ELECTRONIC FILING, RECEIVED, MAY 27, 2005
REVISED

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 05-49
	)	
FLEX-N-GATE CORPORATION, an Illinois corporation,	)	
	)	
Respondent.	)	

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 ELECTRONIC MAIL)

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

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board Respondent Flex-N-Gate Corporation's **MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS II THROUGH VI OF COMPLAINANT'S COMPLAINT**, a copy of which is herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

Dated: May 27, 2005

By: /s/ Thomas G. Safley
One of Its Attorneys

Thomas G. Safley
HODGE DWYER ZEMAN
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CERTIFICATE OF SERVICE

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

MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS II THROUGH VI OF COMPLAINANT'S COMPLAINT 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

via electronic mail on May 27, 2005; and upon:

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 May 27, 2005.

/s/ Thomas G. Safley
Thomas G. Safley

GWST:003/Fil/NOF and COS – PMSJ

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Complainant,	)	
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FLEX-N-GATE CORPORATION, an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO COUNTS II THROUGH VI OF COMPLAINANT'S COMPLAINT

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Motion for Partial Summary Judgment as to Counts II through VI of Complainant's Complaint ("Motion for Partial Summary Judgment"), states as follows:

I. INTRODUCTION

Complainant has filed a six-count Complaint alleging that Flex-N-Gate violated Illinois statutory and regulatory provisions relating to the management of hazardous waste. See Complaint. Counts II through VI of this Complaint allege that Flex-N-Gate failed to properly implement and take other actions with respect to its "contingency plan" for the facility at issue in this case, in response to an alleged release of uncontained hydrogen sulfide gas at the facility. Id. As discussed below, however, the contingency plan regulations cited by Complainant in Counts II through VI were not triggered by the alleged release of hydrogen sulfide gas because uncontained gases do not meet the definition of "solid waste" under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, et seq., and because this alleged gas did not constitute a

"hazardous waste constituent" under RCRA. See discussion below. Further, while the parties disagree as to whether a release of hydrogen sulfide gas occurred, that fact is not material for purposes of this Motion.

Flex-N-Gate also today is filing a separate Motion for Summary Judgment as to Count I of Complainant's Complaint, and (on grounds in addition to the grounds included in this Motion) as to Counts II through VI of the Complaint ("Motion for Complete Summary Judgment"). Because of the length of the arguments in both Motions, and the fact that many of the facts relevant to the arguments in the Motion for Complete Summary Judgment are not relevant to the arguments in this Motion, Flex-N-Gate has separated the arguments in this Motion into a separate document in an attempt to present its arguments in both motions more clearly. As to Counts II through VI, the Illinois Pollution Control Board ("Board") can grant Flex-N-Gate summary judgment under either the arguments set forth in this Motion for Partial Summary Judgment or the arguments set forth in Flex-N-Gate's separate Motion for Complete Summary Judgment.

II. BACKGROUND

The facts of this matter which are relevant to this Motion, which, except as discussed, Flex-N-Gate understands to be undisputed, are as follows:

Flex-N-Gate owns and operates a facility at 601 Guardian Drive in Urbana, Illinois ("Facility"). Complaint at ¶3. On August 5, 2004, a pipe in the Facility that carries a solution of approximately 93% concentrated sulfuric acid/ 7% water separated at a fitting, and a small amount of acid drained out from the pipe onto the floor of a room inside the Facility. Affidavit of Denny Corbett, attached hereto as Exhibit A ("Corbett Aff."), at ¶3. Complainant asserts that this release of sulfuric acid to the floor generated

uncontained hydrogen sulfide gas. Complaint, at ¶15. Flex-N-Gate vehemently denies that this could have occurred or did occur. Regardless, however, as discussed below, whether or not uncontained hydrogen sulfide gas was generated is irrelevant.

III. SUMMARY JUDGMENT STANDARD

Section 101.516(a) of the Board's procedural rules provides for the filing of Motions for Summary Judgment. See 35 Ill. Admin. Code § 101.516(a). In cases before the Board, as in cases before a Court, "[s]ummary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Cassens and Sons, Inc. v. Illinois EPA, PCB No. 01-102, 2004 Ill. ENV LEXIS 635, at **11-12 (Ill.Pol.Control.Bd. Nov. 18, 2004) (citing Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998)); accord, 35 Ill. Admin. Code § 101.516(b).

In Cassens, the Board stated as follows regarding motions for summary judgment:

> In ruling on a motion for summary judgment**,** the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Id. [i.e., Dowd & Dowd, Ltd., cited above] Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." Id., citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist 1994).

Cassens, 2004 Ill. ENV LEXIS at 11-12.

The Illinois Supreme Court's Purtill decision, which the Board cites in Cassens, further emphasizes that "use of the summary judgment procedure is to be encouraged as

an aid in the expeditious disposition of a lawsuit." Purtill, 111 Ill.2d at 240, 489 N.E.2d at 871 (citations omitted). The Supreme Court goes on as follows:

> If a party moving for summary judgment supplies facts which, if not contradicted, would entitle such party to a judgment as a matter of law, the opposing party cannot rely on his pleadings alone to raise issues of material fact. Thus, facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion.

Id. (Citations omitted.)

For purposes of a motion for summary judgment, a fact is "material" if it is "[]related to the essential elements of the cause of action" (Smith v. Neumann, 289 Ill. App. 3d 1056, 1069, 682 N.E.2d 1245, 1254 (2d Dist. 1997) (citations omitted)); that is, if it will "affect the outcome of a party's case." Westbank v. Maurer, et al., 276 Ill. App. 3d 553, 562, 658 N.E.2d 1381, 1389 (2d Dist. 1995). Thus, as the Board has held, "[f]actual issues which are not material to the essential elements of the cause of action or defense, regardless of how sharply controverted, do not warrant the denial of summary judgment." Environmental Site Developers, Inc. v. White & Brewer Trucking, Inc., PCB No. 96-180, 1997 Ill. ENV LEXIS 649, at **27-28 (Ill.Pol.Control.Bd. Nov. 20, 1997).

Finally, the Gauthier decision cited by the Board in Cassens makes clear that "[i]f from the papers on file, a plaintiff fails to establish an element of his cause of action, summary judgment for the defendant is proper." Gauthier, 266 Ill. App. 3d at 220, 693 N.E.2d at 999 (citations omitted).

IV. UNCONTAINED HYDROGEN SULFIDE GAS IS NOT A "HAZARDOUS WASTE" OR "HAZARDOUS WASTE CONSTITUENT" UNDER RCRA.

As discussed below, Counts II through VI of Complainant's Complaint allege violations of regulations relating to RCRA "contingency plans." See discussion below.

Central to the question of whether Flex-N-Gate could have violated these provisions is the question of whether uncontained hydrogen sulfide gas constitutes a "hazardous waste" or a "hazardous waste constituent" under RCRA. Id. For the reasons set forth below, uncontained hydrogen sulfide gas constitutes neither of these things.

A. Uncontained Hydrogen Sulfide Gas Is Not "Hazardous Waste" Under RCRA.

One thing that can trigger a RCRA contingency plan is a release of "hazardous waste" from a unit that is subject to the RCRA contingency plan requirements. See discussion below. As set forth in Flex-N-Gate's Motion for Complete Summary Judgment, the RCRA contingency plan requirements do not apply in this case because of RCRA's Wastewater Treatment Unit Exemption. See Motion for Complete Summary Judgment. Even if the contingency plan requirements did apply, however, they could not have been triggered in this case (even if a release of hydrogen sulfide gas had occurred), because uncontained hydrogen sulfide gas does not constitute "hazardous waste" under RCRA.

1. Uncontained Gases are not "Solid Waste," and therefore are not "Hazardous Waste," under RCRA.

Section 721.102(a)(1) of the Board's regulations defines "solid waste" as "any discarded material that is not excluded by Section 721.104(a) or that is not excluded pursuant to 35 Ill. Adm. Code 720.130 and 720.131." 35 Ill. Admin. Code § 721.102(a)(1). In turn, "[a] solid waste, as defined in Section 721.102, is a hazardous waste if" certain things are true. 35 Ill. Admin. Code § 721.103(a). Accord, 35 Ill. Admin Code § 720.110 ("'Hazardous waste' means a hazardous waste as defined in 35 Ill. Adm. Code 721.103.")

"When determining whether material is a 'waste'" under these definitions, "the Board considers federal court interpretations of the definition of 'solid waste' under federal RCRA regulations." People v. State Oil Co., 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. April 5, 2001).

In this case, "[f]ederal court interpretations of the definition of 'solid waste' under federal RCRA regulations," as well the federal RCRA regulations themselves and the United States Environmental Protection Agency's ("USEPA") interpretations of those regulations, make clear that uncontained gases do not meet the definition of "solid waste" under RCRA. For example, 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. Id. at ***30-32. In support of its decision, the Court noted: "The only gaseous substances included in RCRA's definition of 'solid waste' are 'contained gaseous materials.'" Id. at *30. Thus, the Court held,

> in order to be considered a solid waste for RCRA purposes, the gaseous material must be both discarded and contained, [and therefore,] 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. (Emphasis added.)

