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 the following documents:

1. **Flex-N-Gate Corporation's RESPONSE TO COMPLAINANT'S MOTION TO WITHDRAW MOTION TO STRIKE ANSWER;**

2. **Flex-N-Gate Corporation's RESPONSE TO COMPLAINANT'S MOTION TO RECONSIDER HEARING OFFICER ORDER;**

3. **Flex-N-Gate Corporation's RESPONSE TO COMPLAINANT'S MOTION FOR SANCTIONS FOR EVASIVE PLEADING; and,**

4. Flex-N-Gate Corporation's MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

copies of which are herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

Dated: June 24, 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
(217) 523-4900

CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached RESPONSE TO COMPLAINANT'S MOTION TO WITHDRAW MOTION TO STRIKE ANSWER; RESPONSE TO COMPLAINANT'S MOTION TO RECONSIDER HEARING OFFICER ORDER; RESPONSE TO COMPLAINANT'S MOTION FOR SANCTIONS FOR EVASIVE PLEADING; and MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER, 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 June 24, 2005; and upon:

Mr. Morton F. Dorothy
104 West University, SW Suite
Urbana, Illinois 61801

by depositing said documents in the United States Mail in Springfield, Illinois, postage prepaid, on June 24, 2005.

/s/ Thomas G. Safley
Thomas G. Safley

GWST:003/Fil/NOF and COS – Responses to Motions2

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONSE TO COMPLAINANT'S
MOTION TO WITHDRAW MOTION TO STRIKE ANSWER

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Response to Complainant's Motion to Withdraw Motion to Strike Answer, states as follows:

1. Complainant has moved the Illinois Pollution Control Board ("Board") to allow him to withdraw his Motion to Strike Flex-N-Gate's Answer. See Complainant's Motion to Withdraw Motion to Strike Answer ("Motion to Withdraw").

2. Flex-N-Gate states the following in response to statements made by Complainant in his Motion to Withdraw.

3. In paragraphs one and two of his Motion to Withdraw, Complainant states that Flex-N-Gate has made an admission in response to Complainant's Supplemental Request to Admit, which admission "has rendered moot [Complainant's] Motion to Strike Answer." See Motion to Withdraw at ¶¶1,2. Flex-N-Gate takes no position as to whether or not this is the case. Flex-N-Gate notes, however, that the "admission" at issue is substantively identical to statements that Flex-N-Gate made in sworn statements it previously served or filed in this case, and, thus, is in no way "new." See Flex-N-Gate's Response to Complainant's Motion for Sanctions for Evasive Pleading, at 7-8.

4. In paragraph three of his Motion to Withdraw, Complainant states that he "is also filing a Motion for Sanctions for Evasive Pleading asking that the Board award complainant the costs of extracting the above admission from respondent." Id. at ¶3.

5. Flex-N-Gate is responding separately to Complainant's Motion for Sanctions for Evasive Pleading. As stated in its Response to that Motion, Flex-N-Gate vehemently denies that it has engaged in "evasive pleading," that Complainant has had to "extract" any admission from Flex-N-Gate or has incurred any costs in "extracting" any admission from Flex-N-Gate, that Complainant is entitled to any relief requested in his Motion for Sanctions for Evasive Pleading, or that the Board's rules authorize the relief that Complainant seeks.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

Dated: June 24, 2005

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

Thomas G. Safley
HODGE DWYER ZEMAN
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(217) 523-4900

GWST:003/Fil/Response to Motion to Withdraw Motion to Strike

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONSE TO COMPLAINANT'S
MOTION TO RECONSIDER HEARING OFFICER ORDER

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Response to Complainant's Motion to Reconsider Hearing Officer Order ("Motion to Reconsider"), states as follows:

I. INTRODUCTION

Flex-N-Gate has filed two Motions for Summary Judgment. See Flex-N-Gate's Motion for Summary Judgment as to All Counts of Complainant's Complaint, Flex-N-Gate's Motion for Partial Summary Judgment as to Counts II through VI of Complainant's Complaint ("Motions for Summary Judgment"). In addition, the Parties have filed numerous Motions relating to discovery. See, e.g., Flex-N-Gate's Motion for Protective Order, Complainant's Motion to Compel Response to Interrogatories. On June 2, 2005, the Hearing Officer issued an Order which states in part:

> The parties are awaiting the Board's ruling on complainant's motion to strike respondent's answer to the complaint. Additionally, since the last status conference, the parties have filed numerous motions pertaining to discovery, and respondent has filed a motion for summary judgment. In the interest of administrative economy, the hearing officer will reserve

> ruling on the outstanding discovery motions until the Board rules on the motion for summary judgment.

June 2, 2005, Hearing Officer Order.

Complainant has moved the Hearing Officer to reconsider this Order. See Motion to Reconsider. For the reasons set forth below, the Hearing Officer should deny Complainant's Motion to Reconsider.

