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 SUMMARY JUDGMENT AS TO ALL COUNTS 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
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
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CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached MOTION FOR SUMMARY JUDGMENT AS TO ALL COUNTS 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 – CMSJ

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MOTION FOR SUMMARY JUDGMENT
AS TO ALL COUNTS 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 Summary Judgment as to All Counts of Complainant's Complaint, 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. Count I of this Complaint alleges that Flex-N-Gate is required to have a Resource Conservation and Recovery Act ("RCRA") permit for its facility at issue in this litigation. Id. Counts II through VI of the Complaint allege that Flex-N-Gate failed to properly implement and take other actions with respect to its "contingency plan" for the facility, in response to an alleged release of uncontained hydrogen sulfide gas at the facility. Id. As discussed below, no RCRA permit is required for the facility, and the RCRA "contingency plan" requirements cited by Complainant do not apply to the facility's wastewater treatment system. Further, while the parties disagree as to whether

a release of hydrogen sulfide gas occurred at the facility, that fact is not material for purposes of this Motion.

Flex-N-Gate also today is filing a separate Motion for Partial Summary Judgment as to Counts II through VI of Complainant's Complaint ("Motion for Partial 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 this Motion are not relevant to the arguments in the Motion for Partial Summary Judgment, 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 or the arguments set forth in Flex-N-Gate's separate Motion for Partial Summary Judgment.

II. BACKGROUND

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

A. Operation of Facility/Wastewater Treatment Unit

Flex-N-Gate owns and operates a facility at 601 Guardian Drive in Urbana, Illinois ("Facility"). Complaint at ¶3. At the Facility, Flex-N-Gate primarily manufactures bumpers for vehicles. Id. at ¶4. The manufacturing process includes a Nickel/Chromium Electroplating Line ("Electroplating Line") in which steel bumpers are cleaned, electroplated with several layers of nickel, electroplated with chromium, and rinsed. Id. The cleaning, plating and rinsing operations take place in open-top tanks holding up to 10,000 gallons of various chemicals in water solution. Id. at ¶5. The tanks

are arranged in two rows, with a catwalk between the rows to access the tops of the tanks. Id. The diagram attached hereto as Exhibit A roughly illustrates the layout of the Electroplating Line. Affidavit of Anthony Rice ("Rice Aff."), attached hereto as Exhibit B, at ¶3.

The tanks are mounted on concrete piers above a sloped, coated concrete floor. Rice Aff. at ¶4; Complaint at ¶6. During the process of cleaning, plating, and rinsing, the bumpers are dipped into the first tank, raised up, moved into position above the next tank, dipped into that tank, etc. Rice Aff. at ¶5. When a bumper is removed from a tank, some amount of the solution which that tank contains remains on the bumper. Id. at ¶6. The Electroplating Line is engineered so that when bumpers are being moved from tank to tank, the solution that remains on the bumpers after removal from a tank may fall from the bumpers and land on the floor of the room in which the Line is located (hereinafter "Plating Room"). Id. at ¶7. This process is intentional. Id. at ¶8. This is a standard design for plating operations. Affidavit of James Dodson, attached hereto as Exhibit C, at ¶ 3.

The floor of the Plating Room is coated with epoxy and is sloped towards the center of the room, where two concrete "pits" are located in the floor. Rice Aff. at ¶9. The purpose of the slope of the floor is to direct the solution which falls from the bumpers and lands on the floor into the "pits" in the center of the floor. Id. at ¶10. The purpose of the coating on the floor is to make the floor impervious to the materials that fall on it so that such materials are directed into the "pits" rather than soaking into the floor. Id. at ¶11. At least part of the floor is hosed down each shift in order to wash any material that has fallen onto the floor into the "pits." Id. at ¶12.

A pump is located at each "pit," which pumps are used to transfer solution that falls onto the floor into piping which leads to equipment in which wastewater from the Facility is treated (see further discussion below). Id. at ¶13. These pumps do not run continuously. Id. at ¶14.. Rather, a level indicator in each pit automatically actuates each pump when the material in the pit reaches a pre-determined level. Id. at ¶15. This normally occurs several times each day. Id. at ¶16. Thus, the longest period of time that material which falls to the floor would remain in the pit normally would be a few hours. Id. at ¶17.

Again, piping leads from the two "pits" in the center of the Plating Room floor to numerous pieces equipment in which wastewater from the Facility is treated. Id. at ¶13. The pieces of equipment normally involved in August 2004 (the sludge dryer since has been removed), the material out of which such equipment is constructed, and the purpose of each piece of equipment, are listed below in the order that wastewater enters each piece of equipment:

Piece of Equipment	Material Out of Which the Equipment is Constructed	Purpose of Equipment
Equalization Tank #1	Fiberglass Reinforced Plastic ("FRP")	Serves as a collection point for wastewater before it is transferred to the outside equalization tanks.
Outside EQ Tanks 1 and 2	Mild Steel	These tanks serve as equalization (mixing) and surge storage during times when the WWTP could otherwise be overwhelmed with too much flow from the wet processes.
Chrome Reduction/PH Adjustment	FRP	PH adjusted and reducing agent added to reduce hexavalent chromium to trivalent chromium in preparation for hydroxide precipitation.

pH Adjustment	FRP	Caustic or acid is added to achieve optimum pH for precipitating dissolved cations. Reagents are also added here to begin the process of coagulation.
Flocculation Tank	Mild Steel	Large charged particles are added to "floc" smaller coagulated particles together so that solids will settle out in the Lamella.
Lamella	Mild Steel	Designed to physically separate solids from liquids. From here liquids flow to the sand filters and solids are pumped to the sludge holding tank.
from the Lamella, liquids enter:		
Sand Filters	Mild Steel	Serve as final "polishing" step for any lighter solids that may not settle out in Lamella.
Final pH Adjustment	FRP	If necessary, automatically adds acid or caustic to adjust pH to permit required limits prior to discharge to POTW.
from the Lamella, solids enter:		
Sludge Holding Tank	Mild Steel	This Sludge Holding Tank serves to control the flow of sludge into the Sludge Dryer or the Filter Presses.
Filter Presses	Mild Steel	These Filter Presses dewater sludge. Liquids removed from the sludge is recirculated to equipment discussed above.
Sludge Dryer[1] (prior to March 2005)	Mild Steel	This Dryer dewatered the sludge.

[1] The Sludge Dryer was removed from the Facility in March 2005. Dodson Aff., at ¶5.

Dodson Aff. at ¶4. (All of the equipment in this table is referred to herein as the Facility's "Wastewater Treatment Equipment.")

All of this equipment is located on-site, within the boundaries of the Facility. Dodson Aff. at ¶6. The diagram attached hereto as Exhibit D roughly illustrates the layout of the wastewater treatment system. Id. at ¶7.

Following treatment in the Wastewater Treatment Equipment, liquids are discharged to a Publicly Owned Treatment Works ("POTW") operated by the Cities of Champaign and Urbana, Illinois. Id. at ¶8; Complaint at ¶10. Following dewatering, sludge is placed into a satellite accumulation container in preparation for placement into 90-day accumulation containers, where it is accumulated before it is shipped off-site for recycling. Dodson Aff. at ¶9. Attached hereto as Exhibit E is an example of a manifest by which Flex-N-Gate has had such sludge transported off-site recycling. Id. at ¶10.

B. August 5, 2004, Sulfuric Acid Release

The Facility stores approximately 93% concentrated sulfuric acid in a bulk storage tank which is located in a different room at the Facility than the Plating Room. Rice Aff. at ¶18. Several pipes lead from this bulk storage tank to various other tanks at the Facility, including a pipe that leads from the bulk storage tank directly to Tank No. 8 in the Plating Room, which tank is part of the Electroplating Line. Id. at ¶19. Tank No. 8 is an open-top tank and contains a solution of approximately 10% sulfuric acid and 90% water. Id. at ¶20. Sulfuric acid is transferred from bulk storage to Tank No. 8 by means of a pump that is located at the bulk storage tank, which pump is controlled by a button located adjacent to Tank No. 8. Id. at ¶21.

