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STATE OF ILLINOIS
Pollution Control Board

Respondent.

No. PCB 05-049

1. On May 27, 2005, Respondent filed two motions for summary judgment.
2. On June 24, 2005, Complainant served responses to the motions for summary judgment, including an Affidavit in Support of Responses to Motions for Summary Judgment.
3. On July 8, 2005, respondent Flex-N-Gate Corporation, filed a Motion to Strike Affidavits Filed and Unsupported Statements Made in Support of Complainant's Summary Judgment Filings and Motion for Admonishment of Complainant.
4. On July 20, 2005, Complainant served a Motion to Substitute Affidavits with respect to Complainant's Motion for Partial Summary Judgment.
5. Complainant is also filing a Second Motion to Substitute Affidavits with respect to Complainant's affidavit in support of his responses to Respondent's motions for summary judgment.
6. 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.

7. Respondent has cited Supreme Court Rule 191(a) as to the content of affidavits. This rule does not on its face apply to citizen's enforcement actions under the Environmental Protection Act.
8. This case is a citizen's enforcement action under the Environmental Protection Act. Complainant observed a violation of the Act and Board regulations mainly protecting worker safety at hazardous waste facilities.
 - a. Complainant is acting on behalf of the People of the State in bringing the violations he witnessed before the Board, and is entitled to a hearing under the Environmental Protection Act.
 - b. Many of Respondent's objections center on the absence of qualified expert witnesses. Complainant does not have a budget for expert witnesses. Although Complainant happens to be a qualified expert witness in many of the areas under dispute, there is no basis under the Act or Board rules to deny Complainant a hearing on the basis that he does not have a budget for expert witnesses. Nor is there a provision allowing the Board to tax the costs of expert witnesses on Respondent.
 - c. Complainant intends at this time to take this matter to hearing based only on his own testimony, documentary evidence, and testimony from Respondent's employees. Although Respondent is free to question the degree of Complainant's expertise in various areas at hearing, this goes to the weight of the evidence. The Complainant cannot, under the Act, be barred from testifying at hearing on the grounds that he might not be an expert witness in certain areas.
 - d. Respondent has chosen to file motions for summary judgment. Complainant has attempted to answer those motions. Granting summary judgment on the basis of the lack of qualified expert opinion in Complainant's affidavits would have the effect of denying Complainant a hearing on his complaint, in violation of Section 31(d) of the Act.
9. Although Respondent is claiming that Complainant's opinions and conclusions cannot be proved by affidavit, Respondent has filed motions for summary judgment that are also based on opinion and conclusions. For example:
 - a. On p. 8 of the Motion for Summary Judgment (p. 2 of the Motion for Partial Summary Judgment), Respondent is arguing that only a "small quantity of sulfuric acid" was released to the plating room floor, but is objecting to Complainant's "opinion" or "conclusion" to the contrary, even though Complainant witnessed the immediate aftermath of the spill. (Motion to Strike Affidavits, Par. 24(m -s))

- b. Also on p. 8 of the Motion for Summary Judgment (p. 2 of the Motion for Partial Summary Judgment), Respondent is denying that a release of hydrogen sulfide gas "could have occurred or did occur", but is objecting to Complainant's "opinion" or "conclusion" to the contrary, even though Complainant witnessed the release of hydrogen sulfide. (Motion to Strike Affidavits, Par. 24(m-s))
10. Respondent has supported its Motion for Partial Summary Judgment with the affidavit of Denny Corbett, a person who has repeatedly made false statements in connection with the incident that is the subject of this case. (Motion for Partial Summary Judgment, Exhibit A.) Although Respondent relies on his affidavit, Respondent has declined in discovery to list Denny Corbett as a witness it intends to call (Answers to Complainant's Interrogatories, par. 1), and argues that Complainant cannot impeach his credibility through affidavits. (Motion to Strike Affidavits, par. 24(u), 52)
- a. Among the false statements made by Denny Corbett was the following:

"We did have a pipe break in our plating department, which contained a diluted acid content." (Fax to Peggy A. Zweber, OSHA, 9/14/05, Request for Production of Documents, No. 12.) A second, related, false statement was: "We did have a break in one of the discharge pipes in the chrome plating tank #8 which was a diluted sulfuric acid content..." (Memorandum to Guardian West employees dated 9/14(?)04, posted in response to an OSHA complaint, Request for Production of Documents, No. 12.)