Likewise, the federal RCRA regulations themselves make clear that uncontained gases are not "solid wastes" under RCRA. Specifically, Appendix I to 40 C.F.R. Part 260 provides an "overview" of the RCRA Subtitle C regulations. In relevant part, Appendix I states:

> [A]ll materials are either: (1) Garbage[,] refuse, or sludge; (2) solid, liquid, semi-solid or contained gaseous material; or (3) something else. No materials in the third category are solid waste.

40 C.F.R. Part 260, App. I. (Emphasis added.)

Uncontained gas is not "[g]arbage[,] refuse, or sludge," nor is it "solid, liquid, semi-solid or contained"; therefore, uncontained gas "must fall into the category of 'something else[,]' and the regulations clearly state that 'no materials in the [something else] category are solid waste.'" Gallagher v. T.V. Spano Bldg. Corp., 805 F. Supp. 1120, 1129 n.7 (D.Del. 1992). Thus, under the plain language of the federal RCRA regulations, "[t]here can be no dispute that [under RCRA, uncontained] gas is not a solid waste." Id. at 1129.

Significantly, the Board has adopted this Appendix to Part 260 of the federal RCRA regulations as also reflecting Illinois law. Appendix A to Part 720 of the Board's regulations, 35 Ill. Admin. Code Part 720, also is titled "Overview of 40 CFR, Subtitle C Regulations." In this Appendix, the Board states: "See Appendix I to 40 CFR 260." Id. (Emphasis added.) Thus, the Board already has made clear that under Illinois' RCRA regulations, uncontained gases do not meet the definition of "solid waste."

Likewise, USEPA in its interpretations of the federal RCRA regulations has made clear that uncontained gases are not "solid wastes" under RCRA, stating: "our 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)." 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). (Emphasis added.)

Finally, analogously, the Act's definition of "waste" also includes only "contained gaseous material":

> "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, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include ….

415 ILCS 5/3.535. (Emphasis added.)

In his Response to Flex-N-Gate's Motion to Dismiss ("Response to Motion to Dismiss"), Complainant argues:

> The Board implemented the rulemaking directive of Section 22.4 of the Act by adopting extensive definitions of the[] terms ["waste" and "hazardous waste"] 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.

Response to Motion to Dismiss at 19.

Flex-N-Gate agrees. Illinois' RCRA program is "identical in substance" with the federal RCRA program. Under that federal program, uncontained gases are not "solid waste." The same is true under Illinois law.

2. Complainant's Arguments that RCRA Regulates Uncontained Gases are Erroneous.

Flex-N-Gate also noted in its Motion to Dismiss that uncontained gases are not regulated by RCRA. See Flex-N-Gate's Motion to Dismiss. In his Response to Flex-N-Gate's Motion to Dismiss, Complainant disagreed. See Response to Motion to Dismiss. As set forth below, Complainant's arguments are erroneous.

a. The Fact that Hydrogen Sulfide is Listed in 721.133(f) is Irrelevant.

Complainant first argues that "[h]ydrogen sulfide is a hazardous waste, listed as U135 in Part 721." Response to Motion to Dismiss at 6. 35 Ill. Admin. Code § 721.133(f) does state:

> The commercial chemical products, manufacturing chemical intermediates, or off-specification commercial chemical products referred to in subsections (a) through (d) of this Section, are identified as toxic wastes (T) unless otherwise designated and are subject to the small quantity exclusion defined in Section 721.105(a) and (g). These wastes and their corresponding USEPA hazardous waste numbers are the following:
>
> * * *
>
> U135 7783-06—4 Hydrogen sulfide

35 Ill. Admin. Code § 721.133(f).

However, this does not mean that all "[h]ydrogen sulfide is a hazardous waste." First, the listing in Section 721.133(f) includes only "commercial chemical products, manufacturing chemical intermediates, or off-specification commercial chemical products referred to in subsections (a) through (d) of" Section 721.133. 35 Ill. Admin. Code § 721.133(f). The alleged hydrogen sulfide gas at issue here does not constitute a "commercial chemical product[], manufacturing chemical intermediate[], or off-

specification commercial chemical product." See Board note to Section 721.133(d), defining these terms.

Second, and more importantly, hydrogen sulfide cannot be hazardous waste under Section 721.133(f) unless it first is a solid waste. "[F]or a waste to be classified as hazardous, it must first qualify as a solid waste under RCRA." United States v. Self, 2 F.3d 1071, 1076 (10th Cir. 1993). (Emphasis added; citations omitted.) Accord, 35 Ill. Admin Code § 721.103(a)(2)(B) ("A solid waste, as defined in Section 721.102, is a hazardous waste if the following is true . . . .") (Emphasis added.) This is just as true of commercial chemical products and manufacturing chemical intermediates listed as hazardous in Section 721.133 as it is of any other material. See id. (defining all hazardous waste – including wastes listed in Section 721.133 – as "solid waste" of which certain things are true); USEPA RCRA Hotline Questions and Answers, May 1995, 1. Solid Waste Determination for Spilled Commercial Chemical Products, No. 9441.1995(20), Faxback 13743 (attached hereto as Exhibit B) (discussing how spilled commercial chemical products sometimes are, and sometimes are not, "solid waste" for purposes of RCRA, and how – only when they constitute "solid waste" – they must be "managed in accordance with all applicable RCRA standards").

Obviously, if a company purchased compressed, liquefied hydrogen sulfide for use in a production process, (1) that hydrogen sulfide would not meet the definition of "solid waste," because would not be "discarded," and (2) because it is not "solid waste," it could not be considered "hazardous waste." See id. Likewise, the alleged hydrogen sulfide gas at issue here does not meet the definition of "solid waste," because it was uncontained. As discussed above, USEPA has held that "RCRA excludes all other gases

[i.e., gases other than contained gases] from the definition of solid wastes and thus cannot be considered hazardous wastes." Hazardous Waste Management System, 54 FR 50968, at 50973. (Emphasis added.) Therefore, the fact that "hydrogen sulfide" is listed in Section 721.133(f) is irrelevant. Because uncontained gases are not "solid wastes," they cannot be "hazardous wastes," under Section 721.133(f) or otherwise.

b. The Authority that Flex-N-Gate Cites is Directly Applicable to this Case.

Complainant next argues that "the cases cited by" Flex-N-Gate to illustrate that RCRA does not regulate uncontained gases are distinguishable because they "involve attempts to extend the RCRA rules to 'gaseous process emissions' on the grounds that the emissions are 'hazardous waste.'" Response to Motion to Dismiss, ¶21. Complainant goes on:

> 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.

Id.

First, Flex-N-Gate simply disagrees with Complainant's argument that a facility owner or operator is "required . . . to follow [a contingency] plan in the event of accidental release of toxic gas from hazardous waste." Complainant cites no authority to support this argument, and Flex-N-Gate is unaware of any such authority. Rather, the Board's regulations make clear that "[t]he provisions of [a contingency] plan must be carried out" only in the event of "a fire, explosion or release of hazardous waste or hazardous waste constituents." 35 Ill. Admin. Code § 725.151(b). (Emphasis added.) Section 725.151(b) does not state:

> The provisions of the plan must be carried out immediately whenever there is a fire, explosion or release of hazardous waste or hazardous waste constituents or toxic gas from hazardous waste which could threaten human health or the environment.

Second, Complainant's attempt to distinguish the authorities that Flex-N-Gate cites is unavailing. The fact that in Helter v. AK Steel, "[t]he plaintiff . . . argued that RCRA applied because the gas became a waste at the point at which it leaked," while in this case, allegedly, "gas was generated from a hazardous waste in a handling accident," is a distinction without a difference. In Helter, the question before the Court was whether coke oven gas ("COG") "that was released from [a] faulty pipe near Plaintiffs' residences in January 1996 was not a hazardous waste or a solid waste as those terms are employed in the RCRA citizen suit provision." 1997 U.S. Dist. LEXIS 9852, at *29. The Court held that the COG was not a "solid waste," stating:

> The definitional section, § 9603(27), includes only contained gaseous materials that have been discarded. In other words, in order to be considered a solid waste for RCRA purposes, the gaseous material must be both discarded and contained.

Id. at *31. (Emphasis added.)

The Court further emphasized that while "[d]iscarded liquids are defined as solid waste . . . [d]iscarded gases are not so defined, unless they are 'contained.'" Id. at **31-32. (Emphasis added.) Thus, the Court stated:

> The Court finds no authority for Plaintiffs' position that the COG that leaked, in its gaseous form, from Defendant's pipe near Plaintiffs' residences in January 1996 was contained at the time when it became "discarded." Absent such authority, the Court concludes 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 *32.

The Helter Court's holding had nothing to do with how the gas at issue was generated. Rather, the Court's holding was based on whether the gas at issue was or was not "contained." That is the same issue before the Board – does the uncontained hydrogen sulfide gas that allegedly was present at the Facility meet the RCRA definition of "solid waste"?[1]

Likewise, in Hazardous Waste Management System, 54 FR 50968, at 50973 (Dec. 11, 1989), USEPA also relied solely on the definition of "solid waste" under

[1] The fact that Helter is an "unreported trial court decision" (Response to Motion to Dismiss, ¶21(a)) is irrelevant. The Board's decisions also are "unreported," except through the Board's Internet site or, like Helter, through Lexis and Westlaw, and the Board (and Illinois Courts) rely on Board decisions. Further, the Board has relied on "unreported trial court decisions" in the past. See, e.g., Saline County Landfill, Inc., v. Illinois EPA, et al, No. 04-117, 2004 Ill. ENV LEXIS 255 (Ill.Pol.Control.Bd. May 6, 2004) (citing Monfardini v. Quinlan, 2004 Westlaw 533132 (N.D.Ill. Mar. 15, 2004).