Near Tank No. 8, the pipe from bulk storage approaches Tank No. 8 traveling horizontally at a level lower than the top of the tank (pipe segment 1), then travels vertically to a level higher than the top of the tank (pipe segment 2), then travels horizontally to a position over the top of the tank (pipe segment 3), then descends vertically into the top of the tank (pipe segment 4). Id. at ¶22. A valve is located in pipe segment 2, which valve must be opened to allow material to be pumped from bulk storage to Tank No. 8. Id. at ¶23. A fitting is located above this valve. Id. at ¶24. The diagram attached hereto as Exhibit F roughly illustrates the arrangement of this pipe, the "pipe segments" noted above, and the location of the valve and fitting. Id. at ¶25.[2]

On August 5, 2004, the pipe from bulk storage to Tank No. 8 separated at the fitting located above the valve in the vertical portion of the pipe that is outside the tank, i.e., in pipe segment 2. Id. at ¶26. See Exhibit F. Flex-N-Gate has since determined that this separation occurred because improper adhesive had been used to join the pipe to the fitting. Rice Aff. at ¶27. The separation was not caused by a fire or explosion; the

[2] While not relevant to this Motion, Flex-N-Gate notes Complainant's allegation that "[s]ulfuric acid is pumped from the bulk chemical storage area to the day tank, which is located under the catwalk," and that "[a]cid is then pumped from the day tank as needed." Complaint at Count VI, ¶ 9. (Emphasis added.) At one time, a "day tank" was located in the Plating Room and used as Complainant describes. Rice Aff. at ¶32. However, Flex-N-Gate stopped using the day tank in this manner and re-plumbed the system to the arrangement described in the body of this Memorandum above in December 2001, more than 2 1/2 years before the separation of the pipe on August 5, 2004. Id. at ¶33. Thus, on August 5, 2004, the day tank, while still present in the Plating Room (it since has been removed completely) did not contain any substance of any kind, and the separation of the pipe did not "empt[y] the day tank," as Complainant alleges in paragraph 11 of Count VI of his Complaint. Id. at ¶34. For this reason, Flex-N-Gate denied the allegations in paragraphs 9, 10, and 11 of Count VI of Complainant's Complaint. See Flex-N-Gate's Answer at 18.

separation did not cause a fire or explosion; and no fire or explosion otherwise occurred in connection with the separation. Id. at ¶28.

The separation allowed a small quantity of sulfuric acid that was in the portion of pipe segment 2 above the fitting, and potentially sulfuric acid contained in pipe segments 3 and 4, to be released to the Plating Room floor. Id. at ¶29. In addition, back siphoning could have occurred in this situation, which could have allowed some amount of the approximately 10% sulfuric acid solution contained in Tank No. 8 to be released to the floor as well. Id. at ¶30. However, an examination of Tank No. 8 after the pipe separation indicated that at most a small amount of solution from Tank No. 8 was back-siphoned and released to the floor. Id. at ¶31.

The pump that is used to transfer sulfuric acid from bulk storage to Tank No. 8 was not operating when the pipe separated. Id. at ¶35. Thus, sulfuric acid was not pumped from bulk storage through the separation in the pipe and onto the floor. Id. at ¶36.

C. Alleged Production of Hydrogen Sulfide Gas

Complainant asserts that the release of sulfuric acid to the floor generated uncontained hydrogen sulfide gas. Complaint, ¶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 at the Facility is irrelevant.

D. Other Hazardous Waste Production and Management

As noted above, the Facility's wastewater treatment equipment generates wastewater treatment sludge. Dodson Aff. at ¶¶4,9,18. While this sludge is located in the wastewater treatment equipment, Flex-N-Gate considers the sludge to be exempt from

RCRA regulation. Id. at ¶11; discussion below. After Flex-N-Gate removes the sludge from this equipment, the Facility accumulates the sludge in containers prior to the transportation of the sludge off-site for recycling. Dodson Aff. at ¶9.

In addition, the Facility as part of its normal operations produces numerous (currently ten) other streams of RCRA hazardous waste. Flex-N-Gate Corporation's Answers to Complainant's Interrogatories, relevant portions of which are attached hereto as Exhibit G, at 1-2 (answer to Interrogatory No. 3). Currently, those other hazardous wastestreams are:

Wastestream (Flex-N-Gate Description)	**RCRA Classification**
Flush solvent	D001 for flammability
chromic acid	D007 for chromium, D002 for corrosive, D008 for lead
Paint	D001 for flammability
Chrom. solids like concrete with chromic acid	D007 for chromium
solvent rags	D001 for flammability
barium sludge	D002 for corrosive, D007 for chromium, D005 for barium, D008 for lead
Aerosols	D001 for flammability
Chrome rags	D007 for chromium
Tanks #1, #3, #4	D002 for corrosive, D007 for chromium
Chrom. contaminated solids-PPE	D002 for corrosive, D007 for chromium

Id.

Pursuant to 35 Ill. Admin. Code § 722.134(a) and (c), Flex-N-Gate accumulates each of these hazardous wastestreams on-site in containers before shipping the waste off-site for treatment, storage or disposal. Id.; Dodson Aff. at ¶12.

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. THE FACILITY'S WASTEWATER TREATMENT SYSTEM MEETS THE DEFINITION OF "WASTEWATER TREATMENT UNIT" UNDER RCRA.

As discussed below, one issue that is central to each of the counts of Complainant's Complaint is whether the equipment that the Facility uses to treat wastewater meets the definition of "wastewater treatment unit" ("WWTU") under RCRA. For the reasons set forth below, this equipment meets that definition.

Section 720.110 of the Board's regulations defines "wastewater treatment unit" as "a device of which the following is true":

> It is part of a wastewater treatment facility that has an NPDES permit pursuant to 35 Ill. Adm. Code 309 or a pretreatment permit or authorization to discharge pursuant to 35 Ill. Adm. Code 310; and
>
> It receives and treats or stores an influent wastewater that is a hazardous waste as defined in 35 Ill. Adm. Code 721.103, or generates and accumulates a wastewater treatment sludge which is a hazardous waste as defined in 35 Ill. Adm. Code 721.103, or treats or stores a wastewater treatment sludge which is a hazardous waste as defined in 35 Ill. Adm. Code 721.103; and
>
> It meets the definition of tank or tank system in this Section.

35 Ill. Admin. Code § 720.110.

Thus, the equipment that Flex-N-Gate uses to treat its plating waste is a "wastewater treatment unit" under RCRA if it satisfies the following three elements:

(1) It is part of a wastewater treatment facility that has

  (a) an NPDES permit pursuant to 35 Ill. Adm. Code 309 or

  (b) a pretreatment permit or authorization to discharge pursuant to 35 Ill. Adm. Code 310; and

(2) It

  (a) receives and treats or stores an influent wastewater that is a hazardous waste as defined in 35 Ill. Adm. Code 721.103, or

  (b) generates and accumulates a wastewater treatment sludge which is a hazardous waste as defined in 35 Ill. Adm. Code 721.103, or

  (c) treats or stores a wastewater treatment sludge which is a hazardous waste as defined in 35 Ill. Adm. Code 721.103; and

(3) It meets the definition of tank or tank system.

Id.

Flex-N-Gate's wastewater treatment system satisfies each of these elements.

A. The Wastewater Treatment Equipment "is Part of a Wastewater Treatment Facility that has . . . Authorization to Discharge Pursuant to 35 Ill. Adm. Code 310."

Again, the first element of the definition of WWTU is (in relevant part) whether a device used to treat wastewater "is part of a wastewater treatment facility that has . . . authorization to discharge pursuant to 35 Ill. Adm. Code [Part] 310." The equipment that the Facility uses to treat wastewater satisfies this element.

