

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

**RECEIVED**  
CLERK'S OFFICE

**APR 18 2005**

STATE OF 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)

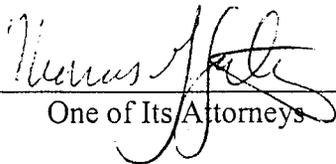
Carol Webb, Esq.  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Post Office Box 19274  
Springfield, Illinois 62794-9274  
(VIA FIRST CLASS MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original and nine copies of **FLEX-N-GATE CORPORATION'S MOTION FOR LEAVE TO SUPPLEMENT RESPONSE TO COMPLAINANT'S MOTION TO STRIKE ANSWER, AND MOTION FOR BRIEFING SCHEDULE**, a copy of which is herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,  
Respondent,

Dated: April 15, 2005

By:   
One of Its Attorneys

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

**CERTIFICATE OF SERVICE**

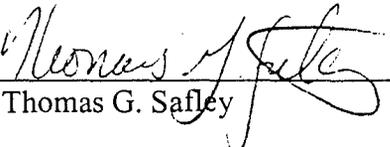
I, Thomas G. Safley, the undersigned, certify that I have served the attached  
FLEX-N-GATE CORPORATION'S MOTION FOR LEAVE TO SUPPLEMENT  
RESPONSE TO COMPLAINANT'S MOTION TO STRIKE ANSWER, AND MOTION  
FOR BRIEFING SCHEDULE upon:

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

Carol Webb, Esq.  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Post Office Box 19274  
Springfield, Illinois 62794-9274

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 April 15, 2005.

  
Thomas G. Safley

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD  
CHAMPAIGN COUNTY, ILLINOIS

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STATE OF ILLINOIS  
Pollution Control Board

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FLEX-N-GATE CORPORATION, )  
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**FLEX-N-GATE CORPORATION'S  
MOTION FOR LEAVE TO SUPPLEMENT  
RESPONSE TO COMPLAINANT'S MOTION  
TO STRIKE ANSWER, AND MOTION FOR BRIEFING SCHEDULE**

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(e), and for its Motion for Leave to Supplement Response to  
Complainant's Motion to Strike Answer, and Motion for Briefing Schedule, states as  
follows:

1. Flex-N-Gate filed its Answer to Complainant's Complaint on March 4,  
2005.
2. On or about March 15, 2005, Complainant filed his Motion to Strike Flex-  
N-Gate's Answer ("Motion to Strike").
3. Complainant directed his Motion to Strike to the Hearing Officer for  
ruling. See Complainant's Motion to Strike.
4. On March 30, 2005, Flex-N-Gate's filed its Response to Complainant's  
Motion to Strike.

5. In its Response to Complainant's Motion to Strike, Flex-N-Gate argued that the Hearing Officer did not have authority under the Illinois Pollution Control Board's ("Board") rules to rule on Complainant's Motion to Strike. See Flex-N-Gate's Response to Complainant's Motion to Strike.

6. On or about April 5, 2005, the undersigned received the correspondence attached hereto as Exhibit A, which Complainant apparently mailed to the Hearing Officer. Affidavit of Thomas G. Safley ("Safley Affidavit") attached hereto as Exhibit B.

7. In this correspondence, Complainant, among other things, argues that "it is within [the Hearing Officer's] authority as hearing officer to rule on" his Motion to Strike. Exhibit A at 1. Complainant also states that, by his Motion to Strike, he is "requesting a ruling as to the scope of the evidence at hearing," and states: "I suggest you narrow the focus of the case to compliance with the conditions of Section 722.134 and the consequences of a failure to comply." Id. at 1-2.

8. Finally, Complainant by his correspondence clearly is attempting to reply to Flex-N-Gate's Response to Complainant's Motion to Strike, for example, stating: "Respondent is correct that petitioner has directed interrogatories on this issue," referring to Flex-N-Gate's Response to Complainant's Motion to Strike at pages 11-12. See Exhibit A at 1; Flex-N-Gate's Response to Complainant's Motion to Strike at 11-12.

9. Under the Board's rules, "[t]he moving person will not have the right to reply, except as permitted by the board or the hearing officer to prevent material prejudice." 35 Ill. Admin. Code § 101.500(e).

10. Complainant did not seek or receive leave from the Board or the Hearing Officer to reply to Flex-N-Gate's Response to Complainant's Motion to Strike.

11. Nevertheless, Flex-N-Gate does not move the Board to strike Complainant's correspondence to the Hearing Officer, which constitutes an unauthorized Reply in support of Complainant's Motion to Strike.

