

ILLINOIS POLLUTION CONTROL BOARD
November 18, 2004

MORTON F. DOROTHY,)
)
Complainant,)
)
v.) PCB 05-49
) (Citizens Enforcement – Air, Land)
FLEX-N-GATE CORPORATION, an Illinois)
Corporation,)
)
Respondent.)

ORDER OF THE BOARD (by N. J. Melas):

For the reasons below, today's order denies complainant's motion to accept this complaint for hearing prior to ruling on respondent's motion to dismiss. In addition, the Board grants complainant leave to withdraw his motion to join the Illinois Environmental Protection Agency (Agency) as a party in interest.

MOTION TO ACCEPT FOR HEARING

On September 9, 2004, Morton F. Dorothy filed a six-count citizen's enforcement complaint against Flex-N-Gate Corporation (Flex-N-Gate). *See* 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.204. Mr. Dorothy alleges that Flex-N-Gate violated Section 21(f) of the Environmental Protection Act (Act), and Sections 725.151(b), 725.156(j), 725.154(b), 725.154(c) of the Board's Interim Status Standards For Owners And Operators Of Hazardous Waste Treatment, Storage, And Disposal Facilities. The complaint concerns Flex-N-Gate's facility known as Guardian West, located at 601 Guardian Drive, Urbana, Champaign County where it produces bumpers for vehicles.

All of Mr. Dorothy's allegations concern an alleged spill of sulfuric acid at the facility on August 5, 2004. Mr. Dorothy alleges that Flex-N-Gate violated these provisions by: (1) operating the facility without a Resources Conservation and Recovery Act (RCRA) permit or interim status; (2) failing to carry out a contingency plan; (3) failing to notify the Illinois Environmental Protection Agency (Agency); (4) failing to amend the contingency plan after the alleged spill; (5) failing to amend the contingency plan in response to changed circumstances; and (6) failing to carry out the contingency plan as required by the plan.

On October 12, 2004, Flex-N-Gate filed a motion to dismiss for failure to state a claim on which relief can be granted. On October 14, 2004, Mr. Dorothy filed several motions including a motion to accept this matter for hearing. On November 3, 2004, Flex-N-Gate responded to Mr. Dorothy's pending motions.

Mr. Dorothy moved the Board to accept this matter for hearing before ruling on the respondent's motion to dismiss, stating "[t]he Board normally accepts non-citizen enforcement cases for hearing without waiting for resolution of motions to dismiss." Mot. to Dismiss at 1. Mr. Dorothy contends that Section 101.312(b) of the Board's procedural rules allows the respondent to file a "duplicitous or frivolous" motion with respect to a citizen's complaint within 30 days following service. Mr. Dorothy claims Flex-N-Gate filed the motion to dismiss more than 30 days following service and is, therefore, untimely. Accordingly, Mr. Dorothy moves the Board to accept the complaint for hearing before ruling on the motion to dismiss.

Flex-N-Gate argues that the motion to dismiss as frivolous is timely and Mr. Dorothy's motion is premature. Flex-N-Gate states it was served with the complaint on September 8, 2004 and filed the motion to dismiss on October 7, 2004, which is within 30 days following service. Flex-N-Gate asserts that its motion was timely filed for the purposes of Section 103.212(b).

In its October 12, 2004 motion, Flex-N-Gate moved the Board to dismiss Mr. Dorothy's complaint because all six counts of the complaint fail to state a claim on which relief can be granted. Flex-N-Gate cites the Board's definition of "frivolous" as including "a complaint that fails to state a cause of action upon which the Board can grant relief." Resp. at 3; *citing* 35 Ill. Adm. Code 101.202. Flex-N-Gate next cites Section 31(d)(1) of the Act, which provides that the Board must schedule a hearing in a citizen's enforcement action unless it determines the complaint is duplicative or frivolous. Mot. at 2; *citing* 415 ILCS 5/31(d)(1) (2002). Therefore, argues Flex-N-Gate, pursuant to the Board regulations and Section 31(d)(1) of the Act, the Board must rule on the motion to dismiss before it can accept the matter for hearing.

The Board finds, as Flex-N-Gate argues, that it cannot accept Mr. Dorothy's complaint for hearing before resolving the pending motion to dismiss. Both parties agree that respondent was served with the complaint on September 8, 2004 and filed the motion to dismiss with the Board on October 7, 2004. The Board finds the motion to dismiss was timely filed for the purposes of Section 103.212. 35 Ill. Adm. Code 103.212. Further, the Board finds that Flex-N-Gate's motion to dismiss all counts of the complaint for failure to state a claim on which relief can be granted is, by the Board's definition, a motion to dismiss as frivolous. By statute, the Board must first make a frivolous and duplicative determination in this action before it can accept this case for hearing. 415 ILCS 5/31(d)(1) (2002); 35 Ill. Adm. Code 103.212(a). Accordingly, Mr. Dorothy's motion to accept for hearing prior to resolution of respondent's motion to dismiss is denied.

MOTION TO ADD AGENCY AS A PARTY IN INTEREST

In addition to the motion to accept for hearing, on October 14, 2004, Mr. Dorothy also moved the Board to join the Agency as a party in interest pursuant to Section 101.404 of the Board's procedural rules. Mot. to Join at 2; *citing* 35 Ill. Adm. Code 101.404. Mr. Dorothy reasoned that the Agency has an interest in the permitting violations alleged in the complaint, "which interest may be determined by the Board's order in this case." Mot. to Join at 2. Mr. Dorothy stated he served the Agency with a copy of the motion, complaint, and motion to dismiss. The Agency did not respond.

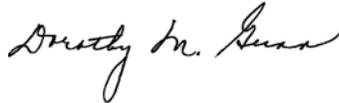
On November 15, 2004, Mr. Dorothy moved the Board for leave to withdraw his motion to add the Agency as a party in interest. Mr. Dorothy explains that because Flex-N-Gate claims exemption pursuant to Section 722.134(a), in his opinion there is no further need to join the Agency as a party in interest. The Board grants Mr. Dorothy leave to withdraw the motion to join.

CONCLUSION

The Board denies Mr. Dorothy's motion to accept for hearing and grants Mr. Dorothy leave to withdraw his motion to join the Agency as a party in interest. The Board notes that on October 14, 2004, Mr. Dorothy also moved the Board for expedited discovery in this proceeding. The Board reserves ruling on the motion for expedited discovery until after deciding Flex-N-Gate's pending motion to dismiss the complaint as frivolous. The most recent filing in response to the motion to dismiss was Mr. Dorothy's November 15, 2004 motion to supplement his response.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 18, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board