First, this equipment is "part of a wastewater treatment facility." For purposes of the definition of WWTU, the term "facility" means "[a]ll contiguous land and structures, other appurtenances, and improvements on the land used for treating, storing, or disposing of hazardous waste." 35 Ill. Admin. Code § 720.110. As discussed below, the equipment that makes up the Facility's wastewater treatment system is all located on-site, and generates, accumulates and stores a wastewater treatment sludge that is a hazardous waste. Thus, that equipment is part of a "facility."

Second, the Facility has an "authorization to discharge pursuant to 35 Ill. Adm. Code [Part] 310." Among other things, Part 310 of the Board's regulations "authorize[s] POTWs to issue authorizations to discharge to industrial users." 35 Ill. Admin. Code § 310.103(b). An "[a]uthorization to discharge" is:

> an authorization issued to an industrial user by a POTW that has an approved pretreatment program. The authorization may consist of a permit, license, ordinance or other mechanism as specified in the approved pretreatment program.

35 Ill. Admin. Code § 310.110.

Complainant admits in his Complaint that the Facility discharges "[t]reated wastewater . . . to a sanitary sewer owned by the Urbana Champaign Sanitary District ["UCSD"]." Complaint at 2, ¶10. Accord, Dodson Aff. at ¶8. The wastewater that the Facility discharges to the UCSD includes wastewater from the Plating Room floor. Id. at ¶13. And, the UCSD is a POTW, that is, it comprises "devices and systems used in the storage, treatment, recycling, and reclamation of municipal or industrial wastewater," which devices and systems are owned by a "unit of local government," in this case, the Cities of Urbana and Champaign, Illinois. See Exhibit H (Illinois EPA Public Notice and NPDES Fact Sheet regarding UCSD); 35 Ill. Admin. Code § 310.110 (definitions of "POTW," "treatment works"). Finally, Flex-N-Gate discharges to the UCSD pursuant to an authorization that UCSD issued to Flex-N-Gate, a copy of which authorization is attached hereto as Exhibit I. Dodson Aff. at¶14.

Thus, the equipment that treats the Facility's plating waste satisfies the first element of the definition of WWTU because "is part of a wastewater treatment facility that has . . . authorization to discharge pursuant to 35 Ill. Adm. Code [Part] 310."

B. The Equipment "Generates and Accumulates a Wastewater Treatment Sludge Which is a Hazardous Waste as Defined in 35 Ill. Adm. Code 721.103."

The second element of the definition of "wastewater treatment unit" is, in relevant part. whether the equipment "generates and accumulates a wastewater treatment sludge which is a hazardous waste as defined in 35 Ill. Adm. Code 721.103." See 35 Ill. Admin. Code § 720.100. Id. The equipment here also satisfies this element.

As noted above, the Facility's wastewater treatment processes generate and accumulate wastewater treatment sludge. Dodson Affidavit, at ¶9. As discussed below,

this sludge is a hazardous waste as defined in 35 Ill. Adm. Code § 721.103. Id. at ¶15; accord, Complaint at 2, ¶10.

Section 721.103(a) provides in relevant part that:

> A solid waste, as defined in Section 721.102, is a hazardous waste if the following is true of the waste:
>
> 1) It is not excluded from regulation as a hazardous waste under Section 721.104(b); and
>
> 2) It meets any of the following criteria:
>
> * * *
>
> B) It is listed in Subpart D of this Part and has not been excluded from the lists in Subpart D of this Part under 35 Ill. Adm. Code 720.120 and 720.122.

35 Ill. Admin. Code § 721.103(a).

The Facility's wastewater treatment sludge "is not excluded from regulation as a hazardous waste under Section 721.104(b)." See 35 Ill. Admin. Code § 721.104(b). Further, the Facility's wastewater treatment sludge "is listed in Subpart D of" Part 721. Specifically, Section 721.131(a) lists the following as "F006" hazardous waste:

> Wastewater treatment sludges from electroplating operations except from the following processes: (1) sulfuric acid anodizing of aluminum; (2) tin plating on carbon steel; (3) zinc plating (segregated basis) on carbon steel; (4) aluminum or zinc-aluminum plating on carbon steel; (5) cleaning/stripping associated with tin, zinc, and aluminum plating on carbon steel; and (6) chemical etching and milling of aluminum.

35 Ill. Admin. Code § 721.131(a).

As discussed above, the plating process at issue involves electroplating steel bumpers with nickel and chromium. Complaint, ¶4. Thus, the Facility's wastewater

treatment sludge is "from electroplating operations," and the exceptions in Section 721.121(a) do not apply.

Finally, the Facility's wastewater treatment sludge "has not been excluded from the lists in Subpart D of this Part under 35 Ill. Adm. Code 720.120 and 720.122." Dodson Aff., at ¶16. The Board can take official notice that Flex-N-Gate has not applied to the Board for a site-specific rule or a delisting of this waste under Section 720.120 or Section 720.122. 35 Ill. Admin. Code § 101.630.

Thus, again, the equipment here satisfies the second element of the definition of "wastewater treatment unit" because it "generates and accumulates a wastewater treatment sludge which is a hazardous waste as defined in 35 Ill. Adm. Code 721.103."

C. The Equipment "Meets the Definition of Tank or Tank System."

The third element of the definition of "wastewater treatment unit" is whether the equipment at issue "meets the definition of tank or tank system in" Section 720.110. 35 Ill. Admin. Code § 720.110. The Facility's Wastewater Treatment Equipment meets these definitions.

Section 720.110 defines "tank" as:

> a stationary device, designed to contain an accumulation of hazardous waste that is constructed primarily of nonearthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.

Id.

Section 720.110 defines "tank system" as:

> a hazardous waste storage or treatment tank and its associated ancillary equipment and containment system.

Id.

For purposes of the definition of "tank system," Section 720.110 defines "ancillary equipment" as:

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

Id.

As discussed above, the wastewater at the Facility is treated in several pieces of equipment. Dodson Aff. at ¶4. This equipment meets the definition of "tank," because:

(1) it is stationary;

(2) it is "designed to contain an accumulation of hazardous waste," i.e., the F006 sludge that the treatment of the wastewater creates;

(3) it is "constructed primarily of nonearthen materials (e.g., wood, concrete, steel, plastic)," in this case, Fiberglass Reinforced Plastic and steel; and,

(4) these "nonearthen materials . . . provide structural support."

Id. at ¶17.

Further, the coated and sloped floor of the plating room, the pit in the center of that floor, the pump that is contained in that pit, the pipes that lead from the pit to the Wastewater Treatment Equipment, all piping between the pieces of Wastewater Treatment Equipment, and the piping from the Wastewater Treatment Equipment to the connection with the UCSD, meet the definition of "ancillary equipment," because they all constitute "device[s] . . . used to distribute, meter, or control the flow of hazardous waste from its point of generation to storage or treatment tanks, between hazardous waste storage and treatment tanks to a point of disposal onsite, or to a point of shipment for disposal off-site." See 35 Ill. Admin. Code § 720.110 (definition of "ancillary equipment"). Again,

- the floor of the Plating Room is coated and sloped in order to direct solution which falls onto the floor during the plating process into the pit in the center of the floor (i.e., to "control the flow" of this material "from its point of generation to storage or treatment tanks");

- the pit in the center of the Plating Room Floor exists in order to contain Plating Room floor wastewater until it is pumped into pipes that lead to the equipment in which the wastewater is treated (again, to "distribute . . . or control the flow" of the material);

- the pump located in that pit exists in order to "distribute" material from the pit into those pipes (the definition of "ancillary equipment" specifically references "pumps"); and,

- the piping that leads from the pit to the Wastewater Treatment Equipment, and between the Wastewater Treatment Equipment, and from the Wastewater Treatment Equipment to the UCSD "control[s] the flow" of the material "between hazardous waste storage and treatment tanks . . . to a point of shipment for disposal off-site." i.e., to the connection with USCD (the definition of ancillary equipment specifically references "piping").

