BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
vs.	)	No. PCB 05-049
	)	
FLEX-N-GATE CORPORATION, an Illinois Corporation,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I, the undersigned, certify that, on the 24 day of June, 2005, I served the listed documents, by first class mail, upon the listed persons:

RESPONSE TO MOTION FOR SUMMARY JUDGMENT
RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS II - VI
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Morton F. Dorothy

Morton F. Dorothy, Complainant

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

MORTON F. DOROTHY, Complainant, vs. FLEX-N-GATE CORPORATION, an Illinois Corporation, Respondent.	))))))))))	No. PCB 05-049

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Complainant Morton F. Dorothy says the following for his response to respondent Flex-n-gate Corporation's motion for summary judgment filed on or about May 27, 2005.

INTRODUCTION

1. This case involves an accident in which sulfuric acid spilled onto hazardous waste, resulting in a release of hydrogen sulfide, a toxic gas. Several workers were sickened as a result of exposure to unknown levels the gas. The accident demonstrated a weakness in the Section 725.151 contingency plan for the facility in that the workers lacked training, and monitoring and safety equipment, to safely deal with this type of incident.

2. According to all information available to the complainant, respondent has not yet amended its contingency plan to address this type of accident. Although complainant has not yet amended to complaint to so allege, this case represents continuing, intentional violation of Board rules protecting the environment and worker safety at a hazardous waste facility.

3. The complaint in this case is a "softball" which complainant deliberately restricted to violations relevant to a specific incident which could be easily fixed by amending the contingency plan and improving the operating practices in the sump area, thereby protecting the lives of people who work in this factory, as well as fire fighters who need to be officially warned of a hydrogen sulfide hazard so they can plan for this contingency. The most expensive item would be safety equipment needed to deal with a future hydrogen sulfide emergency, which equipment would cost about $2,000.

4. In the course of discovery, respondent has now admitted that the facility actually had the required safety equipment on hand, but Denny Corbett, the safety manager, failed or refused to produce the equipment during the incident. Whether this was out of ignorance, incompetence or malice remains to be seen. Nonetheless, with the needed equipment already on hand, the cost of compliance is virtually nil. By filing these hooligan motions, respondent is seeking to delay this action, recklessly endangering lives for no economic purpose whatsoever.

   a. OSHA rules require monitoring of tanks for hydrogen sulfide prior to "permitted entry". The equipment is used routinely in a context other than emergency response.

5. The complaint was filed on September 9, 2004. Respondent filed a motion to dismiss on October 12, 2004. Complainant responded on November 3, 2004, supplemented on November 15, 2004. On February 3, 2005, the Board denied the motion to dismiss.

6. Respondent answered the complaint on March 4, 2005. The parties have since engaged in discovery aimed at developing the facts in this case in preparation for hearing. Discovery has been delayed during the pendency of the motions for summary judgment.

7. The motions for summary judgment are not based on any facts adduced during discovery. They appear rather to be a repetition of the legal arguments advanced in the motion to dismiss, which the Board has already denied.

8. During the course of discovery, respondent has made admissions that establish that the contingency plan was deficient ab initio, in ways completely independent of the incident alleged in the complaint. At the conclusion of discovery, complainant intends to amend the complaint alleging these additional violations, and to allege continuing and intentional violations.

FACILITY DESCRIPTION

9. The facility description provided on p. 2-6 of the motion is generally accurate except as follows.

   a. Although a part of the floor is sometimes hosed down each shift, the hosing is done around the periphery, towards the tanks. Under the tanks and catwalk there is an accumulation of sludge and contaminated debris, in addition to the hose water and spilled liquids from the tanks. The sludge

and contaminated debris is not, and cannot be, pumped to the wastewater treatment unit. The sludge and contaminated debris is hazardous waste. The sludge and contaminated debris was not removed from the plating room floor between November 2002 and August 2004. Complainant contends that this practice is itself storage of hazardous waste, and that respondent is in violation of the accumulation time limitations of Section 722.134 for this reason alone.

b. The sludge and contaminated debris on the plating room floor impedes the flow of liquids to the pits, so that liquid ponds in areas, slowly percolating through the sludge toward the pits. The movement of liquid on the plating room floor is so slow that large amounts of liquid remain even after the line has been shut down for more than 2 weeks.

c. Contrary to respondent's assertion on p. 4 of the motion, the longest time that liquid normally remains on the floor is much more than "a few hours". It is indeed measured in weeks.

d. The sulfide that was the source of the release may have been produced by chemical or biological reactions in the sludge and debris, and accumulated liquids, that were allowed to stand far longer than the facility was designed for.

e. Whether the sludge dryer has since been removed is irrelevant to the time frame of the complaint. (Pages 4 and 24 of the motion)

EXTENT OF THE SULFURIC ACID SPILL

10. On page 6 - 8 of the motion for summary judgment, respondent presents an account of the acid spill that attempts to minimize the amount and concentration of the acid spilled. This is not consistent with what complainant observed as a witness to the immediate aftermath of the spill, and is not consistent with the evidence produced in discovery. Furthermore, respondent has not identified any witnesses or evidence that it intends to introduce at hearing to support its account of the incident.

HYDROGEN SULFIDE GAS PRODUCTION

11. In the course of discovery, respondent has produced a technical argument to the effect that hydrogen sulfide production was impossible in this accident. The technical argument was produced by a person who, although he may be qualified as an expert, did not observe the incident. In addition, the technical argument includes a large number statements of fact with which the complainant

disagrees.

