BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MORTON F. DOROTHY, Complainant, v. FLEX-N-GATE CORPORATION, an Illinois corporation, Respondent.	)	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)

Carol Webb, Esq.
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Post Office Box 19274
Springfield, Illinois 62794-9274
(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 four copies of **FLEX-N-GATE CORPORATION'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE ANSWER**, a copy of which is herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

Dated: March 30, 2005

By: _____
One of Its Attorneys

Thomas G. Safley
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CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached FLEX-N-GATE CORPORATION'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE ANSWER upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
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Carol Webb, Esq.
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by depositing said documents in the United States Mail in Springfield, Illinois, postage prepaid, on March 30, 2005.

Thomas G. Safley

GWST:003/Fil/NOF and COS – Response to Motion to Strike

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 05-49
	)	
FLEX-N-GATE CORPORATION, an Illinois corporation,	)	
	)	
Respondent.	)	

FLEX-N-GATE CORPORATION'S
RESPONSE TO COMPLAINANT'S MOTION TO STRIKE ANSWER

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(d), and for its Response to Complainant's Motion to Strike Answer, states as follows:

I. INTRODUCTION

Flex-N-Gate filed its Answer to Complainant's Complaint on March 4, 2005. On March 15, 2005, Complainant mailed his Motion to Strike Answer ("Motion to Strike") to Flex-N-Gate's counsel "by first class mail." See Motion to Strike, Certificate of Service. Flex-N-Gate timely files this Response to Complainant's Motion to Strike.

As set forth more fully below, the Hearing Officer must deny Complainant's Motion to Strike because Illinois Pollution Control Board ("Board") Hearing Officers do not have authority to rule on Motions to Strike Pleadings. The Board must deny Complainant's Motion to Strike because that Motion is not permitted under the Board's rules, it seeks to rely on unsupported allegations of fact, and, even if it was proper, Flex-N-Gate's Answer is not inconsistent with its previous filings.

II. ANALYSIS

Section 101.500(a) of the Board's Procedural Rules provides that "[t]he Board may entertain any motion the parties wish to file that is permissible under the [Illinois Environmental Protection] Act or other applicable law, these rules, or the Illinois Code of Civil Procedure." 35 Ill. Admin. Code § 101.500(a). Section 101.500(b) further provides in relevant part that:

> All motions must be in writing, unless made orally on the record during a hearing or during a status conference, and must state whether directed to the Board or to the hearing officer. Motions that should be directed to the hearing officer are set out in Section 101.502 of this Part.

35 Ill. Admin. Code § 101.500(b).

Section 101.502(a) provides in relevant part that:

> The hearing officer has the authority to rule on all motions that are not dispositive of the proceeding. Examples of motions that hearing officers may not rule upon are motions to dismiss, motions to decide a proceeding on the merits, motions to strike any claim or defense for insufficiency or want of proof, motions claiming lack of jurisdiction, motions for consolidation, motions for summary judgment, and motions for reconsideration.

35 Ill. Admin. Code § 101.502(a). (Emphasis added.)

For the reasons set forth below, the Hearing Officer, and the Board, must deny Complainant's Motion to Strike.

B. The Hearing Officer must deny Complainant's Motion because Board Hearing Officers do not have authority to rule on Motions to Strike Pleadings.

Complainant does not direct his Motion to Strike to the Board, but to the Hearing Officer. See, e.g., Motion to Strike at 2 ("WHEREFORE complainant prays that the Hearing Officer ... [s]trike as evasive the Answer filed by respondent Flex-N-Gate

Corporation."). (Emphasis added.) However, "[t]he Board's procedural rules prohibit the hearing officer from ruling on . . . motions to dismiss or motions to strike." Citizens Against Regional Landfill v. County Board of Whiteside County, et al., PCB No. 92-156, 1992 Ill. ENV LEXIS 940, at *5 (Ill.Pol.Control.Bd. Dec. 17, 1992). Rather, Board Hearing Officers only have authority "to rule on . . . motions that are not dispositive of the proceeding." 35 Ill. Admin. Code § 101.502(a).