RCRA to find that "its 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)." Id. This decision was not premised on the source of the gas at issue.

Third, these statements of law are by no means isolated, but merely are examples. Other authorities also have made clear that RCRA does not regulate uncontained gases. See, e.g., United States v. Sims Bros. Constr., Inc., 277 F.3d 734, 740 (5th Cir. 2001) ("For gaseous material to be 'solid waste' [under RCRA] it must be **'**contained.'"); Gallagher, 805 F. Supp. at 1129 and n.7 ("There can be no dispute that [under RCRA, uncontained] methane gas is not a solid waste.").

Fourth, as noted above, the Board already has adopted this position in Appendix A to Part 720 of the Board's regulations, which incorporates Appendix I to 40 CFR Part 260. See 35 Ill. Admin. Code Part 720, App. A.

Fifth, in contrast to Complainant's argument at Paragraph 21 of his Response to Motion to Dismiss, USEPA has made clear that uncontained gas is not solid waste under RCRA even if the gas is "generated from a hazardous waste." Specifically, USEPA has found that "[n]oncontainerized gases emitted from hazardous wastes are not themselves hazardous waste because the RCRA statute implicitly excludes them." Hazardous Waste TSDF – Technical Guidance Document for RCRA Air Emission Standards for Process Vents and Equipment Leaks, EPA-450/3-89-021, at p. 2-3 (USEPA July 1990), relevant portions of which are attached hereto as Exhibit C (this document is available from the library at Illinois EPA's headquarters in Springfield, Illinois). (Emphasis added.) Thus,

again, despite Complainant's argument to the contrary, this case is not "different in that the [alleged] gas was generated from a hazardous waste."

The bottom line is that uncontained gases do not meet the definition of "solid waste" under RCRA, no matter how the gases are generated. The authorities which provide that uncontained gases are not "solid waste" – including the Board's Appendix A to Part 720 – are not distinguishable. The question those authorities faced was the same question now before the Board in this case: is uncontained gas regulated by RCRA? In all cases, including this one, the answer is "no."

c. Complainant's Policy Arguments are Misdirected.

Complainant also argues that the fact that RCRA does not regulate uncontained gases is bad policy. Specifically, Complainant argues:

> By arguing that the contingency plan requirements do not apply to spills that result in releases of un-contained gases, 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.

Response to Motion to Dismiss, ¶ 20.

Complainant cites no authority to support this argument. See id.

This type of argument might be appropriate before the legislature, or potentially in a rulemaking before the Board, but it is misdirected in an enforcement action.

> The primary rule of statutory [and hence regulatory] construction is to ascertain and effectuate the legislature's [or agency's] intent. The initial source for determining legislative [or agency] intent is the plain meaning

> of the language used, and where unambiguous, the plain meaning of the language controls.

Color Communications, Inc. v. Illinois EPA, No. 96-125, 1996 Ill. ENV LEXIS 599, at *3 (Ill.Pol.Control.Bd. July 18, 1996). (Citations omitted.) Thus, "a court [or agency] may not alter that meaning beyond the clear import of the language employed therein." Continental Grain Co. v. IPCB, 475 N.E.2d 1362, 1363 (Ill. App. 5th Dist. 1985) (reversing the Board where the Court found that the Board's "interpretation of its . . . Rules . . . would require [the court] to ignore the plain language of those rules.") That is, the Board may not "ignore . . . the plain meaning of [its] rules and, in effect, amend them through construction rather than the usual rulemaking procedures"; rather, where "the language utilized" in a Board regulation is clear, that language can be changed only "by proper amendment of the rules. In the interim, the PCB is bound to follow the rules as stated." Id.

Here, the language of the Board's regulations is clear: as under federal law, in Illinois, contingency plans apply only in the event of "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); 40 C.F.R. § 265.51(b). If one of these four things does not occur, a contingency plan is not triggered. The Board's regulations are clear on this, and the Board "is bound to follow the rules as stated."

Thus, if someone hits his thumb with a hammer, or chokes on a sandwich, or falls off a ladder – or even if a drum of hazardous waste falls over on someone's foot, but the drum stays intact – a facility's RCRA contingency plan simply does not apply, because no "fire" or "explosion" or "release of hazardous waste" or "release of hazardous waste

constituents" occurred. Likewise, if a release of hazardous waste occurs to land, the Clean Water Act does not apply; if a release of oil occurs to water, the Clean Air Act does not apply; if a release of particulate matter occurs to air, RCRA does not apply. Each statute has a universe of situations to which it applies and a universe of situations to which it does not apply. Complainant may think it is "absurd" that RCRA's universe does not include uncontained gases, but it simply does not, any more than RCRA contingency plans regulate hammers or sandwiches or ladders or falling containers of hazardous waste that do not break. If Complainant can convince Congress to rewrite RCRA, that is fine, but, until then, the "authority to identify or list a waste as hazardous under RCRA is limited to containerized or condensed gases." Hazardous Waste Management System, 54 FR 50968, at 50973 (Dec. 11, 1989). Accord, 35 Ill. Admin. Code Part 720, Appendix A.

3. Uncontained Gases Do Not Meet The Definition Of "Solid Waste" Or "Hazardous Waste."

Thus, for all of the reasons stated above, under federal law and Illinois law, (1) uncontained gases do not meet the definition of "solid waste" under RCRA, and (2) because they do not meet the definition of "solid waste," they cannot be "hazardous waste" under RCRA. As discussed below, in light of this fact, the Board should grant Flex-N-Gate summary judgment on Counts II through VI of Complainant's Complaint.

B. Uncontained Hydrogen Sulfide Gas Also Is Not A "Hazardous Waste Constituent" Under RCRA.

A RCRA contingency plan also can be triggered by a release of a "hazardous waste constituent" from a unit that is subject to the RCRA contingency plan requirements. See discussion below. Again, the RCRA contingency plan requirements

do not apply in this case because of RCRA's Wastewater Treatment Unit Exemption. See Motion for Complete Summary Judgment. And, Flex-N-Gate disputes that a release of hydrogen sulfide occurred. Regardless, however, even if the contingency plan requirements did apply, and even if a release of hydrogen sulfide had occurred, the contingency plan requirements were not triggered in this case because uncontained hydrogen sulfide gas does not constitute a "hazardous waste constituent" under RCRA.

1. Hydrogen Sulfide Is Not A "Hazardous Waste Constituent" Because It Did Not "Cause Hazardous Waste To Be Listed."

The Board defines the term "hazardous waste constituent" 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. Hydrogen sulfide clearly is not "a constituent listed in 35 Ill. Adm. Code 721.124." See 35 Ill. Admin. Code § 721.124. Thus, the alleged uncontained hydrogen sulfide gas at issue here can be a "hazardous waste constituent" only if it "caused the hazardous waste" at issue "to be listed in 35 Ill. Adm. Code 721.Subpart D."

According to Complainant, "the hazardous waste" at issue, from which hydrogen sulfide gas allegedly was emitted at the Facility, is "[t]he spillage on the floor" of the Facility, which Complainant argues constitutes "D003, 'reactive waste.'" Complaint, ¶¶ 7, 17; Response to Motion to Dismiss, ¶¶ 1,17. Solid waste that is characteristically "reactive" is given the designation D003. See 35 Ill. Admin. Code § 721.123(b). However, "D003 waste" is not "listed in 35 Ill. Adm. Code 721.Subpart D." Rather, "D003" is the designation given to characteristically reactive waste in 35 Ill. Admin. Code § 721.123, which is located in Subpart C of Part 721.

Thus, neither hydrogen sulfide nor anything else has "caused [D003 reactive waste] to be listed in 35 Ill. Adm. Code 721.Subpart D" for purposes of the definition of "hazardous waste constituent" in 35 Ill. Admin. Code § 720.110. Therefore, by definition, any substance emitted from D003 waste cannot be a "hazardous waste constituent," because D003 is not "listed in . . . Subpart D." Further, even if D003 waste was "listed in . . . Subpart D," hydrogen sulfide is not listed in Appendix G to Part 721 as having caused any hazardous waste to be listed. Thus, hydrogen sulfide is not a "hazardous waste constituent."

2. The Fact That Hydrogen Sulfide Is Listed In Appendix H To Part 721 Is Irrelevant.

In response to Flex-N-Gate's Motion to Dismiss, Complainant argues that "[h]ydrogen sulfide is a hazardous constituent listed in Appendix H of Part 721." Response to Motion to Dismiss at 6. Appendix H of Part 721 is titled: "Hazardous Constituents." See 35 Ill. Admin. Code Part 721, Appendix H. As set forth below, this is irrelevant.