12. Complainant was present during the incident and directly observed the production of hydrogen sulfide gas. Most of the other witnesses whose accounts have been produced in discovery have given accounts that are consistent with hydrogen sulfide production. Some of these witnesses also made statements to complainant during the incident that indicated that they agreed with complainant's assessment at the time.

13. Respondent has refused to name any witnesses or other evidence that it intends to produce at hearing to show that the hydrogen sulfide emission did not occur. The only witness who appears to have been in a position to testify to this seems to be the safety manager, Denny Corbett, who, during the incident, voiced no disagreement with complainant's assessment, and who has made numerous false statements in connection with this incident, and whose testimony would therefore not be believable.

COMPLAINANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

14. Complainant has filed a separate motion for partial summary judgment with respect to Count I. The easy way to dispose of this case would be to grant that motion, which would be dispositive of this motion.

15. Respondent has admitted that it is conducting hazardous waste treatment and storage operations without a RCRA permit:

    Flex-N-Gate admits that it is "a large quantity generator of hazardous waste." Flex-N-Gate admits that it treats <u>some</u> of its hazardous waste "on-site in tanks," but denies that it treats all of its hazardous waste "on-site in tanks." Flex-N-Gate admits that it does not have "a RCRA permit or interim status". To the extent that Request to Admit No. 8 makes any other statements of fact, Flex-N-Gate denies the same. (Request to Admit, par. 8)

16. Respondent has also made the following admission:

    Respondent claims exemption from the RCRA permit requirement pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a) with respect to one or more wastes generated by the Guardian West facility. (Response to Supplemental Request to Admit, par. 1)

17. Section 103.204(d) provides that:

Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.

18. The exemptions from the RCRA permit requirement must be raised by affirmative defense: in order to notify the complainant that respondent intends to rely on that defense; in order to list in the pleadings the facts respondent intends to prove to establish that the exemption applies to the case; in order to afford complainant the opportunity to admit or deny the facts ahead of hearing; and, in order to establish a framework by which the relevance of evidence can be decided during discovery and at hearing.

    a. On page 31 of the motion, respondent argues that affirmative defenses before the Board are limited to general legal defenses such as laches.

    b. The exemptions from the permit requirement operate in the same way as the general legal defenses in that they are "so what" defenses: even if the facts in the complaint are taken as true, there are other facts, not alleged in the complaint, which, if proved, would defeat the complaint.

        i. For example, in this case, complainant has alleged, and respondent has now admitted, that respondent is conducting hazardous waste treatment and storage operations without a RCRA permit. Respondent could still win by affirmatively alleging and proving compliance with the exemption in Section 722.134.

19. Respondent has also argued that complainant has the burden of pleading, and proving, non-compliance with the permit exemptions.

    a. If Section 21(f) of the Act itself contained an exemption within the operative words of the permit requirement, the burden would be on the complainant to plead and prove non-compliance with the exemption.

    b. In this case, however, the exemptions are located in the regulations as complicated rules that stand by themselves.

20. Requiring the complainant to allege and prove non-compliance with the RCRA permit exceptions would require the complainant to draft an enormous complaint in which the complainant attempted to list all of the permit exceptions, together with the peculiar conditions of each, and allege non-compliance with those conditions.

    a. As a matter of administrative efficiency, it is much simpler to require the

respondent to list, by way of affirmative defense, which exceptions it seeks to rely on, thereby reducing the volume of paper needed to define the issues.

b. As a matter of public policy, people who are in the business of managing hazardous waste need to either get a RCRA permit, or else make a conscious decision to operate pursuant to an exception, and collect and maintain the documentation needed to establish that they qualify for the exception. If a complaint is filed against them, they should be expected to have a simple answer as to which exception applies, and the required documentation already prepared, so that pleading the exception should impose no burden on them whatsoever.

   i. Respondent is suggesting a system that would encourage people managing hazardous waste to take a "we probably qualify for some exception or another, so let's hope we don't get caught, but if we do, let's go to the hearing, and then argue that we qualify for an exemption" attitude.

   ii. Respondent has clearly taken this approach in this case. If Flex-N-Gate had consciously decided before the incident that the plating room floor was part of a "wastewater treatment unit" so it did not have to follow the contingency plan on the plating room floor, it would have included this in the contingency plan and provided employee training to that effect. Moreover, counsel would have filed a motion to dismiss focused on the wastewater treatment unit argument, instead of the multiple exemptions argued in that motion. Counsel is clearly making after-the-fact excuses, and has decided that the wastewater treatment unit is the best of the earlier excuses. Requiring the respondent to plead the exemption up front as a defense would be a limitation on this rummaging for excuses which is delaying this case.

c. Most of the exceptions to the RCRA permit requirement depend on information that is peculiarly within the exclusive knowledge of the respondent, such as the maintenance of documentation by the person managing the hazardous waste. An outsider observing an apparent violation of the permit requirement has no way of knowing whether the operator is maintaining the required documentation. Requiring the complainant to allege non-compliance would require the complainant to allege that the required documentation was not being kept, without, prior to discovery, having any way of knowing if the allegation were true.

d. Respondent is arguing that, in RCRA enforcement cases in general, the complainant should be required to take the case to hearing without knowing which permit exemptions are being raised, and that respondent should be allowed to comb through the rule books on closing argument in search of additional exemptions, without affording complainant the opportunity to present evidence that the exemption does not apply.

21. In summary, respondent has admitted that it is conducting hazardous waste treatment and storage operations without a RCRA permit, and has not bothered to allege that it is exempt under Section 722.134, or any other provision. The Board should grant summary judgment as to Count I pursuant to complainant's motion, and deny the instant motion.