By his Motion, Complainant clearly intends the Hearing Officer to issue a ruling that is "dispositive," that is, to "strike ... the Answer filed by ... Flex-N-Gate," and to find that "Flex-N-Gate Corporation has admitted in this proceeding that it claims to be exempt from RCRA permitting requirements under 35 Ill. Adm. Code 722.134(a)." Motion to Dismiss at 2. Thus, under Section 101.502(a), Complainant's Motion must be decided by the Board, not by the Hearing Officer. See 35 Ill. Admin. Code § 101.502(a). Complainant cites no authority that would allow the Hearing Officer to ignore Section 101.502(a). Therefore, and for the reasons stated above, the Hearing Officer must deny Complainant's Motion to Strike on the grounds that Board Hearing Officers do not have authority under the Board's rules to rule on motions to strike pleadings.

C. The Board must Deny Complainant's Motion because it is not "Permissible under the Act or other Applicable Law, the[] [Board's] Rules, or the Illinois Code of Civil Procedure."

As noted above, "[t]he Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure." 35 Ill. Admin. Code § 101.500(a). (Emphasis added.) Complainant's Motion is not "permissible" under any of these authorities.

Complainant moves the Hearing Officer to "[s]trike as evasive the answer filed by" Flex-N-Gate. Motion to Strike at 2. Section 2-615 of the Illinois Code of Civil Procedure governs Motions to Strike. See 735 ILCS 5/2-615(a).

> A motion brought pursuant to section 2-615 ... attacks the legal sufficiency of the complaint. It must be determined whether the allegations of the complaint, when viewed in a light most favorable to the plaintiffs, are sufficient to state a cause of action upon which relief can be granted. A section 2-615 motion admits as true all well-pleaded facts, but not conclusions of law or factual conclusions that are unsupported by allegations of specific facts.
>
> * * *
>
> [P]resent[ing] evidentiary material going to the truth of the allegations contained in the complaint [in support of a motion to strike] is improper because a motion pursuant to either section 2--615 or section 2--619 concedes the truth of all well-pled allegations in the complaint. Further, a section 2--615 motion, unlike a section 2--619 motion or a motion for summary judgment pursuant to section 2--1005 (735 ILCS 5/2--1005(c) (West 1998)), is a motion based on the pleadings rather than the underlying facts. Accordingly, depositions, affidavits, and other supporting materials may not be considered by the court in ruling on a section 2--615 motion.

Provenzale v. Forister, 318 Ill. App. 3d 869, 878-79, 743 N.E.2d 676, 683-84 (2d Dist. 2001). (Emphasis added; citations omitted.)

These principles apply to motions to strike filed in cases before the Board. See, e.g., Shelton v. Crown, PCB 96-53, 1996 Ill. ENV LEXIS 329, at *3 (Ill.Pol.Control.Bd. May 2, 1996) (holding that the Board "will apply the principles applied to Illinois Code of Civil Procedure 2-615 and 2-619 motions to strike or dismiss" when deciding such motions in cases before it) and cases cited therein.

In Provenzale, the defendants "filed separate motions to strike and dismiss" the plaintiffs' complaint "pursuant to sections 2-615 and 2-619(a)(9) of the Code of Civil

Procedure," and in support of these motions, filed additional "evidentiary material going to the truth of the allegations contained in the complaint." 318 Ill. App. 3d at 873, 879, 743 N.E.2d at 679, 683. The trial court granted the motions to strike, and struck two paragraphs of the complaint. Id. The appellate court reversed this decision on appeal because, in granting the motions to strike, the trial court relied on the additional "evidentiary material" instead of just reviewing the pleading at issue. 318 Ill. App. 3d at 879, 743 N.E.2d at 683-4. The Appellate Court found that "this is improper," stating: "If the Foristers wished to contest factual allegations in the complaint, they should have filed motions for summary judgment." Id.