Complainant apparently contends that because hydrogen sulfide is included in the Appendix H list of "hazardous constituents," it meets the definition of "hazardous waste constituent." See Response to Motion to Dismiss at 6. The problem with this argument is that Complainant confuses the RCRA term "hazardous constituent" with the RCRA term "hazardous waste constituent." That is, Complainant apparently argues that when the definition of "hazardous waste constituent" refers to "a constituent that caused the hazardous waste to be listed in 35 Ill. Adm. Code 721.Subpart D," it is referring to the substances listed in Appendix H to Part 721, "Hazardous Constituents." As discussed

below, however, this is not the case. In fact, the phrase "a constituent that caused the hazardous waste to be listed in 35 Ill. Adm. Code 721.Subpart D," in the definition of "hazardous waste constituent," refers to Appendix G to Part 721, "Basis for Listing Waste."

a. "Hazardous Constituents" and "Hazardous Waste Constituents" are Different Things.

First, despite their similar names, under RCRA, "hazardous constituents" and "hazardous waste constituents" are different things. See, e.g., In the Matter of: Beezer East, Inc. and Koppers Indus., Inc., Permit No. KYD 006 383 392, No. 91-25, 1993 EPA App. LEXIS 12, at * 9, 4 E.A.D. 536 (USEPA Env. App. Bd. Mar. 18, 1993) ("The principal problem we have with this argument is that Beazer does not provide any citations to the permit or the record to support its belief that there is a permit term obligating it to monitor "hazardous waste constituents," as opposed to monitoring "hazardous constituents.") (Emphasis added.)

As noted above, "hazardous waste constituents," in addition to being those constituents listed in 35 Ill. Admin. Code § 721.124, are "constituent[s] that caused . . . hazardous waste to be listed in 35 Ill. Adm. Code 721.Subpart D." 35 Ill. Admin. Code § 720.110. (Emphasis added.) On the other hand, USEPA has explained the meaning of the term "hazardous constituents," and the purpose of Appendix VIII to 40 C.F.R. Part 261 (which is equivalent to Appendix H of Part 721 of Illinois' rules), as follows:

> The Appendix VIII list is actually a composite of several other lists. It includes chemicals identified as priority pollutants under the Clean Water Act, chemicals identified by the Department of Transportation as hazardous to transport, chemicals for which EPA's Carcinogen Assessment Group (CAG) has laboratory evidence of carcinogenicity, and

> chemicals which the NIOSH Registry of Toxic Effects of Chemical Substances lists as having high acute toxicity (numerically low LD[50]).
>
> The principal purpose of the list is to define a universe of chemicals of concern. Wastes would be matched against the list to see if they contained any chemicals from this universe. If so, they would be considered for listing as "hazardous."

List (Phase I) of Hazardous Constituents for Ground-Water Monitoring, 52 FR 25942 (USEPA July 9, 1987). (Emphasis added.)

USEPA also noted in a June 1989 RCRA/Superfund Hotline Monthly Summary regarding Appendix VIII, "Hazardous Constituents," that:

> Owners/operators of RCRA facilities use Appendix VIII for hazardous waste analysis before incineration (Section 264.340)[, and that] . . . . EPA's original regulations for ground-water monitoring at permitted land disposal facilities required owners and operators, under some circumstances, to analyze samples of groundwater for all constituents listed on Appendix VIII.

USEPA RCRA/Superfund Hotline Monthly Summary, No. 9445.1989(01), Faxback 13290 (USEPA June 1989), attached hereto as Exhibit D, at 1-2. (Emphasis added.)

Thus, "hazardous constituents" – listed in Appendix H – are "chemicals of concern," which (1) are monitored for in certain circumstances such as incineration and, formerly, groundwater monitoring, and (2) the presence of which might cause USEPA to "consider[]" listing a solid waste as "hazardous waste" in the future. "Hazardous waste constituents," on the other hand, are those constituents "that caused . . . hazardous waste to be listed" in the past. That is, USEPA looks at "hazardous constituents" when considering whether to list a solid waste as "hazardous waste," and, if USEPA determines that a solid waste should be listed as "hazardous waste," the constituents it relied on to make such determination are considered "hazardous waste constituents." Thus, again,

"hazardous constituents" and "hazardous waste constituents," are different things. In the Matter of: Beezer East, Inc., 1993 EPA App. LEXIS 12, at *9.

b. "Hazardous Waste Constituents" Are Listed In Appendix G To Part 721, Not Appendix H to Part 721.

Second, "hazardous waste constituents . . . are . . . listed in 40 C.F.R. Part 261, Appendix VII," In the Matter of Michigan Waste Systems, Inc., No. RCRA-V-W-84-R-054, 1991 EPA ALJ LEXIS 18, at *92 (USEPA ALJ Sept. 30, 1991) (emphasis added), that is, in Appendix G to Illinois' Rules. (Appendix VII in the federal rules in equivalent to Appendix G. Compare 40 C.F.R. Part 261, Appendix VII to 35 Ill. Admin. Code Part 721, Appendix G.) Thus, in a later opinion in the Michigan Waste Systems case, the USEPA Office of Administrative Law Judges ("ALJs") ordered the respondent to, among other things:

> specify, by chemical names, the entire set of hazardous wastes and hazardous waste constituents in the facility, including each constituent listed in Table 1 of 40 C.F.R. section 261.21 and, for each hazardous waste listed in 40 C.F.R. section 261.31 or section 261.32, that has been disposed of in the landfill, the corresponding constituents listed in Appendix VII to 40 C.F.R. Part 261.

1997 EPA ALJ LEXIS 61, at **42-43 (USEPA ALJ March 21, 1997). (Emphasis added.)

And, in In the Matter of Koppers Company, Inc., the USEPA Office of ALJs stated:

> Moreover, and although the background document for creosote production (Exh A-1), supports Respondent's position that the hazardous waste constituents of creosote are benz(a)anthracene, benzo(b)fluoranthene and benzo(a)pyrene, other chemicals such as chrysene, naphthalene and acenaphthalene are listed under pentachlorophenol in 40 CFR 261, Appendix VII, Basis For Listing Hazardous Waste. Accordingly, there may be other hazardous waste constituents of Respondent's sludges.

USEPA No. RCRA-III-012, 1983 EPA ALJ LEXIS 14, at *21 (USEPA ALJ June 21, 1983) (emphasis added).

3. Uncontained Gases Do not Meet the Definition of "Solid Waste" Or "Hazardous Waste."

As the above makes clear, "hazardous constituents" and "hazardous waste constituents" are different things, and thus, the fact that hydrogen sulfide is listed as a "hazardous constituent" in Appendix H to Part 721 is irrelevant. Hydrogen sulfide is not listed in Section 721.124, or in Appendix G to Part 721. Therefore, hydrogen sulfide is not a "hazardous waste constituent" for purposes of RCRA. As discussed below, the Board therefore should grant Flex-N-Gate summary judgment on Counts II through VI of Complainant's Complaint.

V. ANALYSIS

In light of the above, the Board should grant summary judgment to Flex-N-Gate on Counts II through VI of Complainant's Complaint.

A. Flex-N-Gate is Entitled to Summary Judgment on Counts II and VI – 35 Ill. Admin. Code § 725.151(b).

Counts II and VI of Complainant's Complaint assert that Flex-N-Gate violated 35 Ill. Admin. Code § 725.151(b) by "utterly fail[ing] to carry out the contingency plan in response to" the alleged release of hydrogen sulfide, and by "fail[ing] to carry out the plan in response to th[e] spill" of sulfuric acid, respectively. Complaint, Counts II, VI. Flex-N-Gate disagrees.

1. Complainant Cannot Prove All Of The Elements Of His Claims In Counts II and VI.

Section 725.151(b) states:

> The 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).

As discussed in Flex-N-Gate's Motion for Complete Summary Judgment[2], to prove a violation of Section 725.151(b), Complainant must prove the following four elements:

1. that the incident at issue does not involve "a wastewater treatment unit as defined in 35 Ill. Adm. Code 720.110";

2. that "a fire, explosion or release of hazardous waste or hazardous waste constituents" occurred;

3. That such "fire, explosion or release . . . could threaten human health or the environment"; and,

4. that Flex-N-Gate did not "immediately" carry out "[t]he provisions of the [contingency] plan."

35 Ill. Admin. Code §§ 725.101(c)(10), 725.151(b).

Complainant cannot prove the second element of this test, i.e., that "a fire, explosion or release of hazardous waste or hazardous waste constituents" occurred. 35 Ill. Admin. Code § 725.151(b).

[2] Flex-N-Gate argues in its Motion for Complete Summary Judgment that the first element of this claim (and Complainant's claims in Counts III, IV, and V) exists because 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). Flex-N-Gate also argues that Complainant cannot prove this first element. See Motion for Complete Summary Judgment.

a. No "Fire" Occurred.

One way that a complainant can establish the second element of a claim under Section 725.151(b) is to prove that "a fire" occurred. Here, however, Complainant does not allege that any fire occurred at the Facility on August 5, 2004. See Complaint. And, in fact, there was no fire. Corbett Aff. at ¶4. Thus, Complainant cannot rely on a fire having occurred to establish the second element of his claim under Section 725.151(b).

b. No "Explosion" Occurred.