II. RESPONSE TO MOTION TO RECONSIDER

A. Administrative Economy is Served by Reserving Ruling on the Parties' Discovery Motions.

As noted above, the Hearing Officer has reserved ruling on the Parties' outstanding discovery motions "until the Board rules on the motion for summary judgment," and made this decision to reserve ruling "[i]n the interest of administrative economy." June 2, 2005, Hearing Officer Order. This is appropriate. As discussed below, by definition, discovery in this case can relate only to the claims that Complainant has filed against Flex-N-Gate. If the Board grants summary judgment to Flex-N-Gate, those claims – and this case – will no longer exist, and the Parties' discovery motions will be moot.

Thus, there is no need to rule on the Parties' discovery motions unless the Board denies summary judgment in whole or in part to Flex-N-Gate. Accordingly, as the Hearing Officer has held, administrative economy is served by reserving ruling on the Parties' discovery motions.

B. Complainant's Alleged Plans to File an Amended Complaint are Insufficient to Support Complainant's Motion to Reconsider.

In paragraphs six and seven of his Motion to Reconsider, Complainant states as follows:

> 6. Upon completion of discovery, complainant expects to file an amended complaint to make the complaint conform with the facts as elucidated in discovery, to eliminate many of the legal objections complainant [sic] is raising, to allege continuing violations and to add counts alleging violation of additional Board rules based on the admissions made in discovery.
>
> 7. Administrative economy would be better served by completing discovery while the Board considers the motions for summary judgment. Even if the Board were to grant summary judgment against the complainant, completion of discovery would allow complainant to draft an amended complaint which could move quickly to hearing.

Motion to Reconsider, ¶¶6, 7.

That is, Complainant argues that the Hearing Officer should reverse her June 2, 2005, Order reserving ruling on discovery motions not because the discovery at issue allegedly is relevant to the claims which Complainant has brought in this action, but because the discovery allegedly would be relevant to claims which Complainant plans to file in the future. See id. This is an improper basis on which to allow discovery.

Any party in a proceeding before the Illinois Pollution Control Board ("Board") of course may seek leave of the Board to file an amended pleading. See 35 Ill. Admin. Code § 103.206(d) ("If a party wishes to file an amendment to a complaint . . . that sets forth a new or modified claim against another person, the party who wishes to file the pleading must move the Board for leave to file the pleading.") However, a party may not use discovery in one proceeding in an attempt to discover information that is not relevant to that proceeding, in order to attempt to support some different proceeding.

Section 101.616(a) of the Board's procedural rules provides only for the discovery of "relevant information and information calculated to lead to relevant information." 35 Ill. Admin. Code § 101.616(a). (Emphasis added.) It is axiomatic that for purposes of Section 101.616(a), "relevant" means relevant to the claims currently pending before the Board. See, e.g., Illinois Supreme Court Rule 201(b)(1) (". . . a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action . . . .") (emphasis added); 35 Ill. Admin. Code § 101.616 ("For purposes of discovery, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent."); former 35 Ill. Admin. Code § 101.101 (defining "relevant" as meaning "having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable than it would be without that information") (emphasis added).

Thus, the Illinois Supreme Court has held: "It is axiomatic that discovery should only be utilized to illuminate the actual issues in the case." Sander v. Dow Chem. Co., 651 N.E.2d 1071, 1079 (Ill. 1995). (Emphasis added; quotations omitted.) Likewise, the Illinois Appellate Court has held: "A trial court does not have discretion to order discovery of information that does not meet the threshold requirement of relevance to matters actually at issue in the case." Manns v. Briell**,** 811 N.E.2d 349, 352 (4th Dist. 2004). (Emphasis added.) Any discovery by Complainant to support claims that he might file in the future does not "illuminate the actual issues in the case" currently before the Board, nor does it "meet the threshold requirement of relevance to matters actually at issue in the case" currently before the Board. Thus, any such discovery is improper.

As such discovery is improper, Complainant's wish to conduct such discovery is an invalid basis for the Hearing Officer to reverse her June 2, 2005, Order.

C. Paragraph Eight of Complainant's Motion to Reconsider is Not Properly Supported, and Therefore the Hearing Officer Must Disregard It.

In addition, in paragraph eight of his Motion to Reconsider, Complainant states:

> This case grew out of a toxic gas release in which several people were nearly killed. Based on the information available to complainant, respondent has taken no steps whatsoever to avoid a repetition of this incident, even though such steps would cost less than $1,000. This case needs to proceed as quickly as possible to a Board order requiring compliance to avoid a possible fatal accident.

Motion to Reconsider, ¶8.