Here, Complainant also tries to support his Motion to Strike with "evidentiary material" beyond the face of Flex-N-Gate's pleading, namely Flex-N-Gate's Response to Complainant's Motion to Join Agency as Party in Interest and to Extend Time to Respond to Motion to Dismiss ("Motion to Join") and the Affidavit of James R. Dodson submitted in support of that Response. See Motion to Strike at ¶¶4-6. As in Provenzale, this is not permitted; Complainant may contest the statements in Flex-N-Gate's Answer in a Motion for Summary Judgment, but may not do so in a Motion to Strike. Thus, Complainant's Motion to Strike is not a motion that is "permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure," as required by 35 Ill. Admin. Code § 101.500(a), and the Board must deny Complainant's Motion.

D. Complainant's Motion to Strike Also is Defective as it Attempts to Rely on Unsupported Statements and Conclusions of Fact.

Further, even if it were permissible for Complainant to support his Motion with evidentiary materials, Complainant's Motion to Strike also is defective in that the evidentiary materials on which Complainant attempts to rely constitute unsupported statements and conclusions of fact.

The Board's procedural rules make clear that, in Motions filed with the Board, "[f]acts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure." 35 Ill. Admin. Code § 101.504. Paragraphs ten and eleven of Complainant's Motion to Strike state:

> 10. Complainant withdrew his motion to join the Agency as a party in interest in reliance on respondent's admission that it claimed exemption pursuant to Section 722.134(a). As discussed in that motion, in the event respondent is denying that it claims exemption under Section 722.134(a), it is repudiating longstanding regulatory understandings between the Illinois Environmental Protection Agency and itself. In such event, the Agency needs to be joined as a party in interest to this case.
>
> 11. Complainant would be prejudiced if respondent were allowed to again reverse itself as to this issue which is central to the complaint.

Motion to Strike at 2.

These paragraphs include at least three statements or conclusions of fact, namely:

- that "Complainant withdrew his motion to join the Agency as a party in interest in reliance on respondent's admission . . .";
- that Flex-N-Gate "is repudiating longstanding regulatory understandings between the Illinois Environmental Protection Agency and itself"; and,

- that "Complainant would be prejudiced if respondent were allowed" to "again reverse itself."

Id.

However, Complainant did not attach any affidavit or cite any other evidence in support of these allegations. See Motion to Strike. Thus, Complainant has not "supported" these allegations "in accordance with Section 1-109 of the Code of Civil Procedure," as Section 101.504 of the Board's procedural rules requires, and the Board must deny Complainant's Motion to Strike on that basis as well.[1]

E. Even if Complainant's Motion to Strike was Proper, Flex-N-Gate's Answer and its Previous Submissions are not Inconsistent.

Finally, even if Complainant's Motion was proper, the Board would have to deny that Motion because Flex-N-Gate's Answer and its previous submissions to the Board are not inconsistent.

As noted above, Complainant argues that Flex-N-Gate's Answer to paragraph 12 of the Allegations Common to All Counts ("Common Allegations") of Complainant's Complaint is inconsistent with paragraph 16 of Flex-N-Gate's Response to Complainant's Motion to Join and paragraph 8 of the Affidavit of James R. Dodson submitted in support of that Response. See Motion to Strike. Paragraph 12 of Complainant's Common Allegations states as follows:

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[1] Complainant did attach an Affidavit in support of his Motion to Join, but did not cite that Affidavit in support of his Motion to Strike. See Motion to Strike. Further, even if Complainant had done so, as discussed in Flex-N-Gate's Response to Complainant's Motion to Join, Complainant's Affidavit is defective because it is conclusory, and the Board "[can] not grant relief . . . on the basis of a mere conclusion" in an affidavit. EPA v. Rhodes, PCB No. 71-53, 1972 Ill. ENV LEXIS 169, at *1 (Ill.Pol.Control.Bd. Jan. 24, 1972). See Flex-N-Gate's Response to Motion to Join at 8-9; Flex-N-Gate's Response to Complainant's Motion to Accept for Hearing and for Expedited Discovery at 8-9.