WASTEWATER TREATMENT UNIT EXEMPTION

22. On p. 11 et seq of the motion for summary judgment, respondent argues that the issue of whether the equipment that the facility uses to treat wastewater meets the definition of "wastewater treatment unit" is central to complainant's case. Complainant disagrees.

23. Respondent has not raised the "wastewater treatment unit" exemption by way of affirmative defense or otherwise in its answer to the complaint. It is therefore not relevant.

24. If this issue were properly raised, complainant would dispute as a matter of fact whether the area under the plating tanks, in a process area of the building, is part of the "wastewater treatment unit", which is mostly located in a different area of the building.

a. Complainant would also question, as a matter of fact, whether the plating room floor is a "tank" as argued on p. 16.

25. Complainant believes that, because the facility claims exemption from the RCRA permit requirement pursuant to Section 722.134(a), that Section requires preparation of a compliance plan "for the facility", including those areas that might, by themselves, be exempt from the RCRA permit requirement.

BURDEN OF PROVING COMPLIANCE WITH PERMIT EXEMPTION

26. Respondent is arguing on page 20, 30, 33 of the motion for summary judgment that complainant has the burden of proving that respondent does not meet any of the exemptions from the RCRA permit requirement.

a. As discussed above, complainant believes these exemptions are irrelevant because respondent has not raised them by affirmative defense.

b. As a general rule, the person raising a defense by way of affirmative defense has the burden of proof as to that defense. There are, however, exceptions that place the burden of proof on the complainant, once the respondent has raised the defense in the pleadings.

27. Among the conditions of Section 722.134 is a requirement to have and follow a contingency plan "for the facility". Counts II through VI of the complaint allege violations of the contingency plan requirement. One consequence of violating the contingency plan requirement is imposition of the permit requirement.

a. This makes sense in this case, where respondent's lack of a proper response to the incident demonstrates that respondent is in need of closer Agency supervision, including advance review of its contingency plan as part of the permit application process.

28. The regulations do not require any application for approval to operate a hazardous waste facility without a permit under Section 722.134, or to operate a "wastewater treatment unit" as argued by respondent. Respondent is therefore operating a self-declared exempt RCRA facility. Respondent is arguing that it is entitled to a presumption that its unvoiced claim of exemption is valid, and that the complainant's burden of proof in any RCRA enforcement action is to prove that none of the myriad of exemptions applies.

29. Complainant has alleged violation of the contingency plan requirements in Counts II through VI, and has the burden of proof in connection with those Counts. Complainant believes that he will meet that burden of proof at hearing, and will thereby affirmatively show a failure of the Section 722.134 conditions, and thereby a violation of the permit requirement.

a. There is, however, a possibility that the Board would find that the evidence presented was insufficient to establish a violation of the contingency plan requirements, but also insufficient to establish compliance with those requirements. Complainant believes that, in such a situation of equipoise on the evidence, the Board should find respondent in violation of the permit requirement by having failed to affirmatively demonstrate that it qualified for the exemption.

ONE EXEMPTION AT A TIME?

30. On pages 27 et seq., of the motion for summary judgment, respondent claims

that complainant is arguing that only one exemption from the RCRA permit can apply at a time. This mischaracterizes complainant's position.

31. Section 722.134(a)(4) affirmatively requires a contingency plan "for the facility". The term "facility" includes units that may be exempt under other provisions, as well as stuff that may be completely unrelated to RCRA. The "wastewater treatment unit" exclusion, on the other hand, says nothing specific about contingency plans. The obvious interpretation is that the operator of a Section 722.134 facility has to prepare a contingency plan for the entire facility, including any "wastewater treatment unit".

    a. Conflict between these provisions would arise only if the "wastewater treatment unit" exemption said specifically that the operator did not have to prepare a contingency plan for the unit (in which case the more specific language would control).

    b. Complainant believes these rules were written this way because it would be impossible as a practical matter to prepare multiple contingency plans for different portions of a facility, and to provide meaningful training to factory employees, while drawing the convoluted distinctions counsel is attempting to make.

    c. In preparing the actual contingency plan for this facility, Flex-N-Gate did not attempt to draw these convoluted distinctions. Nor did it provide training to employees as to these distinctions. Flex-N-Gate instead followed the straightforward interpretation offered by complainant, and prepared a single contingency plan for the entire facility.

    d. In the event the Board rules in favor of respondent on this argument, complainant intends to file an amended complaint alleging that respondent violated Board rules ab initio by preparing a sham contingency plan that did not reflect the legal interpretations held by respondent, which respondent had no intention of carrying out, and by providing training to employees that was incorrect.

32. On page 41 et seq., respondent claims that "complainant's position would render the exclusion (for wastewater treatment units) meaningless". On the contrary, that exclusion is not specifically directed at this oddball case involving contingency plans for facilities that also claim exclusion under Section 722.134. Facilities which have only a wastewater treatment unit are completely excluded from the regulatory program. And, those units are excluded from most RCRA requirements at facilities that are exempt under Section 722.134, and even at RCRA permitted facilities. The exclusion is very meaningful for those facilities.

THE CONTINGENCY PLAN ITSELF APPLIED TO THE ENTIRE FACILITY

33. On page 36 of the motion for summary judgment, respondent argues that the "facility's contingency plan did not apply to the facility's" wastewater treatment unit. Respondent has not, however, cited to any provision in the contingency plan that so provided.