Thus, all of this equipment together meets the definition of "tank system," i.e., "a hazardous waste storage or treatment tank" – the Wastewater Treatment Equipment – "and its associated ancillary equipment" – the plating room floor, the pits, the pumps, and the piping. Therefore, this equipment satisfies the third element of the definition of wastewater treatment unit.

D. <u>The Equipment Constitutes a Wastewater Treatment Unit</u>.

Complainant has not taken a position regarding whether the equipment discussed above constitutes a WWTU. Rather, Complainant has stated:

> so far as complainant is concerned, the spilled acid was contained and washed down to a treatment unit that was designed to handle this flow. . . . The complaint does not allege that this is the unit which causes the facility

> to be RCRA regulated, nor does the complaint take a position as to whether the unit might be exempted from regulation as a "wastewater treatment unit" or "elementary neutralization unit."

Complainant's Response to Motion to Dismiss, ¶¶7.a., b.

As discussed above, however, all of this equipment together does constitute a WWTU for purposes of RCRA. In light of this fact, Flex-N-Gate is entitled to summary judgment on each count of Complainant's Complaint.

V. FLEX-N-GATE IS ENTITLED TO SUMMARY JUDGMENT ON COUNT I – ILLINOIS ENVIRONMENTAL PROTECTION ACT, SECTION 21(F), AND 35 ILL. ADMIN. CODE § 703.121(A).

Count I of Complainant's Complaint asserts that Flex-N-Gate is "operating a hazardous waste treatment and storage facility without a RCRA permit or interim status, in violation of Section 21(f) of the Act and 35 Ill. Adm. Code § 703.121(a)." Complaint, Count 1, ¶1. Flex-N-Gate disagrees.

Section 21(f) of the Act provides, in relevant part, that "[n]o person shall . . . [c]onduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation":

> (1) without a RCRA permit for the site issued by the Agency under subsection (d) of Section 39 of this Act [415 ILCS 5/39], or in violation of any condition imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder.
>
> (2) in violation of any regulations or standards adopted by the Board under this Act; or
>
> (3) in violation of any RCRA permit filing requirement established under standards adopted by the Board under this Act; or

(4) in violation of any order adopted by the Board under this Act….

415 ILCS 5/21(f)(1).

It is apparent that Complainant is arguing that Flex-N-Gate has violated Section 21(f)(1)(a), which prohibits certain operations "without a RCRA permit." See Complaint, Count 1, ¶1; Response to Motion to Dismiss, ¶¶3, 4. RCRA permits are required, in certain situations, by the Board's RCRA regulations, found at 35 Ill. Admin. Code Parts 703 and 720 to 729. Specifically, Section 703.121(a) of the Board's regulations (which Complainant also asserts that Flex-N-Gate violated) provides that:

> No person may conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal operation as follows:
>
> 1) Without a RCRA permit for the HWM (hazardous waste management) facility; or
>
> 2) In violation of any condition imposed by a RCRA permit.

35 Ill. Admin. Code § 703.121(a).

However, Section 703.123 of the Board's regulations "exempts specific categories of persons from the requirement of obtaining a permit under the Resource Conservation and Recovery Act." In the Matter of: Standards for Universal Waste Management (35 Ill. Adm. Code Parts 703, 720, 721, 725, 728, AND 733), PCB No. R05-8, 2005 Ill. ENV LEXIS 85 (Ill.Pol.Control.Bd. Feb. 3, 2005). Specifically, Section 703.123 states in relevant part that:

> The following persons are among those that are not required to obtain a RCRA permit:
>
> a) Generators that accumulate hazardous waste on-site for less than the time periods provided in 35 Ill. Adm. Code 722.134;

***

> e) An owner or operator of an elementary neutralization unit or wastewater treatment unit, as defined in 35 Ill. Adm. Code 720.110….

35 Ill. Admin. Code § 703.123. (Emphasis added.)

Thus, in order to prevail on his claims under Section 21(f) and Section 703.121(a), Complainant must prove the following three elements:

1. that Flex-N-Gate is not within one of the categories which is "not required to obtain a RCRA permit" under Section 703.123;

2. that Flex-N-Gate "[c]onduct[ed] [a] hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation"; and,

3. that Flex-N-Gate conducted that operation "without a RCRA permit for the site issued by the Agency under subsection (d) of Section 39 of th[e] Act."

See 415 ILCS 5/21(f)(1), 35 Ill. Admin. Code §§ 703.121(a), 703.123.

Complainant cannot establish the first element of this test, however, because Flex-N-Gate manages its hazardous waste pursuant to exemptions set forth in Section 703.123.

A. Flex-N-Gate is Exempt from the RCRA Permit Requirement.

Again, Complainant's Count I asserts that Flex-N-Gate "is operating a hazardous waste treatment and storage facility without a RCRA permit or interim status, in violation of Section 21(f) of the Act and 35 Ill. Adm. Code 703.121(a)." Complaint, Count I, ¶1. As noted above, under Section 703.123, generators of hazardous waste are exempt from the RCRA permit requirement if they manage their hazardous waste in certain specified ways. See 35 Ill. Admin. Code § 703.123, quoted, in relevant part, above.

Again, here, the Facility produces several hazardous wastestreams. Dodson Aff. at ¶12. Complainant does not explain in Count I whether he feels that Flex-N-Gate is required to have a RCRA permit for its management of all of these wastestreams or just some of them. See Complaint, Count I. Paragraph two of Count I addresses "waste" allegedly located on the Plating Room Floor, implying that Complainant is arguing that Flex-N-Gate is required to have a RCRA permit as to waste contained in the Facility's WWTU. See Complaint, Count I, ¶2. However, in paragraph seven of his Response to Motion to Dismiss, Complainant states:

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

Response to Motion to Dismiss, ¶7.b. (Emphasis added.)

And, paragraph four of Complainant's Response to Motion to Dismiss states:

> Paragraph 1 of Count I alleges that "Respondent is operating a hazardous waste treatment and storage facility without a RCRA permit or interim status";
>
> a. This allegation is sufficient to advise respondent of the nature of the complaint without complainant having to list the specific TSD units that cause the facility to be regulated.
>
> b. At hearing, complainant intends to show that the facility in fact includes a hazardous waste treatment unit, sludge drying unit and sludge storage unit in which hazardous waste is stored before being shipped off-site for recycling and disposal. Complainant has requested that the Agency provided a complete list of the TSD units.

Response to Motion to Dismiss, ¶4. (Emphasis added.)

Paragraph 6(b) of the Response to Motion to Dismiss likewise mentions "units for drying and storing hazardous waste sludge," as well as "the paint line." Id. at ¶6(b).

Thus, it is unclear to Flex-N-Gate exactly why Complainant feels that the Facility is required to obtain a RCRA permit. That is, it is unclear whether Complainant argues that a RCRA permit is required for the WWTU, for what Complainant refers to as the "hazardous waste treatment unit, sludge drying unit and sludge storage unit" (see further discussion below), or for some other waste management at the Facility that Complainant has not mentioned.

Regardless, however, Flex-N-Gate manages each of its hazardous wastestreams pursuant to one of the exemptions from the RCRA permit requirement contained in 35 Ill. Admin. Code § 703.123. Therefore, as Section 703.123 states, Flex-N-Gate is "not required to obtain a RCRA permit" for its management of any of these wastestreams.

1. Flex-N-Gate is in Part Exempt from the RCRA Permit Requirement under the Wastewater Treatment Unit Exemption.

As discussed above, the Facility's treatment of wastewater generates a wastewater treatment sludge. Dodson Aff., at ¶¶4,9. When that sludge is generated, it is located inside equipment that is part of the Facility's WWTU. Id. at ¶18. Before Flex-N-Gate removes the sludge from the equipment, no RCRA permit is required because of the WWTU exemption contained in 35 Ill. Admin. Code § 703.123(e). See, e.g., USEPA Call Center Questions and Answers, June 2004, a copy of which is attached hereto as Exhibit J ("Treatment sludge generated from the management of characteristic wastewaters in a WWTU must be managed as hazardous once removed from the tank if it exhibits a characteristic of hazardous waste.") (Emphasis added.) Thus, Flex-N-Gate is

not required to have a RCRA permit with regard to the WWTU sludge while it is contained in the WWTU.