12. Rather, Flex-N-Gate moves the Board for leave to supplement its Response to Complainant's Motion to Strike to address two issues, and to set a briefing schedule, as set forth below.

**I. MOTION FOR LEAVE TO SUPPLEMENT  
RESPONSE TO COMPLAINANT'S MOTION TO STRIKE**

13. First, Flex-N-Gate moves the Board for leave to supplement its Response in order to address Complainant's explanation in his correspondence to the Hearing Officer that, by his Motion to Strike, Complainant is "requesting a ruling as to the scope of the evidence at hearing."

14. Complainant did not state in his Motion to Strike that he sought a ruling under evidentiary rules. Rather, he moved the Hearing Officer to "strike as evasive the answer filed by respondent Flex-N-Gate Corporation," and to find that Flex-N-Gate had made certain admissions. Motion to Strike at 2.

15. In light of these prayers for relief in Complainant's Motion to Strike, Flex-N-Gate in its Response to Complainant's Motion to Strike argued that Complainant's Motion was insufficient as a Motion to Strike under Section 2-615 of the Illinois Code of Civil Procedure, that Complainant in his Motion attempted to rely on unsupported allegations of fact, and that there was no inconsistency in Flex-N-Gate's filings as Complainant argued.

16. However, because Complainant did not state in his Motion to Strike that he was “requesting a ruling as to the scope of the evidence at hearing,” Flex-N-Gate had no notice that Complainant was seeking such relief, and Flex-N-Gate therefore did not address evidentiary rules in its Response to Complainant’s Motion to Strike. See Flex-N-Gate’s Response to Complainant’s Motion to Strike; Safley Affidavit at paragraph 4.

17. Flex-N-Gate would be materially prejudiced if the Board does not grant it leave to supplement its Response to Complainant’s Motion to Strike to address the issue of “the scope of the evidence at hearing” that Complainant has now raised, as the Board or the Hearing Officer would consider that issue in ruling on Complainant’s Motion to Strike, and Flex-N-Gate has not had an opportunity to respond to that issue.

18. Second, as set forth below, Flex-N-Gate moves the Board to set a briefing schedule on Complainant’s Statement that he “suggest[s] [the Hearing Officer] narrow the focus of the case to compliance with the conditions of Sections 722.134, and the consequences of a failure to comply.”

19. Thus, Flex-N-Gate also moves the Board for leave to supplement its Response to Complainant’s Motion to Strike to address any issues raised by Complainant pursuant to such briefing schedule.

## **II. MOTION FOR BRIEFING SCHEDULE**

20. As noted above, in his correspondence to the Hearing Officer, Complainant states: “I suggest you narrow the focus of the case to compliance with the conditions of Section 722.134, and the consequences of a failure to comply.” Exhibit A at 1-2.

21. Flex-N-Gate does not understand what Complainant means by this statement.

22. Complainant may mean that he wishes to withdraw some portion of his Complaint against Flex-N-Gate, thus “narrow[ing] the focus of the case.” If this is so, Flex-N-Gate does not have notice regarding what portion of his Complaint Complainant wishes to withdraw, and this may be relevant to Flex-N-Gate’s Response to Complainant’s Motion to Strike.

23. Alternatively, Complainant may mean that the Board or the Hearing Officer should “narrow the focus of the case” by striking some argument(s) made by Flex-N-Gate. If this is the case, Flex-N-Gate does not have notice regarding what arguments of Flex-N-Gate Complainant is asking the Board or Hearing Officer to strike. Flex-N-Gate would be materially prejudiced if it is not provided such notice and given a chance to respond to such motion to strike.

24. Alternatively, Complainant may mean something different entirely.

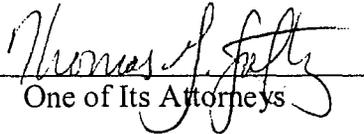
25. In light of the above, Flex-N-Gate moves the Board to set a briefing schedule ordering that:

- a. within ten days of the Board’s Order setting the briefing schedule, Complainant must file a Supplement to his Motion to Strike to explain his statement that the hearing Officer “narrow the focus of the case”; and,
- b. within ten days of service of Complainant’s Supplement to his Motion to Strike, Flex-N-Gate must file its Supplement to its Response to Complainant’s Motion to Strike to respond to issues raised by Complainant in his Supplement, and to address the evidentiary issues raised by Complainant’s correspondence to the Hearing Officer discussed above.