As the Hearing Officer is aware, in motions filed with the Board, "[f]acts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure." 35 Ill. Admin. Code § 101.504. Complainant does attempt to support his Motion to Reconsider by repeating paragraph eight of that Motion as paragraph six of the affidavit he files therewith. See Affidavit, ¶6. However, the Hearing Officer cannot rely on this affidavit, because it is deficient and conclusory.

1. Complainant's Affidavit is Deficient.

As discussed below, paragraph six of Complainant's affidavit concludes, among other things: (1) that "a toxic gas release" occurred; (2) that "several people were nearly killed"; (3) that alleged "steps . . . to avoid a repetition of this [alleged] incident . . . would cost less than $1,000"; and (4) that there is the possibility of a "fatal accident" at Flex-N-Gate's facility. Affidavit, ¶6. However, the affidavit is deficient, because it does not establish Complainant's ability to make these assertions.

First, the affidavit does not state or otherwise establish that Complainant has personal knowledge of these alleged facts (that is, allegedly, that "a toxic gas release" occurred; that "several people were nearly killed"; that alleged "steps . . . to avoid a repetition of this [alleged] incident . . . would cost less than $1,000" (Complainant does reference some unidentified "information available to complainant," but does not state the source of that information, whether or not it is hearsay, etc.); or that there is the possibility of a "fatal accident.")

Second, the affidavit does not state or otherwise establish that Complainant, if sworn as a witness, has the knowledge to testify that "a toxic gas release" occurred; does not establish that Complainant has the medical training testify that "several people were nearly killed"; does not establish that Complainant has the background to testify that alleged "steps . . . to avoid a repetition of this [alleged] incident . . . would cost less than $1,000"; and does not establish that Complainant has the background or medical training to testify regarding the possibility of a "fatal accident."

Instead, all that the affidavit says is that Complainant "makes the following affidavit in support of his Motion to Reconsider Hearing Officer Order." Id.

It is axiomatic that unless there is evidence that a witness has personal knowledge of the matters which he asserts, his assertions are "insufficient" as evidence in a Board proceeding. EPA v. Allaert Rendering, Inc., PCB No. 76-80, 1979 Ill. ENV LEXIS 71, at *24 (Ill.Pol.Control.Bd. Sept. 6, 1979) ("Since this occurrence witness stated that he had no personal knowledge nor evidence of samples of any wastewater discharged from the Allaert treatment works to the Rock River, the Board finds the evidence patently insufficient. . . .") Accord, Illinois Supreme Court Rule 191(a) (providing that certain

affidavits "shall be made on the personal knowledge of the affiants. . . and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."); Johnson v. ADM-Demeter, Hoopeston Division, PCB No. 98-31, 1999 Ill. ENV LEXIS 6, at *2 (Ill.Pol.Control.Bd. Jan. 7, 1999) (relying on Supreme Court Rule 191(a)).

As Complainant's affidavit does not establish that Complainant has personal knowledge of the matters asserted therein, and does not establish that Complainant could testify as to those matters, the Hearing Officer cannot rely on that affidavit, or on the corresponding statements in Complainant's Motion to Reconsider, when ruling on Complainant's Motion to Reconsider.

2. Complainant's Affidavit is Conclusory.

Second, and more fundamentally, Complainant's affidavit is insufficient because it is conclusory.

The Board has long held that it "[can] not grant relief . . . on the basis of a mere conclusion" in an affidavit. EPA v. Rhodes, PCB No. 71-53, 1972 Ill. ENV LEXIS 169, at *1 (Ill.Pol.Control.Bd. Jan. 24, 1972). In recent cases, the Board has stricken conclusory allegations from affidavits filed with it. See, e.g., 2222 Elston LLC v. Purex Indus., Inc., et al., PCB No. 03-55, 2003 Ill. ENV LEXIS 359, at **17-19 (Ill.Pol.Control.Bd. June 19, 2003) (striking an affidavit that was "conclusory"); Heiser v. Office of the State Fire Marshal, PCB No. 94-377, 1995 Ill. ENV LEXIS 895, at *9 (Ill.Pol.Control.Bd. Sept. 21, 1995) (striking from an affidavit a statement that was "self-serving and conclusory.")

Paragraph six of Complainant's affidavit concludes, among other things: (1) that "a toxic gas release" occurred; (2) that "several people were nearly killed"; (3) that alleged "steps . . . to avoid a repetition of this [alleged] incident . . . would cost less than $1,000"; and (4) that there is the possibility of a "fatal accident" at Flex-N-Gate's facility. Complainant does not present any specific facts to support those self-serving and conclusory assertions, however; he simply makes those conclusions. Under the Board's holdings set forth above, this is insufficient.

Accordingly, the Hearing Officer also cannot consider these assertions when ruling on Complainant's Motion to Reconsider because they are conclusory.