Again, in his Response to Motion to Dismiss, Complainant specifically refers to "a hazardous waste treatment unit," a "sludge drying unit"/"unit[] for drying . . . hazardous waste sludge", and a "sludge storage unit"/"unit for . . . storing hazardous waste sludge." Response to Motion to Dismiss, ¶¶4.b, 6.b. By the first term, "hazardous waste treatment unit," Complainant refers to the Facility's WWTU. This is clear from paragraph seven of Complainant's Response to Motion to Dismiss, in which Complainant quotes paragraph ten of the Complaint, which alleges: "The facility includes a hazardous waste treatment unit, which includes pH adjustment, reduction of hexavalent chromium with sodium metabisulfite, and precipitation of a nickel and chromium hydroxide sludge." Id., ¶7; Complaint, ¶10. (Emphasis added.) The only equipment at the Facility to which "includes pH adjustment, reduction of hexavalent chromium . . . , and precipitation of a nickel and chromium hydroxide sludge" is the Facility's WWTU. Dodson Aff., at ¶19.[3]

By the terms "sludge drying unit"/"unit[] for drying . . . hazardous waste sludge," Complainant is referring to the Sludge Dryer that was part of the Facility's WWTU prior to March 2005, and/or the Filter Presses, which are/were used to dewater sludge produced in the WWTU; this is the only equipment at the Facility used to dry "sludge." Dodson Aff. at ¶20. This equipment is not subject to the RCRA permit requirement, however, as it is part of the Facility's WWTU. The United States Environmental

[3] Flex-N-Gate disagrees with Complainant's description of the chemicals used in the WWTU (see Answer at ¶10), but for purposes of this Motion, this disagreement is irrelevant.

Protection Agency ("USEPA") has long held that equipment used to dewater sluge "that is part of a wastewater treatment system is excluded from the need to obtain a RCRA permit provided the equipment meets the definition of wastewater treatment unit as defined in 40 CFR 260.10, and actually is used to evaporate water from the sludge." Sludge Dehydration Equipment as a Wastewater Treatment Unit, USEPA Faxback 13003, No. 9432.1987(08), Aug. 3, 1987, attached hereto as Exhibit K. (Emphasis added.) Accord, RCRA/Superfund Hotline Monthly Summary, May 84, USEPA Faxback 12220, No. 9432.1984(04), attached hereto as Exhibit L ("a tanklike portable filter press used in a wastewater treatment facility . . . would be excluded from regulation by 265.1(c)(10) and 264.1(g)(6) as a wastewater treatment unit.") As noted above, the sludge dewatering equipment meets the definition of WWTU. See discussion above. Thus, the fact that the Facility's WWTU dries wastewater sludge does not mean that the Facility is required to obtain a RCRA permit.

(USEPA also has held that a "chemical flocculation unit" used to treat wastewater can be exempt under the WWTU exemption, provided it meets the definition of WWTU. USEPA Faxback 14104, No. PPC 9451.1996(08), Sept. 23, 1996, attached hereto as Exhibit M. As noted above, the Facility's WWTU also includes a flocculation unit which meets that definition).

By the terms "sludge storage unit"/"unit for . . . storing hazardous waste sludge," Complainant is referring to the tank used to store sludge before dewatering and/or the satellite accumulation container into which sludge is placed after dewatering. Dodson Aff. at ¶21. The storage tank likewise does not require a RCRA permit, however, because it also is part of the Facility's WWTU. Again, in relevant part, Section 720.110

of the Board's regulations defines WWTU as a device regulated by the Clean Water Act that meets the definition of "tank" and "treats or stores a wastewater treatment sludge which is a hazardous waste as defined in 35 Ill. Adm. Code 721.103." 35 Ill. Admin. Code § 720.110. Thus, USEPA has specifically held that "a storage tank for sludge . . . . that is part of a wastewater treatment system subject to regulation under either Section 402 or 307(b) [o]f the Clean Water Act is excluded from regulation under 265.1(c)(10)." USEPA Faxback 12190, March 1984, attached hereto as Exhibit N. And, the satellite accumulation container is exempt from the RCRA permit requirement under 35 Ill. Admin. Code § 722.134(c).

Thus, again, all of the equipment that Flex-N-Gate uses to treat its wastewater is exempt from the RCRA permit requirement under the WWTU exemption.

2. Flex-N-Gate Also is Exempt under the Generator Accumulation Exemption.

In addition to the WWTU exemption, Flex-N-Gate is exempt from the RCRA permit requirement under the exemption for generators that accumulate hazardous waste in containers prior to shipment of the waste off-site for treatment, storage or disposal. See 35 Ill. Admin. Code § 703.123(a), (c).

Again, Flex-N-Gate manages the WWTU sludge (after it is removed from the WWTU), and other hazardous wastestreams that the Facility generates, through on-site accumulation in containers prior to shipment off-site for treatment, storage, or disposal. Dodson Aff. at ¶¶9,12. This is authorized by Section 722.134(a) and (c) of the Board's regulations. See 35 Ill. Admin. Code §722.134(a), (c). Further, under 35 Ill. Admin. Code § 703.123, "[g]enerators that accumulate hazardous waste on-site for less than the

time periods provided in 35 Ill. Adm. Code 722.134" are "among those that are not required to obtain a RCRA permit." 35 Ill. Admin. Code § 703.123. Thus, Flex-N-Gate is not required to have a RCRA permit for its management of the WWTU sludge after it is removed from the WWTU, or for the other hazardous wastestreams produced at the Facility.

3. Flex-N-Gate is not Required to Have a RCRA Permit.

Again, the Facility generates several hazardous wastestreams. Under 35 Ill. Admin. Code § 703.123(e), no RCRA permit is required for the management of one of those wastestreams, the WWTU sludge, while it is located inside the WWTU. Under 35 Ill. Admin. Code § 703.123(a), no RCRA permit is required for the management of the WWTU sludge after it is removed from the WWTU, or as to the other hazardous wastestreams, because all of these wastestreams are accumulated in containers before being transported off-site for treatment, storage or disposal. Thus, the Facility is not required to have a RCRA permit, and the Board should grant Flex-N-Gate summary judgment on Count I.

B. Complainant's Arguments in Support of Count I are in Error.

In his Response to Flex-N-Gate's Motion to Dismiss, Complainant makes several arguments in an attempt to support his claim that Flex-N-Gate is required to have a RCRA permit. As discussed below, each of these arguments fails.

1. RCRA Allows Flex-N-Gate to Manage Different Waste Streams under Different Exemptions from the RCRA Permit Requirement.

First, Complainant appears to argue that (1) only one exemption contained in Section 703.123 can apply to a facility at any one time, and (2) that if a facility relies on

one exemption for some of its waste (for example, the 90-day accumulation exemption of Section 703.123(a)), the facility must manage all of its hazardous waste under that exemption, or obtain a RCRA permit. For example, in response to Flex-N-Gate's Motion to Dismiss, Complainant states:

> Section 21(f) . . . and [Section] 703.121(a) require that any person conducting a hazardous waste treatment, storage or disposal operation have a RCRA permit[, but] Board rules establish certain specific exceptions to this general rule, including exclusions for facilities consisting only of "elementary neutralization units" or "wastewater treatment units" (Sections 703.123(e) and 720.110)).
>
> * * *
>
> If respondent wishes to pursue the "elementary neutralization unit" and "wastewater treatment unit" defenses, respondent needs to file an answer and raise these as affirmative defenses (although this defense would only work if all units at the facility were excluded).
>
> * * *
>
> The contingency plan was required for a facility exempt pursuant to Sections 703.123(a) and 722.134(a), but would not have been required if the facility were exempt as "elementary neutralization units" or "wastewater treatment units."