WHEREFORE, Respondent, FLEX-N-GATE CORPORATION, respectfully moves the Illinois Pollution Control Board to grant it leave to supplement its Response to Complainant's Motion to Strike and to set a briefing schedule as set forth above, and to award FLEX-N-GATE CORPORATION such other relief as the Illinois Pollution Control Board deems just and proper in the premises.

Respectfully submitted,

FLEX-N-GATE CORPORATION  
Respondent,

By:   
One of Its Attorneys

Dated: April 15, 2005

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

GWST:003/Fil/Motion for Leave to Supplement Response to Motion to Strike

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD  
CHAMPAIGN COUNTY, ILLINOIS

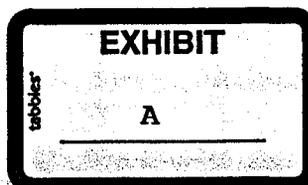
MORTON F. DOROTHY, )  
)  
Complainant, )  
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v. ) PCB 05-49  
)  
FLEX-N-GATE CORPORATION, )  
an Illinois corporation, )  
)  
Respondent. )

**AFFIDAVIT OF THOMAS G. SAFLEY**

Thomas G. Safley, being first duly sworn, deposes and states under oath, and if sworn as a witness, would testify, as follows:

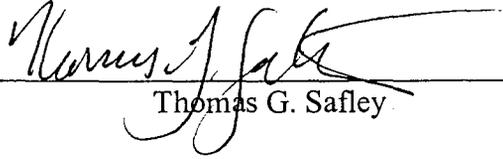
1. I have personal knowledge of the matters set forth in this affidavit.
2. I am an attorney duly licensed in the State of Illinois, and have been retained by respondent Flex-N-Gate Corporation to represent it in this matter.
3. On or about April 5, 2005, I received the correspondence attached to Flex-N-Gate's Motion for Leave to Supplement Response to Complainant's Motion to Strike as Exhibit A, which Complainant apparently mailed to the Hearing Officer.
4. Because Complainant did not state in his Motion to Strike that he was "requesting a ruling as to the scope of the evidence at hearing," Flex-N-Gate had no notice that Complainant was seeking such relief, and Flex-N-Gate therefore did not address evidentiary rules in its Response to Complainant's Motion to Strike.

*Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the*

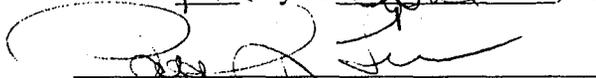


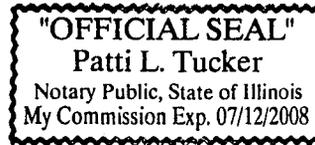
undersigned certifies as aforesaid that he verily believes  
the same to be true.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Thomas G. Safley

Subscribed and sworn to before  
me this 15<sup>th</sup> day of April, 2005.

  
\_\_\_\_\_  
Notary Public



GWST:003/Fil/Affidavit of Thomas Safley

Morton F. Dorothy  
804 East Main  
Urbana IL 61802-2822

217/384-1010  
MDor4248@AOL.COM

April 3, 2005

Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
P.O. Box 19274  
Springfield, IL 62794-9274

Re: PCB 05-049, Morton F. Dorothy v. Flex-n-gate Corporation

Dear Ms. Webb:

As per your request, I have forwarded a copy of my Motion to Strike Answer to the Board. I believe, however, that it is within your authority as hearing officer to rule on this motion.

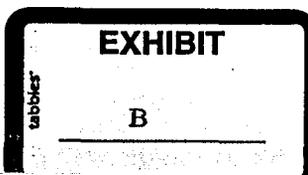
Section 101.502(a) provides as follows:

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...

A ruling on the motion would not be dispositive of the proceeding; nor would it strike a defense. Complainant is instead requesting a ruling as to the scope of the evidence at hearing. Respondent has already admitted in the pleadings in this case that it claims exemption under Section 722.134(a), and attached a supporting affidavit to that effect. The hearing officer should not allow respondent to introduce evidence to the contrary at hearing.

Respondent is correct that petitioner has directed interrogatories at this issue, which was raised by the answer. If the hearing officer were to strike this portion of the answer, respondent would, of course, not have to respond to those interrogatories.

Section 722.134 allows certain types of hazardous waste facilities to operate without a RCRA permit or interim status, provided they comply with certain Board rules, including the contingency planning rules which are the subject of this case. I suggest



you narrow the focus of the case to compliance with the conditions of Section 722.134,  
and the consequences of a failure to comply.

Sincerely,

Morton F. Dorothy

Morton F. Dorothy