FAILURE TO FOLLOW THE PLAN ITSELF

34. Count VI of the complaint alleges failure to follow the plan itself, as opposed to the regulations. As has been established in discovery, respondent produced a document it described as a contingency plan to meet Board rules. It gave this document to the Agency and local emergency response teams. That document itself describes when the contingency plan is to be implemented, and what is to be done. The document does not include any of the limitations and exceptions respondent is now arguing. Even if the Board were to accept respondent's convoluted, after-the-fact, arguments with respect to Counts II - V, the Board needs to hold respondent to compliance with the terms of the document respondent itself drafted.

WHEREFORE complainant prays that the Board deny the motion for summary judgment.

Morton F. Dorothy

Morton F. Dorothy, Complainant

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217/384-1010

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CHAMPAIGN COUNTY, ILLINOIS

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
vs.	)	No. PCB 05-049
	)	
FLEX-N-GATE CORPORATION, an Illinois Corporation,	)	
	)	
Respondent.	)	

RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS II - VI

Complainant Morton F. Dorothy says the following for his response to respondent Flex-n-gate Corporation's motion for partial summary judgment as to Counts II - VI filed on or about May 27, 2005.

INTRODUCTION

1. Complainant incorporates by reference the introductory material from his response to the motion for partial summary judgment as to Count I.

EXTENT OF THE SULFURIC ACID SPILL

2. On page 2 of the motion for partial summary judgment, respondent presents an account of the acid spill that attempts to minimize the amount and concentration of the acid spilled. This is not consistent with what complainant observed as a witness to the immediate aftermath of the spill, and is not consistent with the evidence produced in discovery. Furthermore, respondent has not identified any witnesses or evidence that it intends to introduce at hearing to support its account of the incident.

HYDROGEN SULFIDE GAS PRODUCTION

3. On page 2, 3 and 48 of the motion for partial summary judgment respondent denies that any release of hydrogen sulfide gas "could have occurred or did occur".

4. Respondent has argued at several points that whether there was a hydrogen

sulfide release is "immaterial". However, complainant has alleged such a release, and respondent has denied this allegation (Par. 15 of the Complaint and Answer). The issue is therefore "material".

5. In the course of discovery, respondent has produced a technical argument to the effect that hydrogen sulfide production was impossible in this accident. The technical argument was produced by a person who, although he may be qualified as an expert, did not observe the incident. In addition, the technical argument includes a large number statements of fact with which the complainant disagrees.

6. Complainant was present during the incident and directly observed the production of hydrogen sulfide gas. Most of the other witnesses whose accounts have been produced in discovery have given accounts that are consistent with hydrogen sulfide production. Some of these witnesses also made statements to complainant during the incident that indicated that they agreed with complainant's assessment at the time.

7. Respondent has refused to name any witnesses or other evidence that it intends to produce at hearing to show that the hydrogen sulfide emission did not occur. The only witness who appears to have been in a position to testify to this seems to be the safety manager, Denny Corbett, who, during the incident, voiced no disagreement with complainant's assessment, and who has made numerous false statements in connection with this incident, and whose testimony would therefore not be believable.

BURDEN OF PLEADING DEFENSES

8. This case involves the applicability of two exemptions from the RCRA permit requirement: the large quantity generator exclusions of Section 722.134, and the "wastewater treatment unit" exclusion argued, but not pled, by respondent.

9. Section 103.204(d) provides that:

> Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.

10. The exemptions from the RCRA permit requirement must be raised by affirmative defense: in order to notify the complainant that respondent intends to rely on that defense; in order to list in the pleadings the facts respondent intends to prove to establish that the exemption applies to the case; in order to afford complainant the opportunity to admit or deny the facts ahead of hearing; and, in order to

establish a framework by which the relevance of evidence can be decided during discovery and at hearing.

a. On page 31 (of the motion for summary judgment), respondent argues that affirmative defenses before the Board are limited to general legal defenses such as laches.

b. The exemptions from the permit requirement operate in the same way as the general legal defenses in that they are "so what" defenses: even if the facts in the complaint are taken as true, there are other facts, not alleged in the complaint, which, if proved, would defeat the complaint.

i. For example, in this case, complainant has alleged, and respondent has now admitted, that respondent is conducting hazardous waste treatment and storage operations without a RCRA permit. Respondent could still win by affirmatively alleging and proving compliance with the exemption in Section 722.134.

11. Respondent has also argued, on pages 24, 35, 38, 40 and 45 of the motion for partial summary judgment, that complainant has the burden of pleading, and proving, non-compliance with the permit exemptions.

a. If Section 21(f) of the Act itself contained an exemption within the operative words of the permit requirement, the burden would be on the complainant to plead and prove non-compliance with the exemption.

b. In this case, however, the exemptions are located in the regulations as complicated rules that stand by themselves.

12. Requiring the complainant to allege and prove non-compliance with the RCRA permit exceptions would require the complainant to draft an enormous complaint in which the complainant attempted to list all of the permit exceptions, together with the peculiar conditions of each, and allege non-compliance with those conditions.

a. As a matter of administrative efficiency, it is much simpler to require the respondent to list, by way of affirmative defense, which exceptions it seeks to rely on, thereby reducing the volume of paper needed to define the issues.

b. As a matter of public policy, people who are in the business of managing hazardous waste need to either get a RCRA permit, or else make a conscious decision to operate pursuant to an exception, and collect and

maintain the documentation needed to establish that they qualify for the exception. If a complaint is filed against them, they should be expected to have a simple answer as to which exception applies, and the required documentation already prepared, so that pleading the exception should impose no burden on them whatsoever.

i. Respondent is suggesting a system that would encourage people managing hazardous waste to take a "we probably qualify for some exception or another, so let's hope we don't get caught, but if we do, let's go to the hearing, and then argue that we qualify for something" attitude.