The second way that a complainant can establish the second element of a claim under Section 725.151(b) is to prove that "an explosion" occurred. However, Complainant also does not allege that any explosion occurred at the Facility on August 5, 2004. See Complaint. And, there was no explosion. Corbett Aff. at ¶5. Thus, Complainant also cannot rely on a explosion having occurred to establish the second element of his claim under Section 725.151(b).

c. No "Release of Hazardous Waste" Occurred.

The third way that a complainant can establish the second element of a claim under Section 725.151(b) is to prove that a "release of hazardous waste" occurred. In Count VI, Complainant does not allege that any release of hazardous waste occurred. See Complaint, Count VI. In Count II, however, Complainant does allege that there was a "there [was a] release of hazardous waste"; specifically, Complainant alleges that uncontained "hydrogen sulfide gas" was emitted (Complaint at 2, ¶15), and that "[t]he hydrogen sulfide emission was a release of hazardous waste . . . within the meaning of Section 725.151(b)." Id. at 5, ¶2. (Emphasis added.) Accord, Complainant's Response

to Motion to Dismiss at 8, ¶ 15 ("Hydrogen sulfide is a hazardous waste, listed as U135 in Part 721.")

As discussed above, however, uncontained gases do not meet the definitions of "solid waste" or "hazardous waste" under RCRA, and the fact that hydrogen sulfide is "listed as U135 in Part 721" is irrelevant. See discussion above. Therefore, even if a release of uncontained hydrogen sulfide gas had occurred (which Flex-N-Gate disputes), such a release, by definition, could not (as Complainant argues) constitute "a release of hazardous waste . . . within the meaning of Section 725.151(b)."

It is important to note that whether uncontained gases constitute "hazardous waste" for purposes of Section 725.151(b) is a question of law for the Board, not a question of fact. In re Storment, 203 Ill. 2d 378, 390, 786 N.E.2d 963, 970 (Ill. 2002). ("The construction of a rule**,** like a statute, is also a question of law.") (Citation omitted.) Accord, Panhandle Eastern Pipe Line Co., 314 Ill. App. 3d at 300, 734 N.E.2d at 21 ("The issues raised on appeal relate to interpretation of statutes and administrative rules; interpretation of a statute is a question of law**;** construction of administrative rules and regulations is governed by the same standard as construction of statutes.") (Citations omitted.) Section 720.110 defines "hazardous waste" as follows:

> When used in 35 Ill. Adm. Code 720 through 726 and 728 only, the following terms have the meanings given below:
>
> * * *
>
> "Hazardous waste" means a hazardous waste as defined in 35 Ill. Adm. Code 721.103.

35 Ill. Adm. Code § 720.110.

Section 721.103(a) states: "A solid waste, as defined in Section 721.102, is a hazardous waste if" certain things are true. 35 Ill. Admin. Code § 721.103(a). And, "solid waste" means "any discarded material that is not excluded by Section 721.104(a) or that is not excluded pursuant to 35 Ill. Adm. Code 720.130 and 720.131." 35 Ill. Admin. Code § 721.102(a)(1).

To determine whether uncontained gases are regulated by Illinois' RCRA regulations, the Board must construe the definition of "solid waste" contained in Section 721.102. Above, Flex-N-Gate has set forth authority that this definition of "solid waste" does not encompass uncontained gases. See, e.g., Helter, 1997 U.S. Dist. LEXIS 9852, at **30-32; Hazardous Waste Management System, 54 FR 50968, at 50973; 415 ILCS 5/3.535. Complainant apparently disagrees, arguing in his Complaint that "[t]he [alleged] hydrogen sulfide emission was a release of hazardous waste . . . within the meaning of Section 725.151(b)." Complaint at 5, ¶2. (Emphasis added.) It is clear that this is a dispute about a question of law, as it involves only the construction by the Board of the definition of "solid waste" in Section 721.102. The parties may disagree on this question of law; however, this legal disagreement does not preclude the Board granting summary judgment to Flex-N-Gate. As discussed above, only "genuine issue[s] as to any material fact" preclude the grant of a summary judgment. Cassens and Sons, Inc., 2004 Ill. ENV LEXIS 635, at **11-12; 35 Ill. Admin. Code § 101.516(b). (Emphasis added.)

It also is important to note that, for purposes of this Motion, it does not matter whether or not a release of hydrogen sulfide gas actually occurred at the Facility. Again, Flex-N-Gate disputes that such a release occurred. Regardless, however, whether or not a release of hydrogen sulfide gas occurred at the Facility is not a "material fact," because it

is not "[]related to the essential elements of" Complainant's "cause of action" (Smith, 289 Ill. App. 3d at 1069, 682 N.E.2d at 1254) and will not "affect the outcome of [Complainant's] case." Westbank, 276 Ill. App. 3d at 562, 658 N.E.2d at 1389. This is because, as just discussed, uncontained gases are not "solid waste" for purposes of Illinois' RCRA regulations. Thus,

- to establish the second essential element of his claim under Section 725.151(b), Complainant must prove that that "a fire, explosion or release of hazardous waste or hazardous waste constituents" occurred;

Deleted: at the Facility

- if the Board decides that Illinois' RCRA regulations do not regulate uncontained gases as solid waste (and thus, do not regulate uncontained gases as hazardous waste), then whether a release of uncontained gases occurred at the Facility is irrelevant to this question;

- this is because, even if such a release had occurred, it would not constitute a release of "hazardous waste."

By analogy, if Complainant argued that he hit his thumb with a hammer while working at the Facility, and that the Facility should have invoked its RCRA contingency plan in responding to his injury, the hammer would not be "hazardous waste," if, for no other reason, because it is not "discarded" and thus is not "solid waste." See 35 Ill. Admin. Code § 721.102. Thus, Flex-N-Gate would not have violated Section 725.151(b) by not invoking its contingency plan in response to Complainant hitting his thumb with a hammer, as no "fire, explosion or release of hazardous waste or hazardous waste constituents" occurred. Therefore, even if Flex-N-Gate argued that Complainant did not in fact hit his thumb with a hammer, and the parties disagreed as to that fact, Flex-N-Gate still would be entitled to summary judgment on a claim that it violated Section 725.151(b).

Thus, an argument over whether Complainant actually hit is thumb with a hammer – like an argument over whether a release of uncontained hydrogen sulfide gas occurred – is irrelevant to the question of whether a "release of hazardous waste" occurred, because neither a hammer nor uncontained gas constitutes hazardous waste for purposes of Illinois' RCRA regulations. Therefore, Complainant cannot prove the second element of is claim under Section 725.151(b) – that "a fire, explosion or release of hazardous waste or hazardous waste constituents" occurred – by pointing to an alleged release of uncontained gas.

For the reasons stated above, the alleged release of uncontained hydrogen sulfide gas does not constitute a release of "hazardous waste." Therefore, Complainant cannot rely on a release of "hazardous waste" having occurred to establish the second element of his claims under Section 725.151(b) in Counts II and VI of his Complaint.

d. No "Release of . . . Hazardous Waste Constituents" Occurred.

Finally, the fourth way that a complainant can establish the second element of a claim under Section 725.151(b) is to prove that a "release of . . . hazardous waste constituents" occurred. In Count VI, Complainant does not allege that any release of hazardous waste constituents occurred. See Complaint, Count VI. In Count II, however, Complainant alleges that uncontained "hydrogen sulfide gas" was emitted (Complaint at 2, ¶15), and that "[t]he hydrogen sulfide emission was a release of . . . hazardous waste constituents . . . within the meaning of Section 725.151(b)." Id. at 5, ¶2. (Emphasis added.) Accord, Complainant's Response to Motion to Dismiss at 6, ¶16 ("Hydrogen sulfide is a hazardous constituent listed in Appendix H of Part 721.")

As discussed above, however, uncontained hydrogen sulfide gas does not constitute a "hazardous waste constituent" under RCRA, and the fact that hydrogen sulfide is "listed in Appendix H of Part 721" is irrelevant. See discussion above. Therefore, even if a release of uncontained hydrogen sulfide gas had occurred (which Flex-N-Gate disputes), such a release by definition could not, as Complainant argues, constitute "a release of . . . hazardous waste constituents . . . within the meaning of Section 725.151(b)."

Finally, for the reasons discussed above, the question of whether hydrogen sulfide gas constitutes a "hazardous waste constituent" is a question of law for the Board, and the question of whether hydrogen sulfide gas was emitted is not material to this Motion.

For the reasons stated above, hydrogen sulfide is not a "hazardous waste constituent" for purposes of RCRA. Therefore, Complainant cannot rely on an alleged release of "hazardous waste constituents" having occurred to establish the second element of his claims under Section 725.151(b) in Counts II and VI.

2. The Provisions Of The Facility's "Emergency Response And Contingency Plan" Which Complainant Cites Are Irrelevant.

In response to Flex-N-Gate's Motion to Dismiss, with regard to Counts II and VI, Complainant cites several specific provisions of the Facility's "Emergency Response and Contingency Plan" ("Plan"). See Response to Motion to Dismiss, ¶¶ 22.a., 32. Specifically, Complainant states:

> 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 [should be 6-4] 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 [of] the complaint.)