Response to Motion to Dismiss, ¶¶3, 3.a, 7.c, 9. (Emphasis added.)

The import of this argument appears to be as follows: because Flex-N-Gate manages hazardous waste in part under 35 Ill. Admin. Code § 722.134(a) and (c) – i.e., accumulating waste for no more than 90 days before sending the waste off-site for treatment, storage or disposal – when Flex-N-Gate accumulates hazardous waste for longer than 90 days pursuant to other exemptions from the RCRA permit requirement (e.g., the WWTU exemption), Flex-N-Gate has violated Section 722.134(a) and is

required to have a RCRA permit. See, e.g., Response to Motion to Dismiss, ¶10. If this accurately reflects Complainant's argument, Flex-N-Gate strenuously disagrees.

Specifically, Flex-N-Gate does agree that Section 703.123(e) specifically exempts "[a]n owner or operator of an elementary neutralization unit or wastewater treatment unit" from the RCRA permit requirement, and that a facility which only treats hazardous waste in an "elementary neutralization unit" or "wastewater treatment unit" is not required to have a contingency plan. See Response to Motion to Dismiss, ¶9. Flex-N-Gate does not agree, however, that Section 703.123(e) applies only to "facilities consisting only of 'elementary neutralization units' or 'wastewater treatment units'" (Response to Motion to Dismiss, ¶3.a.), and, more broadly, Flex-N-Gate disagrees with Complainant's position that a party may manage hazardous waste under only on one exemption from the RCRA permit requirement at a time.

First, Complainant cites no authority to support this position. Flex-N-Gate has searched for such authority, and has found none.

Second, Complainant's position is not required by RCRA. USEPA established the exemptions from the RCRA permit requirement because it felt that if generators acted within the terms of those exemptions, they were being sufficiently protective of human health and the environment, and therefore no RCRA permit was necessary. Thus, for example, USEPA has explained that, with regard to the WWTU exemption, "protection of human health and the environment is ensured by regulation under the CWA rather than RCRA." USEPA Faxback 11408, No. 9471.1989(01), at p. 2 (Mar. 20, 1989), attached hereto as Exhibit O. This is just as true if a generator complies with several exemptions as it is if a generator complies with just one exemption. As long as all of a generator's

hazardous waste is managed pursuant to one of the exemptions in Section 703.123, human health and the environment still are protected.

Thus, as Flex-N-Gate stated in its Response to Complainant's Motion to Join Agency as Party in Interest and to Extend Time to Respond to Motion to Dismiss ("Motion to Join Agency"), "Flex-N-Gate is allowed to rely on different exemptions from RCRA permitting requirements for different wastestreams at its facility, as appropriate under the circumstances." Response to Motion to Join Agency at 6-7, ¶29.

2. Complainant has the Burden to Prove that Flex-N-Gate is Required to Have a RCRA Permit.

Next, Complainant argues that, under Section 21(f) of the Act and 35 Ill. Admin. Code § 703.121(a),

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

Response to Motion to Dismiss, ¶3.c. (Emphasis added.) See also id., ¶¶6.b, 7.c.

Again, Flex-N-Gate disagrees.

First, it is axiomatic that "[t]he burden of proof in an enforcement action is on the complainant." People v. Poland, et al., PCB No. 98-148, 2001 Ill. ENV LEXIS 407, at *30 (Ill.Pol.Control.Bd. Sept. 6, 2001). Accord, 415 ILCS 5/31(e). Complainant has filed papers with this Board alleging that Flex-N-Gate violated Section 21(f) and Section 703.121's requirements to obtain a RCRA permit. In order to prove such violations, it is Complainant's burden to prove that Flex-N-Gate is required to obtain such a permit.

Second, Complainant cites no authority to support his argument that Flex-N-Gate "needs to raise th[e] exclusion[s]" of Section 703.123 "by way of affirmative defense." Complainant cites Section 103.204(d) of the Board's procedural rules,[4] but that Section simply provides for affirmative defenses in cases before the Board; it does not provide that a party accused of violating Section 21(f) and Section 703.123 has the burden of proving that it is not required to have a RCRA permit.

Third, the exemptions of Section 703.123 simply do not meet the definition of "affirmative defense." As the Board recently stated,

> An affirmative defense is a response to a claim which attacks the *legal* right to bring an action, as opposed to attacking the truth of claim. [I]f the pleading does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense.

People v. Skokie Valley Asphalt Co., Inc., et al, PCB No. 96-98, 2004 Ill. ENV LEXIS 585, at ** 19-20 (Sept. 2, 2004) (citations and quotations omitted). (Second emphasis added.)

Thus, for example, an argument that a claim is barred by the doctrine of laches, or by a statute of limitations, is an "affirmative defense." Id. (as to laches); People v. Peabody Coal Co., PCB No. 99-134, 2003 Ill. ENV LEXIS 314, at *15 (Ill.Pol.Control.Bd. June 5, 2003) ("The Board emphasizes that a violation of the statute of limitations can be a valid affirmative defense when properly pled.") This is because both laches and a statute of limitations defense meet the definition of "affirmative defense" set out by the Board above. That is, in the case of both arguments:

[4] Complainant cites to "35 Ill. Adm. Code 103.205(d)." Response to Motion to Dismiss at 2. (Emphasis added.) This appears to be a typographical error, however, as Title 35 contains no Section 103.205.

(1) a respondent "admit[s] the opposing party's claim" (e.g., for purposes of the affirmative defense, a respondent admits that it violated the Act); but,

(2) the respondent "attacks the *legal* right to bring an action" based on that violation, e.g.,

(a) in the case of a statute of limitations defense, the respondent argues that, even though it violated the Act, the complainant has no legal right to bring an action based on that violation, because (in the case of an action by a private party) the five-year statute of limitations contained in 735 ILCS 5/13-205 has passed; or,

(b) in the case of a laches defense, the respondent argues that, even though it violated the Act, the complainant has no legal right to bring an action based on that violation, because the respondent has been prejudiced by the complainant's delay in bringing the action.

By contrast, Flex-N-Gate does not admit that it violated the RCRA permit requirement. Rather, Flex-N-Gate denies that it violated the RCRA permit requirement, because that requirement never applied to Flex-N-Gate in the first place. See discussion infra. And, Flex-N-Gate does not "attack[]" Complainant's "*legal* right to bring" his claims. Rather, Flex-N-Gate argues that Complainant cannot prove all of the elements of his claims.

Thus, as the Board stated in Skokie Valley Asphalt Co., Inc., because Flex-N-Gate "does not admit [Complainant's] claim but rather attacks the sufficiency of that claim," Flex-N-Gate's argument that the RCRA permit requirement does not apply to it "is not an affirmative defense." Therefore, (1) Flex-N-Gate was not required to raise WWTU exemption to the RCRA permit requirement as an affirmative defense in its Answer, and (2) Flex-N-Gate does not have the burden of proving that it is not required to obtain a RCRA permit, but rather, Complainant has the burden of proving that Flex-N-Gate is required to obtain a RCRA permit.

3. Complainant Misunderstands Flex-N-Gate's Arguments.

Third, Complainant asserts that Flex-N-Gate "is arguing that the facility is not required to have a RCRA permit because it includes a treatment unit that respondent claims is an 'elementary neutralization unit' or 'wastewater treatment unit.'" Response to Motion to Dismiss at ¶5. Accord, Id. at ¶6.b ("Respondent cannot establish that a facility is exempt from the permit requirement by arguing that one unit is exempt.") Flex-N-Gate has never made, and does not now make, such an argument.

Again, as stated in Flex-N-Gate's Response to Complainant's Motion to Join Agency, at the Facility:

(1) Flex-N-Gate produces several different wastestreams, some of which are "hazardous" under RCRA;

(2) Flex-N-Gate relies on exemptions from RCRA permitting requirements with regard to each of its wastestreams that is "hazardous"; and,

(3) specifically, Flex-N-Gate relies on different exemptions for different wastestreams, as appropriate depending on the circumstances.

