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 SUBSTITUTE AFFIDAVITS;**

2. **Flex-N-Gate Corporation's RESPONSE TO COMPLAINANT'S MOTION FOR LEAVE TO REPLY AND RESPONSE TO MOTION FOR LEAVE TO REPLY; and,**

3. **Flex-N-Gate Corporation's RESPONSE TO COMPLAINANT'S MOTION TO STRIKE UNSUPPORTED STATEMENTS AND FOR ADMONISHMENT OF RESPONDENT.**

copies of which are herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

Dated: July 28, 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 SUBSTITUTE AFFIDAVITS; RESPONSE TO COMPLAINANT'S MOTION FOR LEAVE TO REPLY AND RESPONSE TO MOTION FOR LEAVE TO REPLY; and, RESPONSE TO COMPLAINANT'S MOTION TO STRIKE UNSUPPORTED STATEMENTS AND FOR ADMONISHMENT OF RESPONDENT, 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 July 28, 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 July 28, 2005.

/s/ Thomas G. Safley
Thomas G. Safley

GWST:003/Fil/NOF and COS – Responses to Affidavits, leave to file

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

RESPONSE TO COMPLAINANT'S MOTION TO SUBSTITUTE AFFIDAVITS

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 Substitute Affidavits, states as follows:

1. On July 20, 2005, Complainant mailed his Motion to Substitute Affidavits to counsel for Flex-N-Gate. See Complainant's Certificate of Service, July 20, 2005.

2. In paragraph three of his Motion to Substitute Affidavits, Complainant states:

> Complainant believes that the factual issues in this case are much too complex to be tried by affidavit, and would prefer to see the Board deny all motions for summary judgment, and turn the case back over to the Hearing Officer. Complainant is, however, forced to engage in this war of affidavits.

Motion to Substitute Affidavits, at ¶3.

3. In response to this statement, Flex-N-Gate states as follows.

4. First, Flex-N-Gate disagrees that this case is being "tried by affidavit" or that the parties are "engage[d] in [a] war of affidavits." Flex-N-Gate moved for summary judgment, and Complainant cross-moved for partial summary judgment. Each party supported its Motion(s) for Summary Judgment in part with affidavits, as the Illinois

Pollution Control Board's ("Board") rules allow. Those affidavits are not submitted to the Board for the purposes of "trying" the case, i.e., for the Board to pick between as it would after a hearing. Rather, they were submitted to support each party's position that there is no genuine issue of material fact as to certain elements of the claims at issue in each Motion. The parties may disagree on some facts included in the affidavits, but that does not mean that those facts are "material," that a "genuine issue of material fact" exists that would preclude summary judgment, or that the parties are "trying" this case "by affidavit."

5. Second, for the reasons stated in Flex-N-Gate's Motions for Summary Judgment and Flex-N-Gate's Response to Complainant's Motion for Partial Summary Judgment, Flex-N-Gate does not believe that "the factual issues in this case are . . . complex" at all. As Flex-N-Gate has stated, under the law at issue – Illinois regulations implementing the federal Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq.* – whether or not a release of uncontained hydrogen sulfide gas occurred at Flex-N-Gate's facility is irrelevant. Thus, any "complexity" that might exist as to this question does not matter for purposes of deciding the parties' Motions for Summary Judgment. Flex-N-Gate also submits that the "factual issues" regarding its operations are not at all "complex." See Flex-N-Gate's Motions for Summary Judgment.

6. Third, even if the facts of this matter were "complex," like a Court, the Board does not deny motions for summary judgment because the factual issues before it are "complex." Rather, like a Court, the Board only denies motions for summary judgment when there is (1) a genuine issue as to a fact that is material to the claim at issue, or (2) even if there is no such genuine issue, the moving party is not entitled to

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

7. Put another way, facts can be simple, but in question, or complicated, but without question. Whether there is a question as to a material fact is what matters, not whether the facts are "complex." Thus, to determine whether a hearing is necessary, the Board by definition must (1) identify the elements of the claims that Complainant brought against Flex-N-Gate, and (2) as to those elements that Flex-N-Gate has argued Complainant cannot prove, assess (a) whether there is an issue of fact, and (b) if so, whether the fact at issue is material. If there is no genuine issue of material fact – that is, if the Board concludes that Complainant cannot prove one or more elements of a claim – then a hearing as to that claim is a waste of time, because it will add nothing for the Board to consider, and summary judgment is proper.