III. CONCLUSION

WHEREFORE, the Respondent, FLEX-N-GATE CORPORATION, respectfully prays that the Hearing Officer deny Complainant's Motion to Reconsider Hearing Officer Order and award FLEX-N-GATE CORPORATION such other relief as the Hearing Officer deems just and proper in the premises.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

Dated: June 24, 2005

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

Thomas G. Safley
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GWST:003/Fil/Response to Motion to Reconsider

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RESPONSE TO COMPLAINANT'S
MOTION FOR SANCTIONS FOR EVASIVE PLEADING

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Response to Complainant's Motion for Sanctions for Evasive Pleading ("Motion for Sanctions"), states as follows:

I. INTRODUCTION

Flex-N-Gate filed its Answer to Complainant's Complaint on or about March 4, 2005. On or about March 15, 2005, Complainant moved the Illinois Pollution Control Board ("Board") to strike Flex-N-Gate's Answer on the grounds that the Answer was "evasive" and inconsistent with previous filings by Flex-N-Gate. See Complainant's Motion to Strike Answer ("Motion to Strike"). Flex-N-Gate responded to that Motion to Strike on March 30, 2005.

On June 7, 2005, Complainant moved the Board for leave to withdraw his Motion to Strike. On that same date, Complainant filed his Motion for Sanctions for Evasive Pleading ("Motion for Sanctions"). Complainant also bases his Motion for Sanctions on

his argument that Flex-N-Gate's Answer was "evasive." See id. For the reasons set forth below, the Board should deny Complainant's Motion for Sanctions.

II. ANALYSIS

A. Legal Standard

Sanctions in Board matters are governed by Section 101.800 of the Board's procedural rules. Section 101.800(a) provides that "[i]f any person unreasonably fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 or any order entered by the Board or the hearing officer, including any subpoena issued by the Board, the Board may order sanctions." 35 Ill. Admin. Code § 101.800(a).

"Section 101.800 does not allow the Board to monetarily sanction the offending party." McDonough v. Robke, PCB No. 00-163, 2004 Ill. ENV LEXIS 575, at **5-6 (Ill.Pol.Control.Bd. Oct. 21, 2004). Rather, "[s]anctions include the following:"

1) Further proceedings may be stayed until the order or rules are complied with, except in proceedings with a statutory decision deadline. Proceedings with a statutory decision deadline may be dismissed prior to the date on which decision is due;

2) The offending person may be barred from filing any other pleading or other document relating to any issue to which the refusal or failure relates;

3) The offending person may be barred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

4) As to claims or defenses asserted in any pleading or other document to which that issue is material, a judgment by default may be entered against the offending person or the proceeding may be dismissed with or without prejudice;

5) Any portion of the offending person's pleadings or other documents relating to that issue may be stricken and, if appropriate, judgment may be entered as to that issue; and

6) The witness may be barred from testifying concerning that issue.

35 Ill. Admin. Code § 101.800(b).

B. Complainant's Argument

As just noted, Section 101.800(a) provides that the Board may sanction a party which "unreasonably fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 or any order entered by the Board or the hearing officer, including any subpoena issued by the Board." 35 Ill. Admin. Code § 101.800(a). Complainant does not argue that Flex-N-Gate violated any provision of 35 Ill. Admin. Code Parts 101 through 130, any order entered by the Board or the Hearing Officer, or any subpoena issued by the Board. See Motion for Sanctions. Rather, Complainant states that "the Board's rules are not specific as to evasive pleading," but argues that Flex-N-Gate violated Sections 2-610(a) and (c) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-610(a), (c). Id. at ¶8. Those Sections state as follows:

> (a) Every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates.
>
> * * *
>
> (c) Denials must not be evasive, but must fairly answer the substance of the allegation denied.

735 ILCS 5/2-610(a), (c).

Complainant's claim is based on Flex-N-Gate's Answer to paragraph 12 of Complainant's Complaint. See Motion for Sanctions. That paragraph alleges as follows:

> Respondent claims that the facility operates pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a), as a large quantity generator of hazardous waste which is treated on-site in tanks, without a RCRA permit or interim status. In the event the Board determines that this claim is valid, Section

> 722.134(a)(4) requires compliance with 35 Ill. Adm. Code 725.Subpart D, including Sections 725.151 through 725.156. In the event the Board determines that this claim is invalid, respondent is operating an unpermitted hazardous waste treatment and storage facility which is subject to Section 725.151 through 725.156 directly.

Complaint at 2.

Flex-N-Gate's Answer to paragraph 12 states:

> Flex-N-Gate denies the allegation contained in the first sentence of paragraph 12 of Complainant's Complaint. The remainder of paragraph 12 states legal conclusions that do not call for a response. To the extent that paragraph 12 states any further allegations of fact, Flex-N-Gate denies the same.

Flex-N-Gate's Answer at 4.

Complainant asserts that Flex-N-Gate, in response to Complainant's Supplemental Request to Admit, "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.

Motion for Sanctions, at ¶5.