ii. Respondent has clearly taken the above approach in this case. If Flex-N-Gate had consciously decided before the incident that the plating room floor was part of a "wastewater treatment unit" so it did not have to follow the contingency plan on the plating room floor, it would have included this in the contingency plan and provided employee training to that effect. Moreover, counsel would have filed a motion to dismiss focused on the wastewater treatment unit argument, instead of the multiple exemptions argued in that motion. Counsel is clearly making after-the-fact excuses, and has decided that the wastewater treatment unit is the best of the earlier excuses. Requiring the respondent to plead the exemption up front as a defense would be a limitation on this rummaging for excuses which is delaying this case.

c. Most of the exceptions to the RCRA permit requirement depend on information that is peculiarly within the exclusive knowledge of the respondent, such as the maintenance of documentation by the person managing the hazardous waste. An outsider observing an apparent violation of the permit requirement has no way of knowing whether the operator is maintaining the required documentation. Requiring the complainant to allege non-compliance would require the complainant to allege that the required documentation was not being kept, without, prior to discovery, having any way of knowing if the allegation were true.

d. Respondent is arguing that, in RCRA enforcement cases in general, the complainant should be required to take the case to hearing without knowing which permit exemptions are being raised, and that respondent should be allowed to comb through the rule books on closing argument in search of additional exemptions, without affording complainant the opportunity to present evidence that the exemption does not apply.

WASTEWATER TREATMENT UNIT EXEMPTION

13. Respondent has argued, on pages 24, 35, 38, 40 and 45 of the motion for partial summary judgment, that complainant has the burden of proving that the equipment that the facility uses to treat wastewater does not meet the definition of "wastewater treatment unit".

14. Respondent has not raised the "wastewater treatment unit" exemption by way of affirmative defense or otherwise in its answer to the complaint. It is therefore not relevant.

15. If this issue were properly raised, complainant would dispute as a matter of fact whether the area under the plating tanks, in a process area of the building, is part of the "wastewater treatment unit", which is mostly located in a different area of the building.

    a. Complainant would also question, as a matter of fact, whether the plating room floor is a "tank".

16. Complainant believes that, because the facility claims exemption from the RCRA permit requirement pursuant to Section 722.134(a), that Section requires preparation of a compliance plan "for the facility", including those areas that might, by themselves, be exempt from the RCRA permit requirement.

BURDEN OF PROVING COMPLIANCE WITH PERMIT EXEMPTION

17. As discussed above, respondent has admitted, but not alleged, that this facility is conducting hazardous waste treatment and storage operations without a RCRA permit under claim of exemption under Section 722.134(a). The following discussion assumes that this claim has been properly raised. In the absence of Section 722.134(a), respondent is operating a rogue RCRA facility which has not qualified for interim status, but which is required to follow the rules of 35 Ill. Adm. Code 725, and apply for a permit.

18. Among the conditions of Section 722.134 is a requirement to have and follow a contingency plan "for the facility". Counts II through VI of the complaint allege violations of the contingency plan requirement. One consequence of violating the contingency plan requirement is imposition of the permit requirement.

    a. This makes sense in this case, where respondent's lack of a proper response to the incident demonstrates that respondent is in need of closer Agency supervision, including advance review of its contingency plan as part of the permit application process.

19. The regulations do not require any application for approval to operate a hazardous waste facility without a permit under Section 722.134, or to operate a "wastewater treatment unit" as argued by respondent. Respondent is therefore operating a self-declared exempt RCRA facility. Respondent is arguing that it is entitled to a presumption that its unvoiced claim of exemption is valid, and that the complainant's burden of proof in any RCRA enforcement action is to prove that none of the myriad of exemptions applies.

20. Complainant has alleged violation of the contingency plan requirements in Counts II through VI, and has the burden of proof in connection with those Counts. Complainant believes that he will meet that burden of proof at hearing, and will thereby affirmatively show a failure of the Section 722.134 conditions, and thereby a violation of the permit requirement.

    a. There is, however, a possibility that the Board would find that the evidence presented was insufficient to establish a violation of the contingency plan requirements, but also insufficient to establish compliance with those requirements. Complainant believes that, in such a situation of equipoise on the evidence, the Board should find respondent in violation of the permit requirement by having failed to affirmatively demonstrate that it qualified for the exemption.

THE UNCONTROLLED PRODUCTION OF A GAS FROM HAZARDOUS WASTE AT A HAZARDOUS WASTE MANAGEMENT FACILITY IS ENOUGH TO TRIGGER THE CONTINGENCY PLAN – Introduction

21. Respondent has produced an impressive argument suggesting that uncontained hydrogen sulfide gas is neither a hazardous waste nor a hazardous waste constituent under RCRA. The problem with this argument is that it reaches an absurd conclusion: that the release of a toxic gas from hazardous waste is not the sort of thing that the contingency plan is supposed to deal with.

22. At the time the RCRA rules were adopted, most plating such as that done at Guardian West was done in cyanide solution. This was an easier process to control, and it produced a better product. The problem with cyanide plating was that it produced hazardous waste that could generate a toxic gas, hydrogen cyanide, if the waste came into contact with acid. The RCRA rules created a special category, "reactive waste", mainly to address cyanide plating wastes. Furthermore, the contingency planning requirements were obviously intended to address the then-common situation in which cyanide plating wastes would be mixed with acidic wastes, producing toxic emissions.

23. The Guardian West facility was specifically designed as a new facility to perform only non-cyanide plating. This was done for two reasons: to avoid the danger of evolution of a toxic gas in an acid spill and to avoid the regulatory problems associated with cyanide plating.