8. Fourth, Flex-N-Gate disagrees that the facts of this or any other case are so "complex" that the Board must throw up its hands and "turn the case back over to the Hearing Officer" rather than decide motions for summary judgment on their merits. The Board deals every day with complex factual issues and complex legal issues. The Board is more than capable of deciding the parties' Motions for Summary Judgment.

9. In paragraph five of his Motion to Substitute Affidavits, Complainant states:

> [Respondent] has also objected to the lack of exhibits attached to the affidavit. Complainant does not feel that it is necessary to attach copies of documents that are already on file in this case. . . . Making duplicative copies of documents in this manner is extraordinarily time-consuming and expensive. To the extent the Board may agree with respondent that such duplicative copies are required, complainant requests leave to dispense with them in this case.

Motion to Substitute Affidavits at ¶¶4, 4.a.

10. Likewise, in his Motion for Leave to Reply and Response to Motion for Leave to Reply, Complainant states:

> Respondent cites Illinois Supreme Court Rule 191(a) in support for its argument that copies of documents must be attached to affidavits. Complainant believes that this is referring to documents other than those already on file in the instant case. Complainant does not feel that it is necessary to attach copies of documents that are already on file in this case.

Motion for Leave to Reply at ¶7.

11. Illinois Supreme Court Rule 191(a) provides in relevant part that "[a]ffidavits in support of and in opposition to a motion for summary judgment . . . shall have attached thereto sworn or certified copies of all papers upon which the affiant relies." Ill. S. Ct. R. 191(a). (Emphasis added.)

12. Flex-N-Gate acknowledges that there are limited circumstances in which courts have held that it is proper to consider "sworn or certified copies" of documents which are not attached to an affidavit filed in support of a motion for summary judgment, but otherwise are properly before the court, when deciding a motion for summary judgment. For example, in North Am. Old Roman Catholic Church v. Bernadette, the Court stated:

> Defendant claims that exhibits three and four were improperly before the trial court because they were not sworn or certified in accordance with Rule 191. . . . A copy of each of these letters was also attached to the Church's verified complaint. The verified complaint was already on file. The complaint was verified by Archbishop Rematt, the author and signatory of the letters. . . . Since it appears that Archbishop Rematt would be competent to swear to the letters' authenticity if called as a witness and the letters were attached to the verified complaint which Archbishop Rematt signed under oath, we hold that exhibits three and four were properly considered by the trial court in granting summary judgment.

627 N.E.2d 1094, at 1099 (1st Dist. 1992). (Emphasis added.)

13. That is, while there may be situations in which a decision-making body may decide that compliance with the "attachment" requirement of Rule 191(a) may be excused, that does not mean that compliance with the requirement of Rule 191(a) that documents be "sworn or certified" also is excused.

14. Flex-N-Gate has not advocated and does not advocate the repeated filing of "duplicative copies" of a document that already is properly before the Board, and the Board can take official notice that Flex-N-Gate, in filings in this case, has itself referred to documents which it previously filed in support of other filings in this case.

15. In this situation, however, Complainant has not (a) identified to which documents he refers, or (b) even argued, much less established, that these documents (whatever they are) are properly "sworn or certified" in accordance with Rule 191(a). See Flex-N-Gate's Motion to Strike Affidavits Filed and Unsupported Statements Made in Support of Complainant's Summary Judgment Filings and Motion for Admonishment of Complainant, detailing specific instances in which Complainant has referenced documents or "information" in his affidavits without identifying the documents or "information" to which he refers.