Response to Motion to Dismiss, ¶32. See also, Id., ¶22.a.

The portions of the Plan that Complainant cites are included herewith as part of Exhibit E. Affidavit of Jackie Christensen, attached hereto as Exhibit F ("Christensen Aff."), at ¶3.

Complainant appears to argue that (1) Flex-N-Gate did not follow these provisions of the Plan, and (2) because these provisions were in the Plan, if Flex-N-Gate did not follow them, it violated the RCRA contingency plan regulations even if, under those regulations, on action was required. See, e.g., Response to Motion to Dismiss, ¶22.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.'") Flex-N-Gate denies that it did not follow the Plan. Regardless however, Complainant's argument is a "red herring."

What Complainant fails to realize is that the Facility's "Emergency Response and Contingency Plan" is more than simply a Contingency Plan under Subpart D to 35 Ill. Adm. Code Part 725. Rather, the Plan was developed by Flex-N-Gate to address numerous types of situations that could occur at the Facility, including, but not limited to, situations involving "hazardous waste." Christensen Aff. at ¶4. Thus, portions of the "Emergency Response and Contingency Plan" serve as:

- the Facility's "Contingency Plan" under Subpart D to 35 Ill. Adm. Code Part 725;

- the Facility's "Emergency Response Plan" under the Occupational Safety and Health Act (29 C.F.R. § 1910.120(p)(8)(i));

and set out other procedures for the Facility relating to maintenance, security, etc.

Christensen Aff. at ¶5.

Thus, in addition to discussing certain situations involving "hazardous wastes" (Plan at p. 6-3), the Plan deals with such things as:

- where at the Facility employees who are injured in any way should be taken (Exhibit E at p. 8);
- where Facility employees should seek shelter in the event of a tornado (Exhibit E at p. 18);
- how to tape up vents at the Facility in the event of "a nuclear accident involving a vehicle carrying radioactive materials where radioactive particles are released into the atmosphere in the vicinity of the [Facility]" (Exhibit E at p. 20); and
- which outside contractors should be contacted if "a major disaster" damages plant equipment and the Facility's personnel cannot repair the equipment (Exhibit E at p. 36).

Likewise, Section 6 of the Plan, which includes the pages cited by Complainant, is not focused on "hazardous waste," but rather, is titled "Hazardous Material Spills," and addresses any type of hazardous substance at the Facility, be it a waste or a product. Christensen Aff. at ¶6; see Exhibit E, Section 6. For example, page 6-3 of the Plan states:

> The Spill Teams are comprised of selected employees throughout the facility who have adequate training to deal with a broad range of chemical emergencies. Special attention is afforded areas that have hazardous waste. Provision is also made for areas where loading and off-loading of hazardous materials occurs and along pathways for internal distribution of hazardous chemicals.

Exhibit E at 6-3. (Emphasis added.)

In his response to Motion to Dismiss, Complainant states:

> 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.
>
> ***
>
> 31.b. Respondent elected not to prepare an OSHA emergency response plan, instead relying on the RCRA contingency plan.

Response to Motion to Dismiss, ¶¶13, 13(a) and 31(b).

Complainant misunderstands the OSHA Emergency Response Plan rule and Flex-N-Gate's actions under that rule. That rule, 29 C.F.R. § 1910.120(p)(8)(i) does not "allow the owner or operator of a RCRA facility to use the contingency plan prepared pursuant to Board rules to meet the OSHA requirement." Rather, that regulation provides that an emergency plan "need not duplicate any of the subjects fully addressed in the employer's contingency planning required by permits … provided that the contingency plan is made part of the emergency response plan." By definition, an OSHA Emergency Response Plan is broader than a RCRA contingency plan, because an OSHA Emergency Response Plan must address "an occurrence which results, or is likely to result, in an uncontrolled release of a hazardous substance" (29 C.F.R. § 1910.120(a)(3)), while a RCRA contingency plan is confined only to "fires, explosions, or releases of hazardous waste or hazardous waste constituents." 35 Ill. Admin. Code § 725.151(b). Thus, an OSHA Emergency Response Plan must include more than a RCRA contingency plan. Compare 29 C.F.R. § 1910.120(p)(8) with 35 Ill. Admin. Code § 725.152 (describing

what each plan must contain). Thus, Flex-N-Gate did not "elect[] to prepare a RCRA contingency plan, and to use the RCRA contingency plan to meet the OSHA requirement," as Complainant alleges. Response to Motion to Dismiss, ¶13(a). Rather, as Section 1910(p)(8)(i) allows, Flex-N-Gate included its contingency plan within its emergency response plan; this is why the Plan is titled "Emergency Response and Contingency Plan." See Exhibit E. Christensen Aff., at ¶7.

Thus, because the Plan contains numerous provisions that have nothing to do with fires, explosions, or releases of hazardous waste or hazardous waste constituents, whether or not Flex-N-Gate did not follow some provision of the Plan reveals nothing about whether or not Flex-N-Gate violated the RCRA contingency plan regulations, or, in particular, 35 Ill. Admin. Code 725.151(b). Therefore, while Flex-N-Gate denies failing to comply with the provisions cited by Complainant, whether or not it did so is irrelevant, because these provisions are not requirements of Section 725.151(b):

- the language referenced from Page 6-3 of the Plan addresses responses to "spills," which, again, include products as well as waste;
- the reference on Page 6-4 of the Plan to responses to "a spill that could cause the release of toxic liquids or fumes" applies equally to products as well as to waste, and, as discussed above, a "release of toxic fumes" does not trigger a RCRA contingency plan; and,
- the reference on page 6-10 of the plan to spills of sulfuric acid relates to release reporting requirements under the Emergency Procedures and Community Right to Know Act.

Thus, even if Flex-N-Gate had failed to follow these provisions of the Plan, such failure does not violate Section 725.151(b), because Section 725.151(b) only requires action in the event of "a fire, explosion or release of hazardous waste or hazardous waste constituents," which, again, did not occur here.

By analogy, as noted above, Page 8 of the Plan states that if an employee at the Facility is injured, in any manner, "if possible," he or she "shall be transported directly to the Safety office." Exhibit E at 8. If an employee falls down a flight of stairs at the Facility and breaks her leg, and it is "possible" to transport that employee "directly to the Safety office," but, instead, for some reason, the employee is transported to some other location, this provision on Page 8 of the Plan has not been followed. This does not mean, however, that the RCRA contingency plan requirements have been violated, because, as in this case, no "fire, explosion or release of hazardous waste or hazardous waste constituents" occurred. Thus, again, the Board cannot determine whether or not Flex-N-Gate violated Section 725.151(b) by looking at whether Flex-N-Gate failed to follow provisions of the Plan. Rather, the only way that the Board can determine whether or not Flex-N-Gate violated Section 725.151(b) is by first determining whether a "a fire, explosion or release of hazardous waste or hazardous waste constituents" occurred.

3. Flex-N-Gate is Entitled to Summary Judgment on Counts II and VI.

Again, to prove a violation of Section 725.151(b), Complainant must establish the following four elements:

1. that the incident at issue does not involve a "wastewater treatment unit as defined in 35 Ill. Adm. Code 720.110";

2. that "a fire, explosion or release of hazardous waste or hazardous waste constituents" occurred;

3. That such "fire, explosion or release . . . could threaten human health or the environment"; and,

4. that Flex-N-Gate did not "immediately" carry out "[t]he provisions of the [contingency] plan."

35 Ill. Admin. Code §§ 725.101(c)(10), 725.151(b).

In Count II, Complainant clearly understands that he must establish the second and third of these elements. Why else would he have alleged in paragraph two of Count II 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)"? Complaint at 5, ¶2.

In People v. G.M. Demolition Corp., PCB No. 96-261, 1998 Ill. ENV LEXIS 508 (Ill.Pol.Control.Bd. Oct. 1, 1998), the State brought a claim against the defendant for demolishing a "structure" without taking certain steps required by the National Emission Standards for Hazardous Air Pollutants. Id., 1998 Ill. ENV LEXIS 508, at **5-8. The Board found, however, that the building that had been demolished did not meet the definition of "structure," and therefore that the NESHAP regulations at issue did not apply to the demolition. Id. at **7-8. Accordingly, the Board granted summary judgment to the defendant. Id. at *8.

Likewise,

- in People v. Stringini, PCB No. 01-43, 2003 Ill. ENV LEXIS 624, at ** 27-28 (Ill.Pol.Control.Bd. Oct. 16, 2003), the Board granted summary judgment to the respondent where it was sued for violating Section 21(d) of the Environmental Protection Act by storing "hazardous waste" without a permit, because the material being stored did not meet the definition of "hazardous waste";

- In People v. City of Lawrenceville, et al, PCB No. 00-122, 2001 Ill. ENV LEXIS 247, at *33 (Ill.Pol.Control.Bd. June 7, 2001), the Board granted summary judgment to the respondent where it was sued for violating a portion of the Environmental Protection Act that applied to certain public

water supplies, because the water supply at issue did not meet the definition in the statute; and,

- in People v. Environmental Control and Abatement, Inc., PCB No. 95-170, 2000 Ill. ENV LEXIS 119, at **9-10, 20-21 (Ill.Pol.Control.Bd. Oct. 1, 1998), the Board granted summary judgment to the respondent where it was sued for failing to follow a regulation relating to "demolition," because the project at issue was a "renovation" and thus did not meet the definition of "demolition."