 - i. The break was in the pipe used to fill tank 8 with concentrated sulfuric acid, not the discharge pipe, which is used to drain diluted acid from the tank to the floor.
 - ii. Respondent has failed to disclose in discovery any report or other document that was available to Denny Corbett at the time he made the above statement that would have given him any basis for the quoted statements. Request for Production #8 requested: "Any written accounts of the incident on third shift, August 4-5, 2004, produced by or for respondent."
 - iii. Indeed, the account of the incident given by Tony Rice, Plating Manager, at the same time as the statement of Denny Corbett stated that the release came from the line used to fill Tank 8 with concentrated sulfuric acid. (Statement of Anthony Rice, dated September 14, 2005, Request for Production of Documents, No. 8.)
 - iv. The affidavit of Denny Corbett that is attached to the Motion for Partial Summary Judgment now contradicts his earlier statements to OSHA:

- (1) "[A] pipe in the Facility that carries a solution of approximately 93% concentrated sulfuric acid/ 7% water separated at a fitting..." (Motion for Partial Summary Judgment, Exhibit A, par 3)
 - b. Denny Corbett has also made other false statements, the discussion of which Complainant will omit from this response. (See Second Motion to Substitute Affidavits, par 12(b)).
11. Respondent is somehow arguing that the fact that Denny Corbett's lies were made in his reports to OSHA, and were therefore criminal in nature, somehow makes them off limits to discussion in this case.
 - a. Complainant believes that the fact that an affiant and potential witness has engaged in criminal activities involving false statements is exactly the sort of information the Board needs to know in evaluating the credibility of the person.
12. Rather than argue the sufficiency of the affidavit made in support of the Motion for Partial Summary Judgment, complainant wishes to provide a more detailed affidavit meeting some of the objections raised by respondent.
 - a. Although Complainant is a qualified expert in many of these areas, Complainant will not attempt to qualify himself, resting on the position that, as the complainant, he is not subject to such "qualification".
13. Respondent has raised a number of technical objections to the affidavits offered by Complainant. It would be possible for the Complainant to make similar objections to Respondent's affidavits, but does not wish to further vex the Board.
14. 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.
 - a. Complainant is an unemployed factory worker who uses coin-operated, public copying machines. Making duplicative copies of documents in this manner is extraordinarily time-consuming and expensive. To the extent the Board may agree with the respondent that such duplicative copies are required, complainant requests leave to dispense with them in this case.

WHEREFORE complainant prays that the Board deny Respondent's Motion to Strike Affidavits Filed And Unsupported Statements Made in Support of Complainant's Summary Judgment Filings And Motion For Admonishment of Complainant, and grant leave to dispense with exhibits which duplicate materials already filed in this case.

Morton F. Dorothy
Morton F. Dorothy, Complainant

Morton F. Dorothy
104 W. University, SW Suite
Urbana IL 61801
217/384-1010

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

RECEIVED
CLERK'S OFFICE

JUL 28 2005

MORTON F. DOROTHY,

Complainant,

vs.

FLEX-N-GATE CORPORATION,
an Illinois Corporation,

Respondent.

STATE OF ILLINOIS
Pollution Control Board

No. PCB 05-049

SECOND MOTION TO SUBSTITUTE AFFIDAVITS

Complainant Morton F. Dorothy, moves that the Board allow him to substitute affidavits in support of his Responses to Respondent's Motions for Summary Judgment, and as reason says as follows:

1. On May 27, 2005, Respondent filed two motions for summary judgment.
2. On June 24, 2005, Complainant served responses to the motions for summary judgment, including an Affidavit in Support of Responses to Motions for Summary Judgment.
3. On July 8, 2005, respondent Flex-N-Gate Corporation, filed a Motion to Strike Affidavits Filed and Unsupported Statements Made in Support of Complainant's Summary Judgment Filings and Motion for Admonishment of Complainant.
4. Complainant has filed a separate response to that Motion to Strike Affidavits.
5. 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.
6. Rather than argue the sufficiency of the affidavit made in support of the Motion for Partial Summary Judgment, complainant wishes to provide a more detailed affidavit meeting some of the objections raised by respondent.
7. Complainant 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.