24. There is a second type of reactive waste, sulfide-bearing waste. Although this type of waste is not normally associated with the plating industry, it exhibits precisely the same problem: if the waste comes into contact with acid, it produces a toxic gas. The regulations governing cyanide and sulfide reactive wastes are identical.

25. Flex-N-Gate appears to have an attitude that, while hydrogen cyanide is "really bad", hydrogen sulfide is "not so bad". On the contrary, the primary toxic mechanism for the two gasses, suffocation by binding to hemoglobin, is the same. Of the gasses, hydrogen sulfide is slightly more toxic by many measures. Although hydrogen sulfide is somewhat less dangerous because its foul smell is a warning of its presence, it is more dangerous because the gas quickly numbs the sense of smell. Of the two, hydrogen sulfide produces a far greater body count in industrial accidents.

26. Guardian West has introduced sulfide into the plating process. This is done in order to create a high-sulfur layer of nickel within the plated product, as a part of a controlled corrosion system that prolongs the life of the product. As illustrated by this incident, the sulfide appears to be causing exactly the same problems as cyanide plating.

    a. Complainant believes that Guardian West could make simple, inexpensive modifications to its contingency plan and management practices that would eliminate this problem, without banning sulfide from the process.

    b. Although respondent has not yet responded to discovery on this point, other forms of reduced sulfur, such as organic sulfonates, could be present in the cleaning solutions used in the immediate vicinity of the spill.

27. In arguing that the production of hydrogen sulfide is exempt from RCRA, respondent is also arguing that the production of hydrogen cyanide in an identical accident would also be exempt. If hydrogen sulfide is no problem, why doesn't Guardian West change over to cyanide plating, producing a cheaper, better product?

Complainant agrees that Hydrogen Sulfide is not a "Hazardous Waste Constituent"

28. After reviewing respondent's arguments, complainant is forced to agree that the release of hydrogen sulfide, or hydrogen cyanide, does not amount to the release of a "hazardous waste constituent" as that term is used in the regulations.

    a. This appears to apply even to sulfide and cyanide bearing reactive wastes, since the regulations do not identify hydrogen sulfide or hydrogen cyanide as "hazardous waste constituents" even for those wastes, the very definition of which, and the reason for regulation of which, is the tendency to evolve those gasses.

    b. The reason for this omission appears to be that neither hydrogen sulfide nor hydrogen cyanide would normally be a "constituent" of a waste exposed to the atmosphere. They would be formed only upon the addition of acid to the waste, and would exit to the atmosphere soon thereafter.

Hydrogen Sulfide Emitted was a Portion of the Hazardous Waste Itself

29. The source of the sulfide in the hydrogen sulfide was the hazardous waste present on the plating room floor. Upon contact with acid, the sulfide in that waste was converted to hydrogen sulfide, which was released to the atmosphere. A portion of the hazardous waste, the sulfide contained within it, was released to the atmosphere. The release was therefore a release of a portion of the hazardous waste itself, after it has been converted to a more hazardous form.

    a. Complainant is not arguing that the waste was hazardous because of its sulfide content. Rather, the waste was hazardous for reasons unrelated to this incident, and a portion of the waste, the sulfide, was released.

Hydrogen Sulfide was part of the Hazardous Waste before it became an "Uncontained Gas"

30. Complainant is also not arguing that, by accidently allowing the addition of acid to the waste, respondent was disposing of uncontained hydrogen sulfide (p. 5, 11 of the motion for partial summary judgment.) Rather, the waste on the floor was a "solid waste", and was hazardous, for reasons unrelated to this incident, and a portion of that hazardous waste, the sulfide, was released, triggering the contingency plan.

    a. Complainant stands by his analysis of Helter v. AK Steel in his response to the motion to dismiss. That case involved a release of a gaseous (non-waste) product from a leaking pipe. The court properly held that, because

the gas was not a waste prior to the time it was leaked, it was "uncontained " at the time it became a waste, and was therefore not subject to RCRA. That court clearly stated that its ruling would be different if the pipe had been carrying a gas that was already a "solid waste" under the rules.

b. Although Helter v. AK Steel is a federal court case, it was a trial court decision by a federal court acting in exactly the same capacity as the Board does in Illinois. Although it is certainly helpful for the Board to consider a sister court's decision, this is not a higher court decision that is a precedent binding on the Board, which is legally free to reach its own conclusions.

   i. Helter v. AK Steel was an unreported decision which complainant went to great lengths to locate. The Board needs to require persons using unreported decisions to provide copies to the other parties who do not have access to on-line reporting services. The practice allowing citation to LEXIS, a for-pay, on-line service, gives yet another advantage to people with money appearing before the Board.

c. Respondent also cites to a USEPA document concerning process vents and equipment leaks (p 14 of the motion for partial summary judgment). Again, the complainant is not attempting to impose the RCRA regulations on the escaping gas. On the contrary, complainant is arguing that the unexpected, accidental release of the gas, from material that was already a hazardous waste, was a proper trigger for implementation of the contingency plan to protect worker safety and the environment.

   i. If respondent were routinely adding acid to the waste and venting the hydrogen sulfide to the atmosphere, the practice might come under process vent rules cited by respondent. The contingency plan would not be implemented to deal with an expected, routine release.