16. Accordingly, neither Flex-N-Gate nor the Board can consider (1) whether Complainant is "competent to swear to the [documents'] authenticity," (2) whether the documents are attached to a verified filing made under oath or otherwise are "sworn or certified" in compliance with Rule 191(a), or (3) whether, in fact, whatever documents Complainant refers to actually are "already on file."

17. Further, it appears that in at least some instances, the documents to which Complainant means to refer in his affidavits are discovery requests and responses to those requests. However, under Section 101.302(i) of the Board's rules, "[n]o written discovery, including interrogatories, requests to produce, and requests for admission, or any response to written discovery, may be filed with the Clerk of the Board except upon leave or direction of the Board or hearing officer." 35 Ill. Admin. Code § 101.302(i). Accordingly, these documents would not be before the Board for consideration, even if they met the other requirements discussed above.

18. Thus, while in some situations a decision-making body may decide that the "attachment" requirement of Supreme Court Rule 191(a) is satisfied by reference to a sworn or certified document previously filed in a case, Flex-N-Gate does not believe that Rule 191(a) is satisfied where the document to which an affidavit refers (a) is not even identified, (b) is not shown to be capable of being sworn to by the affiant, and (c) is not attached to a verified filing made under oath or otherwise properly "sworn or certified" as Rule 191(a) requires.

19. "The burden is upon the movant to clearly state the reasons for and the grounds upon which a motion is made, [and] to timely file and adequately support a motion directed to the Board." Goose Lake Ass'n v. Robert J. Drake, Sr., First Nat'l

Bank of Joliet as Trustee, Trust No. 370, PCB No. 90-170, 1991 Ill. ENV LEXIS 432, at ** 1-2 (Ill.Pol.Control.Bd. June 6, 1991). (Emphasis added.)

20. For the reasons stated in Flex-N-Gate's Motion to Strike and Admonish, Flex-N-Gate does not believe that Complainant has adequately supported his filings in this case.

21. For these reasons, Flex-N-Gate continues in its objection to Complainant's Affidavits to the extent that they cite to documents which are not identified and/or cite to documents without demonstrating that Complainant can swear to the truth of the documents or that the documents are properly "sworn or certified."

22. Flex-N-Gate makes no further response to Complainant's Motion to Substitute Affidavits.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

Dated: July 28, 2005

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

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(217) 523-4900

GWST:003/Fil/Response to Motion to Substitute Affidavits

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 FOR LEAVE TO REPLY AND RESPONSE TO MOTION FOR LEAVE TO REPLY

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 Leave to Reply and Response to Motion for Leave to Reply ("Motion for Leave to Reply"), states as follows:

1. On July 18, 2005, Complainant mailed his Motion for Leave to Reply to counsel for Flex-N-Gate. See Complainant's Certificate of Service, July 18, 2005.

2. In paragraph 4.a. of his Motion for Leave to Reply, Complainant states:

> Respondent has, in the Response, denied the truth of facts which it has admitted in discovery and in affidavits attached to its motions, which facts Complainant regarded as established beyond doubt at the time he filed his motion.

Motion for Leave to Reply at ¶2.

3. Complainant makes this same argument in his Motion to Strike Unsupported Statements and for Admonishment of Respondent ("Motion to Strike"). See Complainant's Motion to Strike.

4. Flex-N-Gate responds to this argument in its Response to Complainant's Motion to Strike.

5. In paragraph seven of his Motion for Leave to Reply, Complainant states:

> Respondent cites Illinois Supreme Court Rule 191(a) in support for its argument that copies of documents must be attached to affidavits. Complainant believes that this is referring to documents other than those already on file in the instant case. Complainant does not feel that it is necessary to attach copies of documents that are already on file in this case.

Motion for Leave to Reply at ¶7.

6. Complainant makes this same argument in paragraph five of his Motion to Substitute Affidavits. See Complainant's Motion to Substitute Affidavits, at ¶5.