> Respondent claims that the 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. In the event the Board determines that this claim is valid, Section 722.134(a)(4) requires compliance with 35 Ill. Adm. Code 725.Subpart D, including Sections 725.151 through 725.156. In the event the Board determines that this claim is invalid, respondent is operating an unpermitted hazardous waste treatment and storage facility which is subject to Section 725.151 through 725.156 directly.

Complaint at 2.

Flex-N-Gate's Answer to paragraph 12 states:

> Flex-N-Gate denies the allegation contained in the first sentence of paragraph 12 of Complainant's Complaint. The remainder of paragraph 12 states legal conclusions that do not call for a response. To the extent that paragraph 12 states any further allegations of fact, Flex-N-Gate denies the same.

Flex-N-Gate's Answer at 4.

Paragraph 16 of Flex-N-Gate's Response to Complainant's Motion to Join, and paragraph 8 of Mr. Dodson's Affidavit, state:

> Other wastestreams that Flex-N-Gate produces are stored on-site for less than 90 days and then shipped off-site for disposal, and Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements under 35 Ill. Admin. Code § 722.134(a). Id. [i.e., Affidavit of J. Dodson] at ¶8.

Flex-N-Gate's Response to Complainant's Motion to Join at 4, Exhibit A, at ¶8.

Complainant does not explain how these statements allegedly are inconsistent, but merely states: "Respondent has, in this proceeding, admitted the substance of the allegation of paragraph 12 of the complaint, and cannot now deny the same." Motion to Strike at ¶8. By "the substance of the allegation of paragraph 12," Flex-N-Gate assumes that Complainant means the first sentence of paragraph 12, as the second and third sentences of that paragraph state legal conclusions, and there is no such thing as a binding

"legal admission." Paige-Myatt v. Mount Sinai Hospital Med. Center, et al., 313 Ill. App. 3d 482, 490, 729 N.E. 2d 908, 915 (1st Dist. 2000).

The fact that Flex-N-Gate's statements are not inconsistent is illustrated by comparing the first sentence of paragraph 12 of Complainant's Complaint with paragraphs of Jim Dodson's affidavit surrounding paragraph 8, which Complainant did not cite in his Motion to Strike. Again, the first sentence of paragraph 12 states:

> Respondent claims that the 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 at ¶12. (Emphasis added.)

Complainant made this same allegation in paragraph 1 of his Motion to Join, stating:

> As alleged in paragraph 12 of the complaint, prior to the incident alleged in the complaint, respondent claimed that the facility operated 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.

Motion to Join at ¶1. (Emphasis added.)

In response to Complainant's Motion to Join, Flex-N-Gate cited the Affidavit of James R. Dodson, which in relevant part states:

> 4. At the facility in question in this matter, Flex-N-Gate produces several different wastestreams, some of which are "hazardous" under RCRA.
>
> 5. However, Flex-N-Gate relies on exemptions from RCRA permitting requirements with regard to each of its wastestreams that is "hazardous."

6. Specifically, Flex-N-Gate relies on different exemptions for different wastestreams, as appropriate depending on the circumstances.

7. For example, some wastestreams that Flex-N-Gate produces are treated by what Flex-N-Gate considers to be a "wastewater treatment unit" under RCRA, and thus, Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements.

8. Other wastestreams that Flex-N-Gate produces are stored on-site for less than 90 days and then shipped off-site for disposal, and Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements under 35 Ill. Admin. Code § 722.134(a).

9. Thus, Flex-N-Gate does not now claim, nor has it ever claimed, "that the facility operated" pursuant to just one exemption from RCRA permitting requirements ("Sections 703.123(a) and 722.143(a)" or otherwise), as Complainant alleges in paragraph one his Motion to Join Agency.

10. Likewise, Flex-N-Gate does not now claim, nor has it ever claimed, "that the facility is exempt from the RCRA permit requirements based on the . . . 'wastewater treatment unit' exclusion[]," as Complainant alleges in paragraph five of his Motion to Join Agency.

11. Rather, Flex-N-Gate always has considered different wastestreams at the facility at issue to be exempt from RCRA permitting requirements under different exemptions to those requirements.