Analogously, in this case, the alleged release of uncontained hydrogen sulfide does not meet the definition of "fire, explosion, or release of a hazardous waste or hazardous waste constituent." See discussion above. Thus, as in G.M. Demolition, Stringini, City of Lawrenceville, and Environmental Control and Abatement, Inc., the regulations that Complainant argues Flex-N-Gate violated do not apply to this situation, and, accordingly, as in those cases, the Board should grant Flex-N-Gate summary judgment. See Gauthier, 266 Ill. App. 3d at 220, 693 N.E.2d at 999 ("If from the papers on file, a plaintiff fails to establish an element of his cause of action, summary judgment for the defendant is proper.") (Emphasis added; citations omitted.)

B. Flex-N-Gate Also is Entitled to Summary Judgment on Count III – 35 Ill. Admin. Code § 735.156(j).

Count III of Complainant's Complaint asserts that Flex-N-Gate violated 35 Ill. Admin. Code § 725.156(j) by "fail[ing] to report the incident to the Agency within fifteen days." Complaint at 6, Count III, ¶2. Again, Flex-N-Gate disagrees.

Section 725.156(j) states:

> The owner or operator shall note in the operating record the time, date, and details of any incident that requires implementing the contingency plan. Within 15 days after the incident, it shall submit a written report on the incident to the Director. The report must include:

1) Name, address, and telephone number of the owner or operator;

2) Name, address, and telephone number of the facility;

3) Date, time, and type of incident (e.g., fire, explosion);

4) Name and quantity of materials involved;

5) The extent of injuries, if any;

6) An assessment of actual or potential hazards to human health or the environment, where this is applicable; and

7) Estimated quantity and disposition of recovered material that resulted from the incident.

35 Ill. Admin. Code § 725.156(j).

Thus, to prove a violation of Section 725.156(j), Complainant must prove the following three elements:

1. that the incident at issue does not involve "a wastewater treatment unit as defined in 35 Ill. Adm. Code 720.110";

2. that an "incident that requires implementing the contingency plan" occurred; and,

3. that "[w]ithin 15 days after the incident," Flex-N-Gate did not "submit a written report on the incident to the Director."

35 Ill. Admin. Code §§ 725.101(c)(10), 725.156(j).

Complainant cannot establish the second element of this Count.[3]

Again, to establish the second element of his claim under Section 725.156(j), Complainant must prove that an "incident that requires implementing the contingency plan" occurred. However, the only "incidents" that "require[] implementing [a]

[3] As with Counts II and VI, Flex-N-Gate argues in its Motion for Complete Summary Judgment that Complainant also cannot establish the first element of this Count. See Motion for Complete Summary Judgment.

contingency plan" are "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). ("The provisions of the [contingency] plan must be carried out immediately whenever there is a fire, explosion or release of hazardous waste constituents ….") As discussed above, no "fire, explosion or release of hazardous waste or hazardous waste constituents" occurred. See discussion above. Thus, Complainant cannot establish the second element of his claim under Section 725.156(j), that an "incident that requires implementing the contingency plan" occurred. Therefore, the Board also should grant Flex-N-Gate summary judgment on Count III of Complainant's Complaint.

C. Flex-N-Gate Also is Entitled to Summary Judgment on Count IV – 35 Ill. Admin. Code § 735.154(b).

Count IV of Complainant's Complaint asserts that Flex-N-Gate violated 35 Ill. Admin. Code § 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. Again, Flex-N-Gate disagrees.

1. Complainant Cannot Prove All Of The Elements Of His Claim In Count IV.

Section 725.154(b) states:

> The contingency plan must be reviewed and immediately amended, if necessary, whenever:
>
> * * *
>
> b) The plan fails in an emergency.

35 Ill. Admin. Code § 725.154(b).

Thus, to prove a violation of Section 725.154(b), Complainant must prove the following four elements:

1. that the incident at issue does not involve "a wastewater treatment unit as defined in 35 Ill. Adm. Code 720.110";

2. that "an emergency" occurred;

3. that the plan "fail[ed]"; and,

4. that Flex-N-Gate did not thereafter "review[] and immediately amend[]" the contingency plan.

35 Ill. Admin. Code §§ 725.101(c)(10), 725.154(b).

Complainant cannot establish the third element of this claim. [4]

Again, in order to prove the third element of his claim under Section 725.154(b), Complainant must establish that the Facility's contingency plan "fail[ed]." Complainant cannot do this, because, by definition, the plan cannot "fail" if it never was triggered in the first place. As discussed above, even if the alleged release of uncontained hydrogen sulfide gas occurred, the plan was not triggered, because such alleged release did not constitute a "fire, explosion, or release of hazardous waste or hazardous waste constituents."

The hammer analogy helps illustrate the point. If Complainant had hit his thumb with a hammer, and argued that Flex-N-Gate did not respond properly, the alleged lack of a proper response would not be because of a "failure" of the Facility's Plan, because the

[4] As with Counts II, III, and VI, Flex-N-Gate argues in its Motion for Complete Summary Judgment that Complainant also cannot establish the first element of this Count. See Motion for Complete Summary Judgment. It also is Flex-N-Gate's position that Complainant cannot establish the second element of his claim, namely, that "an emergency" occurred. Flex-N-Gate need not expand on this point, however, as it is entitled to summary judgment because of Complainant's inability to establish the first and third elements of his claim.

Plan never applied in the first place. Likewise, any other "plans" that the Facility has – for parking, for snow removal, for bathroom cleaning, etc. – did not "fail" in response to the alleged release of hydrogen sulfide; they did not apply to that release, so, for purposes of that alleged release, they were irrelevant. The Facility's contingency plan also did not apply to the alleged release of hydrogen sulfide, so, for purposes of that alleged release, the contingency plan also was irrelevant.

This point also is supported by other provisions in Subpart D of Part 725 of the Board's regulations. For example, Section 725.151, "Purpose and Implementation of Contingency Plan," subsection (a), provides that the purpose of contingency plans is:

> to minimize hazards to human health or the environment from fires, explosions or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water,

35 Ill. Admin. Code § 725.151(a). (Emphasis added.)

Section 725.151(b) provides that:

> The provisions of the 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.)

And, Section 725.152, "Content of Contingency Plan," provides that:

> The contingency plan must describe the actions facility personnel must take to comply with Sections 725.151 and 725.156 in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water at the facility.

35 Ill. Admin. Code § 725.152(a). (Emphasis added.)

Thus, Subpart D makes clear that:

- the purpose of contingency plans is to address "fires, explosions or . . . release[s] of hazardous waste or hazardous waste constituents";
- contingency plans are to implemented in the event of "a fire, explosion or release of hazardous waste or hazardous waste constituents"; and
- contingency plans must explain what to do in the event of "fires, explosions, or . . . release of hazardous waste or hazardous waste constituents."

Likewise, then, by definition, a contingency plan could fail only in the event of a "fire, explosion, or release of hazardous waste or hazardous waste constituents."

The Illinois Supreme Court has held that "[o]ne of the fundamental principles of statutory construction is to view all provisions of an enactment as a whole. Words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute." Michigan Ave. Nat'l Bank v. County of Cook, 191 Ill. 2d 493, 504, 732 N.E.2d 528, 535 (Ill. 2000). (Citations omitted.) This same rule governs the construction of regulations. Panhandle Eastern Pipe Line Co., 314 Ill. App. 3d at 300, 734 N.E.2d at 21 ("construction of administrative rules and regulations is governed by the same standard as construction of statutes.") Construing Section 725.154(b) in light of these principles, it is clear that Section 725.154(b) applies only in the case of a "fire, explosion, or release of hazardous waste or hazardous waste constituents."

2. Complainant's Argument That Flex-N-Gate Violated Section 725.154(b) Even If The Plan Was Not Triggered is Erroneous.

In response to Flex-N-Gate's Motion to Dismiss, Complainant argues that Flex-N-Gate violated Section 725.154(b) because "the plan failed in this incident regardless of

whether the incident triggered the plan." Response to Motion to Dismiss, ¶27. Like Complainant's argument as to Counts II and VI discussed above, this also is a "red herring."

Again, the Facility's "Plan" is more than a RCRA contingency plan. Thus, whether or not it had provisions which Complainant asserts are necessary to deal with the alleged release of uncontained hydrogen sulfide gas is irrelevant for purposes of RCRA. As discussed above, the contingency plan regulations only are triggered by a "fire, explosion, or release of hazardous waste or hazardous waste constituents." If something else happened (e.g., a person hitting their thumb with a hammer, or, in this case, an alleged release of uncontained gas), which the Plan did not address, and the Plan was not thereafter amended, that does not violate Section 725.154(b), because the contingency plan portions of the Facility's Plan did not "fail."