7. Flex-N-Gate responds to this argument in its Response to Complainant's Motion to Substitute Affidavits.

8. Flex-N-Gate makes no further response to Complainant's Motion for Leave to Reply.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

Dated: July 28, 2005

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

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GWST:003/Fil/Response to Motion for Leave to Reply and Response to Motion for Leave to Reply

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 STRIKE UNSUPPORTED STATEMENTS AND FOR ADMONISHMENT OF RESPONDENT

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 Strike Unsupported Statements and for Admonishment of Respondent ("Complainant's Motion to Strike and for Admonishment"), states as follows:

1. On July 20, 2005, Complainant mailed his Motion to Strike and for Admonishment to counsel for Flex-N-Gate. See Complainant's Certificate of Service, July 20, 2005.

2. It appears to Flex-N-Gate that the parties may have a misunderstanding of semantics which has created confusion and has led to Complainant's Motion to Strike and for Admonishment.

3. Complainant has alleged in various filings that Flex-N-Gate "treats" and "stores" hazardous waste. See Complainant's Motion to Strike and for Admonishment; Complainant's Motion for Partial Summary Judgment as to Count I, at 2.

4. Complainant also has argued that Flex-N-Gate is "conducting hazardous waste treatment and storage operations" and has moved the Illinois Pollution Control Board ("Board") to "find that respondent Flex-N-Gate Corporation is operating a hazardous waste treatment and storage facility." Id.

5. On the issue of "treatment," Flex-N-Gate has admitted that, as a generator, it "treats" hazardous waste, as generators of hazardous waste are permitted to do under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq*. ("RCRA"). See Flex-N-Gate's Motion to Strike Affidavits Filed and Unsupported Statements Made in Support of Complainant's Summary Judgment Filings and Motion for Admonishment of Complainant ("Flex-N-Gate's Motion to Strike and Admonish"), at ¶¶17-18.

6. However, Flex-N-Gate has argued (1) that "whether or not Flex-N-Gate 'is conducting hazardous waste treatment and storage operations' at the facility is not a fact, it is a legal conclusion, which is inappropriate for an affidavit"; and (2) that even if it was a fact, Complainant's allegation that Flex-N-Gate "is conducting hazardous waste treatment and storage operations" is conclusory. Id. at ¶¶15-16.

7. Complainant apparently views these positions expressed by Flex-N-Gate as incompatible, stating:

> Complainant is at a loss to understand how respondent is able to admit that it is treating hazardous waste, storing hazardous waste and does not have a RCRA permit, and still deny that it is "conducting hazardous waste treatment and storage operations without a RCRA permit."

Complainant's Motion to Strike and for Admonishment at ¶7.

8. Based on his perception that these positions are incompatible, Complainant moves the Board to strike certain statements from Flex-N-Gate's Response

to Complainant's Motion for Partial Summary Judgment as to Count I, and to "admonish Respondent to cease denying facts that it has already admitted in this case." Complainant's Motion to Strike and for Admonishment at 2-3.

9. In fact, however, Flex-N-Gate's statements are perfectly compatible, because Flex-N-Gate understands the question of whether it "treats" hazardous waste to be distinct from the question of whether it is conducting "treatment operations" or operating a "treatment facility."

10. That is, Flex-N-Gate understands the terms "treatment operations" and "treatment facility" under RCRA to apply only to a Treatment Storage and Disposal Facility ("TSDF") operating under 35 Ill. Admin. Code Parts 724 and 725, to which a generator of hazardous waste sends that hazardous waste for treatment, not to a generator that is treating hazardous waste that it is accumulating under 35 Ill. Admin. Code § 722.134 or another exemption to the RCRA permitting requirement.