Complainant then argues that, "[i]n light of th[is] admission . . . the allegation contained in the first sentence of paragraph 12 of the complaint was true, because the allegation contained no specific statement that respondent claimed exemption for the entire facility, or for all wastes." Id., at ¶6. Thus, Complainant argues, "Respondent's answer to paragraph 12 of the complaint was evasive." Id., at ¶9.

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

C. Flex-N-Gate's Answer is not "Evasive."

Complainant does not cite any authority that Section 101.800 of the Board's rules authorizes sanctions for alleged violations of Sections of the Code of Civil Procedure

which the Board's rules do not expressly include, and Flex-N-Gate is not aware of any such authority. (As noted above, Section 101.800 provides that "[i]f any person unreasonably fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 or any order entered by the Board or the hearing officer, including any subpoena issued by the Board, the Board may order sanctions." 35 Ill. Admin. Code § 101.800(a). (Emphasis added.)) The Board has held that "[t]he Code of Civil Procedure does not expressly apply to procedures before the Board," but that, "if the Board's rules are silent, the Board may look to the Code for guidance." People v. Community Landfill Co., Inc., PCB No. 97-193, 2004 Ill. ENV LEXIS 166, at *7 (Ill.Pol.Control.Bd. March 18, 2004). (Citations omitted.) Regardless, as discussed below, Flex-N-Gate's Answer was not "evasive" and thus did not violate Section 2-610.

As noted above, Complainant also argued that Flex-N-Gate's Answer was "evasive" in his Motion to Strike. Flex-N-Gate set forth in detail in its Response to that Motion why Flex-N-Gate's Answer is not inconsistent with Flex-N-Gate's previous filings. See Flex-N-Gate's Response to Complainant's Motion to Strike at 7-12. Rather than wasting space by restating these arguments, Flex-N-Gate hereby incorporates these arguments into this Response. See id.

In addition to demonstrating that Flex-N-Gate's statements have been consistent, the arguments set forth in Flex-N-Gate's Response to Complainant's Motion to Strike demonstrate that Flex-N-Gate's Answer is not "evasive." As discussed in response to Complainant's Motion to Strike, paragraph 12 of Complainant's Complaint makes an allegation regarding "the facility." Response to Motion to Strike at 11. Flex-N-Gate truthfully and accurately denied that allegation, because "the facility" does not "operate[]

pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a)"; rather, "certain 'wastestreams' within the facility" are managed pursuant to those provisions, while others are not. Id. As Flex-N-Gate stated in its Response to Complainant's Motion to Strike, "[t]hese are different things."

Again, Complainant argues that:

> In light of the admission of May 27, 2005 [that is, that "one or more wastes" at the facility is managed under the 90-day accumulation provisions] the allegation contained in the first sentence of paragraph 12 of the complaint was true, because the allegation contained no specific statement that respondent claimed exemption for the entire facility, or for all wastes.

Motion for Sanctions at ¶6.

This simply is not the case. The first sentence of paragraph 12 of the Complaint clearly alleges that the facility manages all of its hazardous waste pursuant to the 90-day accumulation provision. This is made clear by the fact that, in his Supplemental Requests to Admit, Complainant did not ask:

> "Admit that the facility operates pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a),"

as he alleges in paragraph 12 of the Complaint, but rather, asked:

> "Admit that . . . 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."

Complainant's Supplemental Request to Admit the Truth of Certain Facts, attached hereto as Exhibit A, Request No. 1.

If these two statements are the same, as Complainant now argues, why did Complainant switch to the second statement when drafting his Supplemental Requests to Admit? Complainant may have meant to allege in paragraph 12 of the Complaint that the

facility manages "one or more wastes" pursuant to Sections 703.123(a) and 722.134(a), as he states in his Supplemental Requests to Admit. However, he did not make this allegation. Instead, he alleged that "Respondent claims that the facility operates pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a), as a large quantity generator of hazardous waste which is treated on-site in tanks, without a RCRA permit or interim status." Complaint, at ¶12. (Emphasis added.) Flex-N-Gate was required to answer the allegation that Complainant made, not to speculate about what allegation Complainant may have intended to make and answer what Flex-N-Gate thinks Complainant meant to say. Flex-N-Gate accurately denied the allegation that Complainant made, and Flex-N-Gate's Answer was not "evasive."

D. Complainant was not Prejudiced by Flex-N-Gate's Answer.

Complainant also argues that "[b]ecause of respondent's evasive answer to paragraph 12 of the complaint, complainant was forced to file a motion to strike the answer, and forced to engage in a second round of discovery, in order to extract the truth from respondent." Motion for Sanctions, at ¶10. This simply is not the case.

As discussed above, Flex-N-Gate's Answer was not "evasive."