VIOLATION OF THE CONDITIONS OF THE PLAN ITSELF

31. The contingency plan itself provides that it must be implemented whenever there is "a spill that caused the release of toxic fumes" (page 6-4 of the contingency plan). Count VI alleges a failure to follow the provisions of the plan itself, as opposed to the regulations governing the plan.

   a. As has been established in discovery, respondent produced a document it

described as a contingency plan to meet Board rules. It gave this document to the Agency and local emergency response teams. Even if the Board were to accept respondent's convoluted, after-the-fact, arguments with respect to Counts II - V, the Board needs to hold respondent to compliance with the terms of the document respondent itself drafted

32. On pages 31 and 34 of the motion for partial summary judgment, and attached exhibit F, respondent is arguing that certain provisions of the contingency plan "were not focused on hazardous waste", and were therefore a portion of the OSHA emergency response plan, but not the Board-required contingency plan.

a. Respondent has been unable to point to a separate section of the "Emergency Response and Contingency Plan" that was intended as the contingency plan meeting Board requirements. Instead, provisions that are more focused on hazardous waste are mixed in with provisions more focused on non-waste materials, often within the same sentence.

b. Complainant might accept respondent's two-plan argument if the two plans were explicitly separated, with an understandable explanation as to which plans applied to various portions of the facility, and if respondent provided training as to the difference to workers responsible for responding to emergencies.

c. If the Board were to accept respondent's arguments that it should be able to avail itself of the ambiguities in the plan it wrote, complainant would file an amended complaint alleging that the contingency plan was deficient ab initio, independent of this incident, in that it failed to describe what respondent really intended to do in an emergency, and that respondent failed to provide appropriate training to workers.

FAILURE TO AMEND THE PLAN

33. As disclosed in discovery to date, at least five workers were sickened by exposure to the gas in this incident: Afiba Martin, Denny Corbett, Joseph Al-Hussani, Regina Libbie and complainant.

34. Count V of the complaint alleges failure to amend the plan in response to changed circumstances (p. 43 of the motion for partial summary judgment). The evolution of hydrogen sulfide from the waste on the plating room floor was clearly an event that was not contemplated when the contingency plan was drafted. It also changed the response necessary in an emergency, since it demonstrated that emergency equipment and training in hydrogen sulfide was now needed at

the facility. This is true regardless of whether the incident alleged in the complaint rose to the level that implementation of the contingency plan was required in the incident.

a. In the event there is a future, fatal hydrogen sulfide release at the facility, the management will certainly be indicted for reckless homicide under the Illinois Criminal Code, unless they have taken the steps required to prevent a recurrence of this accident, and to provide proper training and safety equipment. The whole point of the contingency planning requirement is, however, to require hazardous waste operators to take steps in advance to prevent accidents, as opposed to relying on the Criminal Code for after-the-fact enforcement.

35. In addition, respondent made a process change shortly before the hydrogen sulfide release, with the introduction of HSA ("High Sulfur Additive") 90 to the process. This was "another changed circumstance" alleged in Count V that should have triggered a review of the contingency plan to determine if this new chemical was presenting new risks that needed to be addressed in the contingency plan.

a. Even if HSA-90 did not actually cause the release, respondent should have "reviewed" the plan under Section 725.154(c).

b. This allegation is also independent of respondent's arguments concerning the facts of the actual release.

WHEREFORE complainant prays that the Board deny the motion for partial summary judgment as to Counts II through VI.

Morton F. Dorothy

Morton F. Dorothy, Complainant

Morton F. Dorothy
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217/384-1010

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
vs.	)	No. PCB 05-049
	)	
FLEX-N-GATE CORPORATION, an Illinois Corporation,	)	
	)	
Respondent.	)	
	)	
State of Illinois	)	
	)	SS
County of Champaign	)	

AFFIDAVIT IN SUPPORT OF RESPONSES TO MOTIONS FOR SUMMARY JUDGMENT

Complainant Morton F. Dorothy makes the following affidavit in support of his responses to the motions for summary judgment in this case:

1. According to all information available to the complainant, respondent has not yet amended its contingency plan to address this type of accident. This case represents continuing, intentional violation of Board rules protecting the environment and worker safety at a hazardous waste facility.

2. The complaint in this case is a "softball" which complainant deliberately restricted to violations relevant to a specific incident which could be easily fixed by amending the contingency plan and improving the operating practices in the sump area, thereby protecting the lives of people who work in this factory, as well as fire fighters who need to be officially warned of a hydrogen sulfide hazard so they can plan for this contingency. The most expensive item would be safety equipment needed to deal with a future hydrogen sulfide emergency, which equipment would cost about $2,000.

3. The facility actually had the required safety equipment on hand, but Denny Corbett, the safety manager, failed or refused to produce the equipment during the incident. With the needed equipment already on hand, the cost of compliance is virtually nil. By filing these hooligan motions, respondent is seeking to delay this action, recklessly endangering lives for no economic

purpose whatsoever.

4. The contingency plan was deficient ab initio, in ways completely independent of the incident alleged in the complaint.

5. Although a part of the floor is sometimes hosed down each shift, the hosing is done around the periphery, towards the tanks. Under the tanks and catwalk there is an accumulation of sludge and contaminated debris, in addition to the hose water and spilled liquids from the tanks. The sludge and contaminated debris is not, and cannot be, pumped to the wastewater treatment unit. The sludge and contaminated debris is hazardous waste. The sludge and contaminated debris was not removed from the plating room floor between November 2002 and August 2004.

6. The sludge and contaminated debris on the plating room floor impedes the flow of liquids to the pits, so that liquid ponds in areas, slowly percolating through the sludge toward the pits. The movement of liquid on the plating room floor is so slow that large amounts of liquid remain even after the line has been shut down for more than 2 weeks.

7. The longest time that liquid normally remains on the floor is measured in weeks.

8. The sulfide that was the source of the release may have been produced by chemical or biological reactions in the sludge and debris, and accumulated liquids, that were allowed to stand far longer than the facility was designed for.

