to respond without training, monitoring equipment or proper respirator.

COUNT V: FAILURE TO AMEND THE CONTINGENCY PLAN IN RESPONSE TO CHANGED CIRCUMSTANCES

28. In paragraph 74 et seq. of the motion, respondent argues that it was not required to amend the plan because it was not required to have a contingency plan and because this incident did not trigger the plan. For the reasons discussed above, respondent was required to have a contingency plan, and was required to implement it in this incident.

29. Regardless of whether the incident triggered the plan, the incident demonstrated that the facility needed to plan for a hydrogen sulfide release.

a. Section 725.154(c) requires that the contingency plan be reviewed and immediately amended whenever: "The 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."

i. At hearing, complainant intends to show that "the operation" changed a few months before the incident when respondent began using "HSA (High Sulfur Additive)-90" in the process. (Complaint, par 8) Respondent should have recognized that this created a new risk of a hydrogen sulfide release, and should have either tested that chemical, or modified the contingency plan at that time.

ii. The hydrogen sulfide release itself showed that the plan needed to be amended to address this type of incident: res ipse loquitur.

COUNT VI: FAILURE TO CARRY OUT CONTINGENCY PLAN AS REQUIRED BY THE PLAN

30. Paragraph 80 et seq. of the motion argue that respondent was not required to follow the plan because it was not required to have a contingency plan and because this incident did not trigger the plan. For the reasons discussed above, respondent was required to have a contingency plan, and was required to

implement it in this incident.

31. Beyond this, respondent actually did have a contingency plan prepared pursuant to Section 725.151, and needs to be held to that plan regardless of after-the-fact legal arguments that the plan was not required.

    a. As discussed above, respondent prepared a contingency plan as early as March, 2001, and represented to the Agency, ESDA and the Urbana Fire Department that the plan was prepared to meet the requirements of 35 Ill. Adm. Code 725.

    b. Respondent elected not to prepare an OSHA emergency response plan, instead relying on the RCRA contingency plan.

    c. The respondent has waived any argument to the effect that it was not required to have prepared the plan that it actually prepared, and is estopped from arguing that it has intentionally failed to prepare an OSHA emergency response plan by relying on a sham RCRA plan.

32. At hearing, complainant will show that the plan prepared by respondent had the following stated triggers in the plan itself, which triggers were pulled:

    a. When Department Associates recognized an emergency (Page 6-3 of the plan, pars. 2-6 of Count VI of the complaint).

    b. A spill that caused the release of toxic fumes (Page 6-1 of the plan, pars 7-8 of Count VI of the complaint).

    c. A spill of more than 100 pounds of sulfuric acid (Page 6-10 of the plan, pars 9 -14 of Count VI the complaint.)

WHEREFORE complainant prays:

A. That the Board deny the motion to dismiss.

B. That the Board allow complainant to supplement or revise this response following receipt of a response from the Agency.

C. That the Board accept this case for hearing.

Morton F. Dorothy

Morton F. Dorothy, Complainant

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the listed document, by first class mail, upon the listed persons, on the ____ day of October, 2004.

RESPONSE TO MOTION TO DISMISS

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