In addition, Flex-N-Gate's Answer did not "force" Complainant "to file a motion to strike the answer . . . in order to extract the truth from respondent," or for any other reason. Presumably, by "the truth," Complainant means the fact that the facility at issue in this matter manages some hazardous waste under the 90-day accumulation provisions of 35 Ill. Admin. Code §§ 703.123(a) and 722.134(a). However, Flex-N-Gate made clear that this was the case even before Flex-N-Gate filed its Answer, and thus, before Complainant filed his Motion to Strike that Answer.

Specifically, Flex-N-Gate filed its Answer on March 3, 2005. Four months before that date, on November 3, 2004, Flex-N-Gate filed 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"). In support of that Response, Flex-N-Gate filed the Affidavit of James Dodson, paragraph eight of which stated:

> Other wastestreams that Flex-N-Gate produces are stored on-site for less than 90 days and then shipped off-site for disposal, and Flex-N-Gate considers this activity to be exempt from RCRA permitting requirements under 35 Ill. Admin. Code § 722.134(a).

Exhibit A to Response to Motion to Join Agency at ¶8. (Emphasis added.)

Paragraph nine of that Affidavit stated:

> Thus, Flex-N-Gate does not now claim, nor has it ever claimed, "that the facility operated" pursuant to just one exemption from RCRA permitting requirements ("Sections 703.123(a) and 722.134(a)" or otherwise), as Complainant alleges in paragraph one his Motion to Join Agency.

Id. at ¶9.

Thus, months before Complainant filed his Motion to Strike, Flex-N-Gate had clearly stated, in a sworn document, that (1) it managed some of the facility's hazardous waste under Sections 722.134(a) and 703.123(a), and (2) that it understood Complainant to be alleging that the facility managed all of its waste under those provisions (and further that this was not the case). Flex-N-Gate could not have been clearer regarding its operations and its understanding of Complainant's allegations. Thus, Flex-N-Gate does not understand how its Answer – which, as discussed in Flex-N-Gate's Response to Complainant's Motion to Strike Answer, is completely consistent with that earlier sworn document – could have caused Complainant any confusion.

Likewise, Flex-N-Gate's Answer did not cause Complainant to need "to engage in a second round of discovery." As noted above, Flex-N-Gate made clear in November 2004, through Jim Dodson's Affidavit filed in support of Flex-N-Gate's Response to Complainant's Motion to Join Agency, that it managed some hazardous waste "under 35 Ill. Admin. Code § 722.134(a)." Exhibit A to Response to Motion to Join Agency at ¶8. In fact, in his Motion to Strike Answer, Complainant cited to Mr. Dodson's affidavit as an "admission that [Flex-N-Gate] claimed exemption pursuant to Section 722.134(a)." Motion to Strike Answer at ¶10. (Emphasis added.) If Complainant considered Mr. Dodson's Affidavit to be such an "admission" when he filed his Motion to Strike in March 2005, then no need existed for Complainant to later "engage in a second round of discovery."

Furthermore, on April 14, 2005 (see Notice of Service of Discovery Documents, dated April 14, 2005), in response to Complainant's Interrogatories, Flex-N-Gate again made clear that it manages some of the facility's hazardous waste under the 90-day accumulation provision, stating in relevant part as follows in response to Complainant's Interrogatory No. 3:

> 3. By which provisions has respondent, prior to August 5, 2004, claimed exemption from the RCRA permit requirement for the Guardian West facility?
>
> **ANSWER:** First, the Guardian West facility which is the subject of this action ("Facility") has "claimed exemption from the RCRA permit requirement" for any material contained in the Facility's wastewater treatment unit pursuant to the "wastewater treatment unit exemption" contained in 35 Ill. Admin. Code 703.123(e).

> Second, the Facility has "claimed exemption from the RCRA permit requirement" for certain other wastestreams which it sends off-site for treatment, storage or disposal pursuant to 35 Ill. Admin. Code 703.123(a).

Flex-N-Gate's Answers to Complainant's Interrogatories, relevant portions of which are attached hereto as Exhibit B, Answer to Interrogatory No. 3.

Thus, by the time that Complainant mailed his Supplemental Request for Admission to Flex-N-Gate (i.e., April 27, 2005; see Certificate of Service filed by Complainant with Board), Flex-N-Gate had stated on two occasions, in sworn documents, that it managed some hazardous waste under the 90-day accumulation provision. Therefore, Complainant's Supplemental for Admission was superfluous; all it resulted in was a third statement by Flex-N-Gate of the same thing it had said, in sworn documents, two times before. Thus, no reason existed for Complainant to serve his Supplemental Request for Admission No. 1, and Flex-N-Gate does not understand why Complainant decided to serve it in the first place. Regardless, any cost that Complainant incurred in serving this Request to gain the same evidence for a third time was not the fault of Flex-N-Gate.