9. Respondent presents an account of the acid spill that attempts to minimize the amount and concentration of the acid spilled. This is not consistent with what complainant observed as a witness to the immediate aftermath of the spill, and is not consistent with the evidence produced in discovery.

10. In the course of discovery, respondent has produced a technical argument to the effect that hydrogen sulfide production was impossible in this accident. The technical argument was produced by a person who, although he may be qualified as an expert, did not observe the incident.

11. Complainant was present during the incident and directly observed the production of hydrogen sulfide gas. Most of the other witnesses whose accounts have been produced in discovery have given accounts that are consistent with hydrogen sulfide production. Some of these witnesses also made statements to complainant during the incident that indicated that they agreed with complainant's assessment at the time.

12. Respondent has refused to name any witnesses or other evidence that it intends to produce at hearing to show that the hydrogen sulfide emission did not occur. The only witness who appears to have been in a position to testify to this seems to be the safety manager, Denny Corbett, who, during the incident, voiced no disagreement with complainant's assessment, and who has made numerous false statements in connection with this incident, and whose testimony would therefore not be believable.

13. As a matter of administrative efficiency, it is much simpler to require the respondent to list, by way of affirmative defense, which exceptions it seeks to rely on, thereby reducing the volume of paper needed to define the issues.

14. As a matter of public policy, people who are in the business of managing hazardous waste need to either get a RCRA permit, or else make a conscious decision to operate pursuant to an exception, and collect and maintain the documentation needed to establish that they qualify for the exception. If a complaint is filed against them, they should be expected to have a simple answer as to which exception applies, and the required documentation already prepared, so that pleading the exception should impose no burden on them whatsoever.

15. Respondent is suggesting a system that would encourage people managing hazardous waste to take a "we probably qualify for some exception or another, so let's hope we don't get caught, but if we do, let's go to the hearing, and then argue that we qualify for an exemption" attitude. Respondent has clearly taken this approach in this case.

16. It would be impossible as a practical matter to prepare multiple contingency plans for different portions of a facility, and to provide meaningful training to factory employees, while drawing the convoluted distinctions counsel is attempting to make.

17. Requiring the complainant to allege and prove non-compliance with the RCRA permit exceptions would require the complainant to draft an enormous complaint in which the complainant attempted to list all of the permit exceptions, together with the peculiar conditions of each, and allege non-compliance with those conditions.

18. At the time the RCRA rules were adopted, most plating such as that done at Guardian West was done in cyanide solution. This was an easier process to control, and it produced a better product. The problem with cyanide plating was that it produced hazardous waste that could generate a toxic gas, hydrogen cyanide, if the waste came into contact with acid. The RCRA rules created a special category, "reactive waste", mainly to address cyanide plating wastes.

Furthermore, the contingency planning requirements were obviously intended to address the then-common situation in which cyanide plating wastes would be mixed with acidic wastes, producing toxic emissions.

19. The Guardian West facility was specifically designed as a new facility to perform only non-cyanide plating. This was done for two reasons: to avoid the danger of evolution of a toxic gas in an acid spill and to avoid the regulatory problems associated with cyanide plating.

20. There is a second type of reactive waste, sulfide-bearing waste. Although this type of waste is not normally associated with the plating industry, it exhibits precisely the same problem: if the waste comes into contact with acid, it produces a toxic gas. The regulations governing cyanide and sulfide reactive wastes are identical.

21. Flex-N-Gate appears to have an attitude that, while hydrogen cyanide is "really bad", hydrogen sulfide is "not so bad". On the contrary, the primary toxic mechanism for the two gasses, suffocation by binding to hemoglobin, is the same. Of the gasses, hydrogen sulfide is slightly more toxic by many measures. Although hydrogen sulfide is somewhat less dangerous because its foul smell is a warning of its presence, it is more dangerous because the gas quickly numbs the sense of smell. Of the two, hydrogen sulfide produces a far greater body count in industrial accidents.

22. Guardian West has introduced sulfide into the plating process. This is done in order to create a high-sulfur layer of nickel within the plated product, as a part of a controlled corrosion system that prolongs the life of the product. As illustrated by this incident, the sulfide appears to be causing exactly the same problems as cyanide plating.

23. The source of the sulfide in the hydrogen sulfide was the hazardous waste present on the plating room floor. Upon contact with acid, the sulfide in that waste was converted to hydrogen sulfide, which was released to the atmosphere. A portion of the hazardous waste, the sulfide contained within it, was released to the atmosphere.

24. The evolution of hydrogen sulfide from the waste on the plating room floor was clearly an event that was not contemplated when the contingency plan was drafted. It also changed the response necessary in an emergency, since it demonstrated that emergency equipment and training in hydrogen sulfide was now needed at the facility.

25. In the event there is a future, fatal hydrogen sulfide release at the facility, the

management will certainly be indicted for reckless homicide under the Illinois Criminal Code, unless they have taken the steps required to prevent a recurrence of this accident, and to provide proper training and safety equipment.

26. Respondent made a process change shortly before the hydrogen sulfide release, with the introduction of HSA ("High Sulfur Additive") 90 to the process.

Morton F. Dorothy

Morton F. Dorothy, Complainant

The undersigned, a notary public in and for the aforesaid County and State, certifies that the above person appeared before me and signed the foregoing document on the 24th day of June, 2005.

Notary Public

"OFFICIAL SEAL"
BRADLEY M. KRALL
Notary Public, State of Illinois
My Commission Expires 11/26/06

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