Complainant also asserts that Flex-N-Gate is "arguing that an incident in which workers were merely sickened did not show the need to amend the plan," and that by this argument, Flex-N-Gate "is arguing that the need to amend the contingency plan would be triggered only if a worker was actually killed." Response to Motion to Dismiss at ¶27. Flex-N-Gate is flabbergasted by this argument. Flex-N-Gate has never argued that whether or not it has any obligation under Section 725.154(b) has anything to do with the severity of health effects experienced by employees.

3. Flex-N-Gate Is Entitled To Summary Judgment on Count IV of Complainant's Complaint.

Again, Section 725.154(b) provides that a contingency plan must be amended if "[t]he plan fails in an emergency." 35 Ill. Admin. Code § 725.154(b). Interpreting

Section 725.154(b) "in light of other relevant provisions of the [regulation]" discussed above – Sections 725.151(a), 725.151(b), and 725.152(a) – makes clear that if no "fire, explosion or release of hazardous waste or hazardous waste constituents" occurs, a contingency plan cannot "fail," because the plan's purpose, implementation trigger, and content requirement relate only to "fires, explosions or releases of hazardous waste or hazardous waste constituents." If one of these four things does not occur, but something else happens – be it hitting one's thumb with a hammer, or a release of uncontained gas – a facility's contingency plan simply does not apply. Thus, Complainant cannot establish the third element of his claim against Flex-N-Gate in Count IV, and the Board should grant Flex-N-Gate summary judgment on Count IV as well.

D. Flex-N-Gate Also is Entitled to Summary Judgment on Count V – 35 Ill. Admin. Code § 725.154(c).

Finally, Count V of Complainant's Complaint asserts that Flex-N-Gate violated 35 Ill. Admin. Code § 725.154(c) by "not amend[ing]" the Facility's contingency plan in light of a "change" in the Facility "in a way that materially increases the potential for releases of hazardous waste constituents," and a "change" in the Facility "in a way that changes the response necessary in an emergency." Complaint at 7-8, Count V, ¶¶ 3-5. Again, Flex-N-Gate disagrees.

Section 725.154(c) states:

> The contingency plan must be reviewed and immediately amended, if necessary, whenever:
>
> * * *
>
> c) 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.

35 Ill. Admin. Code § 725.154(c).

To prove a violation of Section 725.154(c), Complainant must prove the following four elements:

1. that the incident at issue does not involve "a wastewater treatment unit as defined in 35 Ill. Adm. Code 720.110";

2. that "[t]he facility change[d]--in its design, construction, operation, maintenance or other circumstances";

3. that the change in the facility:

   a. "materially increases the potential for fires, explosions or releases of hazardous waste or hazardous waste constituents," or

   b. "changes the response necessary in an emergency"; and,

4. that Flex-N-Gate did not thereafter "review[] and immediately amend[]" the contingency plan.

35 Ill. Admin. Code § 725.154(c).

Complainant cannot establish the third element of this claim. [5]

First, even if some "change" had occurred in the Facility, Complainant cannot prove that any such change "materially increase[d] the potential for fires, explosions or releases of hazardous waste or hazardous waste constituents." Complainant does not

[5] As with Counts II, III, IV, and VI, Flex-N-Gate argues in its Motion for Complete Summary Judgment that Complainant also cannot establish the first element of this Count. See Motion for Complete Summary Judgment. It also is Flex-N-Gate's position that Complainant cannot establish the second element of his claim, that "[t]he facility change[d]--in its design, construction, operation, maintenance or other circumstances." However, Flex-N-Gate need not expand on this point, as it is entitled to summary judgment as to Count V based on the fact that Complainant cannot prove the first and third elements of his claim.

argue that any "material increase[] [in] the potential for fires, explosions or releases of hazardous waste" occurred. However, Complainant does argue that:

> 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 the possibility that an acid spill could result in a release of hydrogen sulfide.

Complaint, Count V, ¶3. (Emphasis added.)

As discussed above, however, even if a release of hydrogen sulfide gas had occurred, hydrogen sulfide does not constitute a "hazardous waste constituent." Thus, even if the "acid spill could result in a release of hydrogen sulfide" (which Flex-N-Gate denies), that does not establish an "increase[] [in] the potential for . . . releases of hazardous waste constituents."

Second, Complainant cannot establish that any "change" at the Facility "changes the response necessary in an emergency." Complainant argues that "the facility has changed in a way that changes the response necessary in an emergency, including the necessity of having a hydrogen sulfide meter available, having personnel trained in the measurement of hydrogen sulfide and having respirators available for use with hydrogen sulfide." Complaint, Count V, ¶4. As discussed above, however, Section 725.151(a) makes clear that what contingency plans must set forth are:

> the actions facility personnel must take to comply with Sections 725.151 and 725.156 in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water at the facility.

35 Ill. Admin. Code § 725.152(a). (Emphasis added.)

The alleged release of hydrogen sulfide does not constitute a "fire, explosion or . . . release of hazardous waste or hazardous waste constituents." Thus, even if the alleged

release of hydrogen sulfide had occurred, the Facility's contingency plan would not need to be revised to address it, because, again, contingency plans only must address "the actions facility personnel must take . . . in response to fires, explosions, or . . . release[s] of hazardous waste or hazardous waste constituents." (To continue the hammer analogy, the Facility's contingency plan also would not need to be revised if Complainant hit his thumb with a hammer, because a hammer is not a "fire, explosion, or . . . release of hazardous waste or hazardous waste constituents.")

Thus, for the reasons stated above, Complainant cannot establish the third element of his claim in Count V of his Complaint. Therefore, the Board also should grant Flex-N-Gate summary judgment on Count V.

VI. WHETHER OR NOT HYDROGEN SULFIDE GAS COULD HAVE BEEN CREATED AT THE FACILITY IS NOT A MATERIAL ISSUE OF FACT.

Finally, Flex-N-Gate again emphasizes that whether or not uncontained hydrogen sulfide gas was produced at the Facility on August 5, 2004 is not a "material fact" for purposes of this Motion. Again, under the Board's rules, "[s]ummary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Cassens and Sons, Inc., PCB No. 01-102, 2004 Ill. ENV LEXIS 635, at **11-12 (citations omitted). For purposes of this rule, a fact is "material" if it is "[]related to the essential elements of the cause of action" (Smith, 289 Ill. App. 3d at 1069, 682 N.E.2d at 1254); that is, if it will "affect the outcome of a party's case." Westbank, 276 Ill. App. 3d at 562, 658 N.E.2d at 1389. Thus, "[f]actual issues which are not material to the essential elements of the cause of action or defense, regardless of how

sharply controverted, do not warrant the denial of summary judgment." Environmental Site Developers, Inc., PCB No. 96-180, 1997 Ill. ENV LEXIS 649, at **27-28. (Emphasis added.)

As noted above, Complainant contends that the August 5, 2004, Tank No. 8 piping release created hydrogen sulfide gas. Complaint at ¶15. Flex-N-Gate vehemently disagrees with this contention, because it is chemically impossible for the chemicals present in the plating room to combine in such a way as to create hydrogen sulfide gas.

Regardless, however, for purposes of this Motion, it does not matter whether Complainant or Flex-N-Gate is right. This is because whether or not uncontained hydrogen sulfide gas was created is not a "material fact"; whether or not hydrogen sulfide gas was created is not "[]related to the essential elements of [Complainant's] cause of action" (Smith, 289 Ill. App. 3d at 1069, 682 N.E.2d at 1254) and will not "affect the outcome of [Complainant's] case." Westbank, 276 Ill. App. 3d at 562, 658 N.E.2d at 1389. This is because, as discussed above, RCRA does not regulate uncontained gases, and uncontained hydrogen sulfide gas is not a "hazardous waste constituent."

Thus, while the question of whether a release of hydrogen sulfide gas occurred at the Facility may be "sharply controverted" by the parties, as the Board has held, "[f]actual issues which are not material to the essential elements of the cause of action or defense, regardless of how sharply controverted, do not warrant the denial of summary judgment." Therefore, the Board can grant summary judgment to Flex-N-Gate even if the parties disagree on this issue.

IV. CONCLUSION

The fact that uncontained gases are not "solid wastes" – and thus not "hazardous wastes" – for purposes of RCRA underscores the fact that Complainant is focusing on the wrong statutory scheme in this litigation. Obviously the Clean Air Act governs air emissions from the Facility. And, OSHA has jurisdiction to review any alleged effect of the alleged release on Facility employees. (In fact, Complainant filed a claim with OSHA relating to this matter. Complainant's Motion to Accept for Hearing and for Expedited Discovery, at ¶8.) The Board should be clear that Flex-N-Gate is not arguing that the alleged release of hydrogen sulfide gas at the Facility is un-reviewable under any law. Rather, Complainant has chosen to bring his claim against Flex-N-Gate under RCRA, and Flex-N-Gate simply is arguing that RCRA does not apply.

WHEREFORE, for the reasons stated above, Respondent, FLEX-N-GATE CORPORATION, respectfully moves the Illinois Pollution Control Board to grant FLEX-N-GATE CORPORATION partial summary judgment as to Counts II through VI of Complainant's Complaint, to enter judgment in favor of FLEX-N-GATE CORPORATION and against Complainant as to those claims, 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:/s/ Thomas G. Safley
One of Its Attorneys

Dated: May 27, 2005

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GWST:003/Fil/Motion for Partial Summary Judgment