11. Thus, as discussed in Flex-N-Gate's Motion to Strike and Admonish at ¶¶17-18, a generator of hazardous waste may treat hazardous waste that it is accumulating prior to off-site treatment, storage, or disposal, and still be considered a "generator" operating under 35 Ill. Admin. Code Part 722, Standards Applicable to Generators of Hazardous Waste, and not a TSDF operating under 35 Ill. Admin. Code Part 724 or 725, Standards [or Interim Standards] for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities.

12. Thus, when Complainant alleges that Flex-N-Gate is conducting "treatment operations" and asks the Board to find that Flex-N-Gate is operating a "treatment facility," Flex-N-Gate understands Complainant to be arguing that Flex-N-

Gate meets the legal definition of a TSDF regulated by 35 Ill. Admin. Code Part 724 or 725, and is not a "generator" of hazardous waste governed by 35 Ill. Admin. Code Part 722. Flex-N-Gate disagrees with this argument and thus denies that it is conducting "treatment operations" or that its facility is a "treatment facility."

13. Similarly, as to the question of whether Flex-N-Gate "stores" hazardous waste, Complainant in his Motion to Strike and for Admonishment acknowledges that he previously did not cite any support for this assertion, and now cites to an Affidavit filed by Flex-N-Gate in which Flex-N-Gate states that it places sludge from its wastewater treatment process "into a satellite accumulation container in preparation for placement into 90-day accumulation containers, where it is accumulated before it is shipped off-site for recycling." Motion to Strike and for Admonishment at ¶¶6, 6.a. (Emphasis added.)

14. Thus, Complainant apparently takes the position that when a generator "accumulates" hazardous waste pursuant to 35 Ill. Admin. Code § 722.134, the generator is "storing" hazardous waste.

15. Flex-N-Gate does not equate "accumulation" by a generator of hazardous waste with "storage" of hazardous waste. Rather, Flex-N-Gate understands "accumulation" to be performed by generators of hazardous waste under Section 722.134 (which is titled "Accumulation Time") and "storage" to be performed by TSDF facilities under Parts 724 and 725.

16. Thus, when Complainant alleges that Flex-N-Gate "stores" hazardous waste and is conducting "storage operations," and asks the Board to find that Flex-N-Gate is operating a "storage facility," Flex-N-Gate again understands Complainant to be arguing that Flex-N-Gate meets the legal definition of a TSDF regulated by 35 Ill.

Admin. Code Part 724 or 725, and is not a "generator" of hazardous waste governed by 35 Ill. Admin. Code Part 722.

17. Thus, while Flex-N-Gate has admitted, and admits, that it "accumulates" hazardous waste under Section 722.134(a), Flex-N-Gate has never agreed, and does not agree, that it "stores" hazardous waste. Thus, Flex-N-Gate does not agree that it is conducting "storage operations" or operating a "storage facility."

18. In conclusion, to be clear, Flex-N-Gate admits that it "treats" hazardous waste and that it "accumulates" hazardous waste, and Flex-N-Gate's understanding is that it does these things as a "generator" of hazardous waste. Flex-N-Gate disagrees, however, with any assertion that it is conducting "treatment" or "storage operations," or operating a "treatment" or "storage facility" that is governed by 35 Ill. Admin. Code Part 724 or 725.

19. In light of the above, it is apparent that Flex-N-Gate has not made the "admissions" which Complainant contends Flex-N-Gate has made and now contradicted, but rather, that Complainant misunderstood Flex-N-Gate's statements because Complainant and Flex-N-Gate had different understandings of the meaning of certain terms under RCRA, as set forth above.

20. Therefore, Flex-N-Gate's statements in this case are not inconsistent, and no reason exists to strike any statements from Flex-N-Gate's filings or to admonish Flex-N-Gate.

WHEREFORE, for the reasons stated above, Respondent, FLEX-N-GATE CORPORATION, respectfully prays that the Illinois Pollution Control Board deny

Complainant's Motion to Strike Unsupported Statements and for Admonishment of Respondent and award FLEX-N-GATE CORPORATION such other relief as the Illinois Pollution Control Board deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

Dated: July 28, 2005

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

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