12. With regard to the wastestream at issue in this case, Flex-N-Gate has never claimed to the Illinois Environmental Protection Agency ("Illinois EPA") or to anyone else that its actions relating to such wastestream are exempt from RCRA permitting requirements "pursuant [to] Sections 703.123(a) and 722.134(a)."

13. Rather, Flex-N-Gate always has considered its actions relating to this wastestream to be exempt from RCRA permitting requirements under the Wastewater Treatment Unit Exemption, and has never claimed otherwise to the Illinois EPA.

Motion to Join, Exhibit A, at ¶¶4-13. (Emphasis added.)

Thus, in both his Motion to Join and paragraph 12 of his Complaint, Complainant alleges that Flex-N-Gate "claims [or "claimed"] that the facility operated pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a) . . . ." (Emphasis added.) And in both cases, Flex-N-Gate denies that allegation, stating in response to the Motion to Join:

> Flex-N-Gate does not now claim, nor has it ever claimed, "that the facility operated" pursuant to just one exemption from RCRA permitting requirements ("Sections 703.123(a) and 722.143(a)" or otherwise) as Complainant alleges,

and in its Answer to Paragraph 12, simply stating:

> Flex-N-Gate denies the allegation contained in the first sentence of paragraph 12 of Complainant's Complaint.

See supra.

As for Flex-N-Gate's statement in paragraph 12 of its Response to Complainant's Motion to Join that:

> Other wastestreams that Flex-N-Gate produces are stored on-site for less than 90 days and then shipped off-site for disposal, and Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements under 35 Ill. Admin. Code § 722.134(a),

Flex-N-Gate simply does not understand Complainant's argument – and disagrees with Complainant's argument – that this statement somehow constitutes an "admi[ssion] of the substance of the allegation of paragraph 12 of the complaint," as Complainant argues in paragraph 8 of his Motion to Strike. Again, paragraph 12 makes an allegation regarding "the facility," while Flex-N-Gate's statement in its Response to Complainant's Motion to Join addresses certain "wastestreams" within the facility. These are different things.

(Finally, Flex-N-Gate notes that Complainant has served Interrogatories on Flex-N-Gate, relevant portions of which are attached hereto as Exhibit A, which

Interrogatories ask, among other things: "By which provisions has respondent, prior to August 5, 2004, claimed exemptions from the RCRA permit requirement for the Guardian West facility." Exhibit A, ¶3. Any confusion on Complainant's part with regard to how Flex-N-Gate handles its hazardous waste will be cleared up by Flex-N-Gate's answer to this Interrogatory.)

F. Complainant has Proffered No Support for the Relief he Requests.

Complainant asks the Board (1) to find that Flex-N-Gate has made certain admissions in this matter, (2) to "strike as evasive the answer filed by" Flex-N-Gate, and (3) to "deem paragraph 12 of the common allegations of the complaint to be admitted." Motion to Strike at 2. However, Complainant has not cited any Board or court case in which such relief has been granted, nor has Complainant cited a single statutory provision or rule to support his request for relief. Instead, Complainant has filed an impermissible motion that seeks to rely on unsupported statements of fact and seeks relief that is unnecessary because the alleged inconsistency at issue does not exist.

"The burden is upon the movant to clearly state the reasons for and the grounds upon which a motion is made, [and] to timely file and adequately support a motion directed to the Board." Goose Lake Ass'n v. Robert J. Drake, Sr., First National Bank of Joliet as Trustee, Trust No. 370, PCB No. 90-170, 1991 Ill. ENV LEXIS 432, at ** 1-2 (Ill.Pol.Control.Bd. June 6, 1991). As set forth above, Complainant has not provided any support, much less "adequate[] support," for his Motion to Strike, and the Board should deny that Motion.

IV. CONCLUSION

WHEREFORE, the Respondent FLEX-N-GATE CORPORATION respectfully prays that the Illinois Pollution Control Board deny Complainant's Motion to Strike and award FLEX-N-GATE CORPORATION such other relief as the Illinois Pollution Control Board deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

By: _____
One of Its Attorneys

Dated: March 30, 2005

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