E. Section 101.800 Does Not Provide for the Monetary Sanctions Complainant Seeks.

Finally, even if grounds did exist to sanction Flex-N-Gate (which is not the case), Section 101.800 of the Board's procedural rules does not provide for the monetary sanctions Complainant seeks. As noted above, the Board has held that "Section 101.800 does not allow the Board to monetarily sanction the offending party." McDonough, PCB No. 00-163, 2004 Ill. ENV LEXIS 575, at **5-6. However, Complainant prays that the Board:

> Direct the Hearing Officer to determine reasonable compensation for the complainant for expenses and unnecessary work as a result of respondent's evasive pleading.

Motion for Sanctions at 2.

As discussed above, Flex-N-Gate's Answer was not evasive; Complainant therefore did not incur any "expenses" or undergo any "unnecessary work as a result of" any "evasive pleading"; and no grounds exist to sanction Flex-N-Gate. Regardless, again, Section 101.800 does not provide for monetary sanctions such as those Complainant seeks.

III. CONCLUSION

WHEREFORE, the Respondent, FLEX-N-GATE CORPORATION, respectfully prays that the Illinois Pollution Control Board deny Complainant's Motion for Sanctions and award FLEX-N-GATE CORPORATION such other relief as the Illinois Pollution Control Board deems just and proper in the premises.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

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

Dated: June 24, 2005

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

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.	)	

SUPPLEMENTAL REQUEST TO ADMIT THE TRUTH OF CERTAIN FACTS

Complainant Morton F. Dorothy requests that respondent Flex-N-Gate Corporation admit the truth of the following statements within 28 days after the date of this request. Failure to respond to the following requests to admit within 28 days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney.

1. 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.

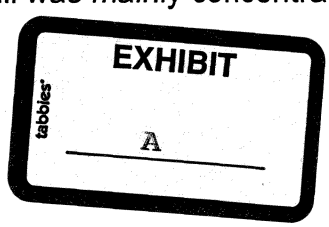
2. Respondent prepared an "Emergency Response and Contingency Plan" pursuant to 35 Ill. Adm. Code 725.151 through 725.156 for the Guardian West facility.

3. Respondent prepared an "Emergency Response and Contingency Plan" pursuant to 35 Ill. Adm. Code 725.151 through 725.156 for the Guardian West facility with the intention of meeting the conditions of Section 722.134(a)(4).

4. The acid spilled in the August 5, 2004 incident was mainly concentrated sulfuric acid from the line used to fill Tank 8.

5. Concentrated sulfuric acid reacts violently when added to water, producing heat, high temperature, agitation and boiling.

6. Although it is possible that some of the dilute sulfuric acid in Tank 8 back-siphoned out of the tank, the spill was mainly concentrated sulfuric acid from the fill line.



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

FLEX-N-GATE CORPORATION'S
ANSWERS TO COMPLAINANT'S INTERROGATORIES

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, pursuant to 35 Ill. Admin. Code § 101.620, and for its Answers to Complainant's Interrogatories, states as follows:

1. List any witnesses respondent intends to call at hearing, including name, address, phone number, and whether the witness is to testify as an expert witness.

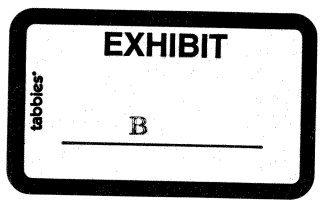
ANSWER: Flex-N-Gate has not yet determined what witnesses, if any, it intends to call at hearing. Flex-N-Gate will supplement its response to this Interrogatory pursuant to 35 Ill. Admin. Code § 101.616(h) at such time that it makes such determination.

2. List any documentary or physical evidence respondent intends to introduce at hearing.

ANSWER: Flex-N-Gate has not yet determined what documentary or physical evidence, if any, it intends to introduce at hearing. Flex-N-Gate will supplement its response to this Interrogatory pursuant to 35 Ill. Admin. Code § 101.616(h) at such time that it makes such determination.

3. By which provisions has respondent, prior to August 5, 2004, claimed exemption from the RCRA permit requirement for the Guardian West facility?

ANSWER: First, the Guardian West facility which is the subject of this action ("Facility") has "claimed exemption from the RCRA permit requirement" for any



material contained in the Facility's wastewater treatment unit pursuant to the "wastewater treatment unit exemption" contained in 35 Ill. Admin. Code 703.123(e).

Second, the Facility has "claimed exemption from the RCRA permit requirement" for certain other wastestreams which it sends off-site for treatment, storage or disposal pursuant to 35 Ill. Admin. Code 703.123(a). Those wastestreams are.

Wastestream (Flex-N-Gate Description)	**RCRA Classification**
flush solvent	D001 for flammability.
wastewater treatment sludge	F006 is a listed waste
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

4. Has respondent had any laboratory analyses performed on the liquid, sludge or debris under the plating line? Provide the results of such analyses.