Response to Motion to Join Agency (citing Oct. 29, 2004, Affidavit of Jim Dodson, a copy of which is attached hereto as Exhibit P, at ¶¶4-6.)

Thus, Flex-N-Gate is not "arguing that the facility is not required to have a RCRA permit because it includes a treatment unit that . . . is a[] . . . 'wastewater treatment unit.'" Response to Motion to Dismiss at ¶5. Rather, Flex-N-Gate is arguing, and always has argued, that the Facility is not required to have a RCRA permit because the Facility manages each of its hazardous wastestreams under one of the exemptions to the RCRA permit requirement contained in 35 Ill. Admin. Code § 703.123. It just so happens that Flex-N-Gate manages different hazardous wastestreams under different exemptions.

This is related to Complainant's argument discussed above that a facility may not rely on more than one exemption from the RCRA permit requirement for its hazardous waste. As discussed above, this simply is not the law. Flex-N-Gate, and any other entity that produces hazardous waste, is allowed to manage different hazardous wastestreams under different exemptions from the RCRA permit requirement. As long as each wastestream is managed under one of the exemptions contained in Section 703.123, the facility which produces the wastestreams is exempt from the RCRA permit requirement.

C. Flex-N-Gate is Entitled to Summary Judgment on Count I.

Thus, again, Complainant cannot establish the first element of his claims under Section 21(f) and Section 703.121(a). "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." Gauthier, 266 Ill. App. 3d at 220, 693 N.E.2d at 999. (Emphasis added; citations omitted.) Thus, the Board must reject Complainant's argument that Flex-N-Gate is violating Section 21(f) and 35 Ill. Admin. Code § 703.121(a) by "operating a hazardous waste treatment and storage facility without a RCRA permit or interim status," and must grant Flex-N-Gate summary judgment on Count I of Complainant's Complaint.

VI. FLEX-N-GATE ALSO IS ENTITLED TO SUMMARY JUDGMENT ON COUNTS II THROUGH VI.

Counts II through VI of Complainant's Complaint assert that Flex-N-Gate violated various provisions of Illinois' RCRA regulations regarding "contingency plans," which provisions are located in 35 Ill. Admin. Code Part 725, Subpart D. Specifically, Counts II through VI assert that Flex-N-Gate violated the following regulations.

- 35 Ill. Admin. Code § 725.151(b), which provides that:

> 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.

Complaint, Counts II and VI;

- 35 Ill. Admin. Code § 725.156(j), which provides that:

> 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 . . . .

Complaint, Count III;

- 35 Ill. Admin. Code § 725.154(b), which provides that:

> The contingency plan must be reviewed and immediately amended, if necessary, whenever . . . [t]he plan fails in an emergency.

Complaint, Count IV; and,

- 35 Ill. Admin. Code § 725.154(c), which provides that:

> 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.

(Complaint, Count V).

For the reasons set forth below, Flex-N-Gate disagrees.

A. The Facility's Contingency Plan Does Not Apply to The Facility's WWTU.

As discussed further below, the Facility has a RCRA contingency plan. Dodson Aff., at ¶22. Specifically, as discussed in Flex-N-Gate's Motion for Partial Summary Judgment, this contingency plan is part of the Facility's "Emergency Response and Contingency Plan," which also incorporates the Facility's OSHA emergency response plan and other general Facility operating requirements. See Motion for Partial Summary Judgment at 31-35. Flex-N-Gate prepared this contingency plan because it manages some of the hazardous waste generated at the Facility pursuant to the accumulation provision of 35 Ill. Admin. Code § 722.134(a) (Dodson Aff., at ¶23) and, Section 722.134(a) requires it to have this Plan. See 35 Ill. Admin. Code § 722.134(a)(4).

However, unlike Section 722.134(a), 35 Ill. Admin. Code § 725.101(c) specifically provides that:

> The requirements of this Part do not apply to:
>
> * * *
>
> 10) The owner or operator of an elementary neutralization unit or a wastewater treatment unit as defined in 35 Ill. Adm. Code 720.110, provided that if the owner or operator is diluting hazardous ignitable (D001) wastes (other than the D001 High TOC Subcategory defined in 35 Ill. Adm. Code 728.Table T) or reactive (D003) waste in order to remove the characteristic before land disposal, the owner or operator

> shall comply with the requirements set out in Section 725.117(b).

35 Ill. Admin. Code § 725.101(c)(10). (Emphasis added.)[5]

Thus, to prove a violation of any of the contingency plan regulations Complainant cites in Counts II through VI, Complainant first must prove the following element:

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

(Flex-N-Gate sets out all of the elements for each of these claims in its Motion for Partial Summary Judgment.)

Thus, for example, Section 725.151(b) provides that the Facility's 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). Complainant does not allege that any "fire" or "explosion" occurred at the Facility. See Counts II, VI. But, Complainant does allege that a "release of hazardous waste or hazardous waste constituents" occurred. Id. Specifically, Complainant alleges that such "release" occurred from the floor of the Plating Room, which, as discussed above, is part of the Facility's WWTU. Id. Under Section 725.101(c)(10), however, Section 725.151(b) does not apply to the Facility's WWTU. Thus, even if a "fire, explosion, or release of hazardous waste or hazardous waste constituents" had occurred at the Facility in connection with the WWTU (which

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

Flex-N-Gate denies), Flex-N-Gate would have no obligation to take any action under 35 Ill. Admin. Code § 725.151(b), as that Section does not apply to WWTUs. The same is true of the other contingency plan regulations cited by Complainant.

Therefore, because none of these regulations apply to the Facility's WWTU, Flex-N-Gate is entitled to summary judgment on Counts II through VI as well.

B. Complainant's Arguments that the Facility's Plan Applies are Incorrect.

In his Response to Flex-N-Gate's Motion to Dismiss, Complainant makes several arguments relevant to this point. As set forth below, those arguments are incorrect.

1. Flex-N-Gate does not Argue that the Facility Does not Need a RCRA Contingency Plan.

First, Complainant apparently understands Flex-N-Gate to be arguing that the Facility does not need a contingency plan. See, e.g., Response to Motion to Dismiss, ¶23 (". . . respondent argues that it was not required to notify the Agency because it was not required to have a contingency plan . . . .") Complainant misunderstands Flex-N-Gate's argument; Flex-N-Gate does not now argue, and never has argued, that the Facility does not need a contingency plan.

As noted above, the Facility manages several different hazardous waste streams under different exclusions to the RCRA permit requirement. See discussion supra. One of the exclusions under which Flex-N-Gate manages some of its hazardous waste is 35 Ill. Admin. Code § 703.123(a). Dodson Aff. at ¶12.

Section 703.123(a) provides:

> The following persons are among those that are not required to obtain a RCRA permit:
>
> a) Generators that accumulate hazardous waste on-site for less than the time periods provided in 35 Ill. Adm. Code 722.134.

35 Ill. Admin. Code § 703.123(a).

In turn, Section 722.134 provides in relevant part that a generator accumulating waste on-site must comply with, among other things, "the requirements for treatment, storage, and disposal facility owners or operators in 35 Ill. Adm. Code 725.Subpart[] . . . D [Contingency Plan and Emergency Procedures]." 35 Ill. Admin. Code § 722.134(a)(4). Thus, any party that manages some of its hazardous waste under Section 722.134 and the exemption from the RCRA permitting requirement at Section 703.123(a) – including Flex-N-Gate – is required to have a contingency plan.

Thus, again, Flex-N-Gate is not arguing that the Facility is not required to have a contingency plan. Rather, Flex-N-Gate is arguing that the Facility's contingency plan does not apply under the facts of this case.[6]

[6] Complainant also attempts to link his misunderstanding of Flex-N-Gate's argument to what Flex-N-Gate has done or has not done under OSHA, stating: "In now arguing that the facility was not subject to the RCRA contingency plan requirement, respondent is arguing that it intentionally violated the requirement to prepare an OSHA Emergency Response Plan." Response to Motion to Dismiss, ¶13(b). As just noted, however, Flex-N-Gate is not "arguing that the facility was not subject to the RCRA contingency plan requirement." And, while irrelevant in this forum, Flex-N-Gate has never violated any "requirement to prepare an OSHA Emergency Response Plan." Dodson Aff. at ¶___.