- a. Complainant is an unemployed factory worker who uses coin-operated, public copying machines. Making duplicative copies of documents in this manner is extraordinarily time-consuming and expensive. To the extent the Board may agree with the respondent that such duplicative copies are required, complainant requests leave to dispense with them in this case.

WHEREFORE complainant prays that the Board grant leave to substitute affidavits, and leave to dispense with exhibits which duplicate materials already filed in this case.

Morton F. Dorothy, Complainant

State of Illinois)
)
County of Champaign) ss

SUBSTITUTED AFFIDAVIT IN SUPPORT OF RESPONSES TO MOTIONS FOR SUMMARY JUDGMENT

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

1. Respondent has not yet amended its contingency plan to address this type of accident. This case therefore represents continuing, intentional violation of Board rules protecting the environment and worker safety at a hazardous waste facility.
 - a. On August 28, 2004, Complainant filed a Freedom of Information Act request with The Champaign County Emergency Services and Disaster Agency (ESDA), which is a normal recipient of the Guardian West contingency plans. Examination of the contingency plan filed with ESDA showed no amendment since August 5, 2004.
 - b. Complainant has corresponded with ESDA concerning the contingency plan for the Guardian West facility. According to ESDA, as of November 8, 2004, Respondent had not filed an amended contingency plan with ESDA. (Exhibit A)
 - c. In response to Complainant's Interrogatory 30, Respondent made the following statement: "Since August 4-5, 2004, Flex-N-Gate has amended its Contingency Plan, but not in response to the incident of that date."
 - d. Respondent has been in continuous violation of the Board regulations

requiring amendment of the contingency plan in response to the hydrogen sulfide release incident since the date of that incident.

- e. On August 20, 2004, Complainant notified Tanvir Ali, Plant Manager at Guardian West, of the need to amend the contingency plan.
 - f. The failure to amend the contingency plan has, at least since August 20, 2004, been an intentional violation of Board rules.
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.
- a. The contingency plan needs to be amended to specifically address the possibility of a hydrogen sulfide release.
 - b. A meter capable of measuring hydrogen sulfide needs to be available.
 - i. Such meters are available on-line for less than \$700. (Ex B)
 - c. Respirators offering protection against hydrogen sulfide need to be available.
 - i. Such respirators are available on-line for \$21.95 (Ex C.)
 - d. The sludge and accumulated debris needs to be removed from the area under the plating line, so that spilled liquids are free to flow quickly toward the pumps.
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.
- a. Denny Corbett was the safety manager for the Guardian West facility.
 - b. Denny Corbett was present during the incident. (Request for Production of Documents, No. 8, Denny Corbett, e-mail to Tanvir, Jackie & Tony, Dated

August 5, 2004, 7:36 am.)

- c. Respondent has admitted that, during the incident, the safety officer present stated to Complainant that he "did not know whether a [hydrogen sulfide probe] was present at the facility". (Answer, par. 24)
 - d. Respondent has admitted that, during the incident, the facility actually had meters available to measure hydrogen sulfide levels, and had respirators approved for use with hydrogen sulfide available. (Responses to Interrogatories 18 and 19).
 - e. The filing of these motions has delayed this case. (Hearing Officer Order of June 2, 2005)
 - f. The delay occasioned by these motions was reasonably foreseeable.
 - g. The motions for summary judgment repeat legal arguments already made to the Board in the Motion to Dismiss, and do not depend on any new facts adduced in discovery.
 - h. Because the Board denied the motion to dismiss, Respondent had no reasonable basis to believe that the motions for summary judgment would be granted.
 - i. The only possible purpose of filing the motions for summary judgment was to delay this case.
4. The contingency plan was deficient ab initio, in ways completely independent of the incident alleged in the complaint.
- a. Respondent has argued, in the motions for summary judgment, that the contingency plan did not apply to incidents on the plating room floor, because that area was part of a "wastewater treatment unit", which Respondent argues is exempt from RCRA, and therefore, Respondent further argues, not subject to the contingency plan requirement.
 - b. Complainant has examined the contingency plan and has determined that the contingency plan itself draws no such distinctions. In particular, it does not identify the plating room floor as part of a "wastewater treatment unit", and does not specify alternative actions are to be taken in the event of a spill or release in that area.
 - c. Section 725.152 requires that the contingency plan "describe the actions facility personnel must take to comply with Sections 725.151 and 725.156 in response to fires, explosions, or any unplanned sudden or non-sudden

release of hazardous waste or hazardous waste constituents to air, soil, or surface water at the facility."