ANSWER: Flex-N-Gate has not had any laboratory analysis performed on any material located "under the plating line."

5. Has respondent had any laboratory analyses performed on the influent into what respondent refers to as the "wastewater treatment unit" receiving "wastewater" from the plating area? Provide the results of such analyses.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION FOR LEAVE TO FILE REPLY
IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Motion for Leave to File Reply in Support of Motion for Protective Order, states as follows:

1. On April 21, 2005, the parties participated in a status conference with the Hearing Officer. See Hearing Officer's April 21, 2005, Order.

2. On May 27, 2005, Flex-N-Gate filed its Motion for Protective Order.

3. Pursuant to 35 Ill. Admin. Code §§ 101.502(a) and 101.616(d), Flex-N-Gate directed that Motion to the Hearing Officer. See Motion for Protective Order.

4. On June 2, 2005, the parties participated in another status conference with the Hearing Officer. See Hearing Officer's June 2, 2005, Order.

5. Following the June 2, 2005, status conference, the Hearing Officer issued an Order which provides in relevant part that, "[i]n the interest of administrative economy, the hearing officer will reserve ruling on the [parties'] outstanding discovery motions until the Board rules on [Flex-N-Gate's] motion for summary judgment." Id.

6. On or about June 6, 2005, Complainant filed his Response to Motion for Protective Order.

7. In that Response, Complainant characterizes the parties' conversation with the Hearing Officer during the April 21, 2005, status conference and characterizes an Order allegedly made by the Hearing Officer during that status conference. See Complainant's Response to Motion for Protective Order, at ¶1.

8. The undersigned participated in the April 21, 2005, status conference, and disagrees with Complainant's characterization of the parties' conversation with the Hearing Officer during that status conference and with Complainant's characterization of the Order allegedly made by the Hearing Officer during that status conference. Affidavit of Thomas G. Safley, attached hereto as Exhibit A, at ¶¶3, 4.

9. Section 101.500(e) of the Board's procedural rules provides that a party that files a Motion before the Board may file a Reply in support of that Motion if "permitted by the Board or the hearing officer to prevent material prejudice."

10. Flex-N-Gate would be materially prejudiced if the Hearing Officer bases her decision on Flex-N-Gate's Motion for Protective Order on Complainant's characterization of the April 21, 2005, status conference without providing Flex-N-Gate the opportunity to file a Reply addressing that characterization, which Flex-N-Gate considers to be incorrect. See Exhibit A.

11. Thus, in the event that the Hearing Officer reverses her decision to reserve ruling on Flex-N-Gate's Motion for Protective Order "until the Board rules on the motion for summary judgment," or in the event that the Board's rulings on Flex-N-Gate's Motions for Summary Judgment do not render Flex-N-Gate's Motion for Protective Order and the Parties' other pending discovery motions moot, Flex-N-Gate respectfully

moves the Hearing Officer to grant it leave to file a Reply in Support of its Motion for Protective Order to address the issue described above.

WHEREFORE, Respondent, FLEX-N-GATE CORPORATION, respectfully moves the Hearing Officer to grant FLEX-N-GATE CORPORATION leave to file a Reply in Support of its Motion for Protective Order as set forth above, and to award FLEX-N-GATE CORPRATION all other relief just and proper in the premises.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

Dated: June 24, 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
(217) 523-4900

GWST:003/Fil/Motion for Leave to File Reply in Support of Motion for Protective Order

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

AFFIDAVIT OF THOMAS G. SAFLEY

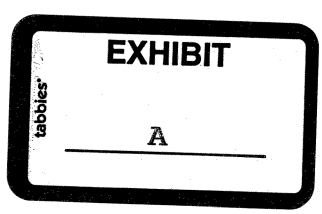
Thomas G. Safley, being first duly sworn, deposes and states under oath, and if sworn as a witness, would testify, as follows:

1. I have personal knowledge of the matters set forth in this affidavit.

2. I am an attorney duly licensed in the State of Illinois, and have been retained by respondent Flex-N-Gate Corporation ("Flex-N-Gate") to represent it in this matter.

3. As counsel for Flex-N-Gate, I participated in the April 21, 2005, status conference with Complainant and the Hearing Officer in this matter.

4. I disagree with Complainant's characterization of the parties' conversation with the Hearing Officer during that status conference and with Complainant's characterization of the Order allegedly made by the Hearing Officer during that status



conference, as set forth by Complainant in his Response to Flex-N-Gate's Motion for Protective Order.

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

FURTHER AFFIANT SAYETH NOT.

Thomas G. Safley

Subscribed and sworn to before
me this 23rd day of June, 2005.

Notary Public

"OFFICIAL SEAL"
Patti L. Tucker
Notary Public, State of Illinois
My Commission Exp. 07/12/2008

GWST:003/Fil/Affidavit of Thomas Safley – Motion for Leave to File Reply