2. The Facility's Contingency Plan does not Apply to the Facility's WWTU.

Second, Complainant apparently takes the position that because Flex-N-Gate manages some of its hazardous waste under Section 722.134(a), Flex-N-Gate's RCRA contingency plan applies to the Facility's WWTU. Specifically, Complainant argues:

> Once a facility is subject to RCRA, many of the requirements apply to portions of the facility other than the regulated TSD units. Specifically, the contingency plan requirement of 35 Ill. Adm. Code 725.151 provides that the owner or operator "must have a contingency plan for his facility."
>
> i. This was intentionally worded this way so that in an emergency situation, for example an acid spill involving a release of a toxic gas, responders would not need to go to the Supreme Court for a ruling as to whether the release was coming from a regulated unit before deciding what to do.
>
> ii. This approach also allowed the RCRA contingency plan to be used to meet the broader OSHA emergency response plan requirement discussed below.

Response to Motion to Dismiss, at ¶6.c. (Emphasis added.)

Complainant also states:

> In paragraph 37 and 38 of the motion to dismiss, respondent contends that Section 725.151(b) does not apply to a "wastewater treatment unit" or "elementary neutralization unit".
>
> a. As discussed above, Section 725.151 provides that the owner or operator "must have a contingency plan for his facility". The contingency plan applies to the entire facility, not just to regulated TSD units.

Response to Motion to Dismiss, ¶11.

Flex-N-Gate disagrees.

First, Complainant does not cite any authority in support of these arguments, and Flex-N-Gate has been unable to locate any such authority.

Second, Complainant's position would render the exclusion of Section 725.101(c)(10) meaningless. "It is well settled that in interpreting statutes, '[s]tatutes should be construed so that the language is not rendered meaningless or superfluous.'" St. Clair Co. v. Mund, AC No. 90-64, 1991 Ill. ENV LEXIS 671, at *8 (Ill.Pol.Control.Bd. Aug. 22, 1991) (quoting People v. Singleton, 82 Ill. Dec. 666, 469 N.E. 2d 200 (Ill. 1984)). Accord, Langendorf v. City of Urbana, 197 Ill. 2d 100, 109, 754 N.E.2d 320, 325 (Ill. 2001) ("A statute should be construed so that no word or phrase is rendered meaningless or superfluous.") This rule applies equally to the construction of administrative regulations. See, e.g., Panhandle Eastern Pipe Line Co. v. Illinois Envtl. Protection Control Bd., 314 Ill. App. 3d 296, 300, 734 N.E.2d 18, 21 (4th Dist. 2000) ("construction of administrative rules and regulations is governed by the same standard as construction of statutes.") (Citations omitted.)

Again, Section 725.101(c)(10) provides that Part 725 of the Board's regulations, including the contingency plan regulations, "do 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). Complainant, however, argues that Section 725.151(b) does apply to a WWTU located at a facility that is required to have a contingency plan because it accumulates waste pursuant to Section 722.134(a). This argument renders the exclusion of Section 725.101(c)(10) meaningless, which is improper.

Third, by rendering Section 725.101(c)(10) meaningless as to those facilities that manage hazardous waste in a WWTU and by another method, Complainant is creating an

exception to Section 725.101(c)(10) that does not exist in the regulation. That is, Complainant reads Section 725.101(c)(10) to state:

> The requirements of this Part do not apply to:
>
> * * *
>
> 10) The owner or operator of an elementary neutralization unit or a wastewater treatment unit as defined in 35 Ill. Adm. Code 720.110, unless the owner or operator of the elementary neutralization unit or wastewater treatment unit manages other hazardous waste at the same facility under a different subsection of this Section(c), provided that . . . .

This request by Complainant that the Board create an exception to a rule that does not exist in the rule is improper. As the Illinois Appellate Court has stated, 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, the language can be changed only "by proper amendment of the rules. In the interim, the PCB is bound to follow the rules as stated." Continental Grain Co. v. IPCB, 475 N.E.2d 1362, 1363 (Ill. App. 5th Dist. 1985).

Fourth, there is no reason to ignore the explicit language of Section 725.101(c)(10). Complainant acknowledges that if a facility treats all of its hazardous waste in a WWTU, the facility is not required to have a contingency plan. Response to Motion to Dismiss, ¶9. This clearly is the case. See 35 Ill. Admin. Code § 725.101(c)(10). Thus, if a "fire, explosion, or release of hazardous waste or hazardous waste constituents" occurred at a facility that treats all of its hazardous waste in a WWTU, no contingency plan would be in place. Why does USEPA permit this? Because, as noted above, even in the case of a release of hazardous waste or hazardous

waste constituents from the WWTU, USEPA has found that "protection of human health and the environment is ensured by regulation under the CWA rather than RCRA." Exhibit O at p. 2.

This is just as true at a facility that, in addition to managing some hazardous waste in a WWTU, manages other hazardous waste under different exemptions to the RCRA permit requirement. That is, if "protection of human health and the environment is ensured by regulation under the CWA" in the event of a release of hazardous waste or hazardous waste constituents from a WWTU at a facility that only manages all of its hazardous waste in that WWTU, then such protection also is "ensured by regulation under the CWA" where the facility manages some of its hazardous waste in other ways.

Thus, for the reasons stated above, Complainant is incorrect that the contingency plan requirements apply to WWTUs located at Facilities that also manage hazardous waste by another method.

3. Flex-N-Gate has not "Waived" Anything.

Third, Complainant argues at various points in his Response to Flex-N-Gate's Motion to Dismiss that Flex-N-Gate somehow has "waived" its argument, or is "estopped" from arguing, that its contingency plan does not apply in the circumstances of this case. See, e.g., Response to Motion to Dismiss, ¶¶13, 22, 25, 31. Flex-N-Gate does not entirely understand Complainant's argument, but this argument appears to be based on Complainant's misunderstanding of Flex-N-Gate's position in this case regarding whether the Facility was required to have a RCRA contingency plan, and Complainant's misunderstanding of the scope of the Facility's "Emergency Response and Contingency Plan." As discussed above, Flex-N-Gate has never argued that the Facility is not required

to have a RCRA contingency plan, only that the Facility's RCRA contingency plan does not apply in this case. Also, the Facility's "Emergency Response and Contingency Plan" encompasses the Facility's RCRA "contingency plan," the Facility's OSHA "emergency response plan," and general guidance regarding the operation of the Facility. This should resolve Complainant's waiver and estoppel arguments.

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

Again, to prove violations of the contingency plan regulations that Complainant cites in Counts II through VI, Complainant first must establish that:

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

As discussed above, however, the alleged "incident" did involve the Facility's WWTU. The Facility has a contingency plan, but that contingency plan does not apply to the Facility's WWTU. "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." Gauthier, 266 Ill. App. 3d at 220, 693 N.E.2d at 999 (citations omitted). (Emphasis added.) Because Complainant cannot establish the first element of each of his claims in Counts II through VI, the Board must grant summary judgment to Flex-N-Gate on those Counts.

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. 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. 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"; that fact 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 hydrogen sulfide 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

WHEREFORE, for the reasons stated above, Respondent, FLEX-N-GATE CORPORATION, respectfully moves the Illinois Pollution Control Board to grant FLEX-N-GATE CORPORATION summary judgment as to all counts of Complainant's Complaint, to enter judgment in favor of FLEX-N-GATE CORPORATION and against Complainant, and to award FLEX-N-GATE CORPORATION such other relief as the Illinois Pollution Control Board deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

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

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GWST:003/Fil/Motion for Complete Summary Judgment