- d. If Respondent's legal arguments are to be believed, Respondent drafted a contingency plan describing steps the steps to be taken in the event of a spill on the plating room floor, which steps it did not intend to take.
 - e. The contingency plan therefore violated Section 725.152, in that it did not describe the actions Respondent intended to take.
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.
- a. The contaminated debris on the plating room floor includes contaminated 4x4 wood blocks that were used in recovering racks from crashes, which wooden blocks could not possibly be pumped through the lines to wastewater.
 - b. Based on Complainant's experience on the plating room floor, the pumps on the plating room floor jam when they receive large quantities of sludge quickly, and have to be cleared.
 - c. Based on Complainant's experience on the plating room floor, the volume of water necessary to wash the accumulated sludge to wastewater would be such that wastewater would be unable to handle the flow, and the additional treatment costs for wastewater would be excessive.
 - d. Based on Complainant's experience on the plating room floor, it would be necessary to shovel the sludge and debris out from under the plating line.
 - e. The material under the plating line is chromium contaminated plating waste, which is a hazardous waste for that reason alone.
 - f. Complainant has been told, by Respondent's agents, in the ordinary course of business, that the waste under the plating line is hazardous waste.
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.
 - a. Complainant was present and observed that hydrogen sulfide was produced when sulfuric acid was spilled onto the plating room floor.
 - b. Because the sulfuric acid used at Guardian West did not exhibit the odor of hydrogen sulfide, it could not have contained sulfide, which would have been rapidly emitted from a highly acidic solvent.
 - c. Because the sulfide did not come from the sulfuric acid, it must have come from sulfide on the floor.
 - d. Based on the observed facts, Complainant believes that the sulfide may have been produced by chemical or biological reactions in the waste which has been allowed to accumulate on the floor for years.
 - e. Complainant has a B.S. in chemistry from the University of Illinois. Complainant has prepared hydrogen sulfide on numerous occasions, and is familiar with its odor and properties. Complainant was employed as a lab tech at Guardian West, and frequently handled the sulfuric acid used in that plant.
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.
 - a. Respondent has stated in its Motions that:
 - i. "The separation allowed a small quantity of sulfuric acid that was in the portion of the pipe segment 2 above the fitting, and potentially sulfuric acid contained in pipe segments 3 and 4, to be released to the Plating Room floor." (Motion for Summary Judgment, p. 8)
 - ii. "However, an examination of Tank No. 8 after the pipe separation indicated that at most a small amount of solution from Tank No. 8 was back-siphoned and released to the floor." (Motion for Summary

Judgment, p. 8)

- iii. "The pump that is used to transfer sulfuric acid from bulk storage to Tank No. 8 was not operating when the pipe separated...Thus sulfuric acid was not pumped from bulk storage through the separation in the pipe and onto the floor." (Motion for Summary Judgment, p. 8)
- b. Complainant observed the evolution of hydrogen sulfide in the aftermath of the spill. The diluted acid in Tank 8 is routinely dumped to the floor every few weeks when the solution is replaced. Because the diluted acid had never been observed to cause the evolution of hydrogen sulfide, Complainant concluded that a large quantity of concentrated sulfuric acid must have spilled.
- c. During the incident, Complainant was aware of the possibility that dilute acid might have siphoned out of Tank 8. The level did not appear to be abnormally low, indicating that siphoning must have been minimal. Had the level dropped below the top of the bumpers, Complainant would have had to call for a halt in production, and taken steps to rebuild Tank 8.
- d. The hydrogen sulfide was rising in a hot plume several feet in diameter in front of the tank. Complainant observed this by advancing toward the area while holding his breath, and sticking his hands into the plume to estimate its temperature, and speed of upward drift.
 - i. Because of the high temperature of the rising plume, Complainant concluded that a large quantity of concentrated sulfuric acid had spilled to the floor, where it was reacting with water and other material on the floor, bringing the material on the floor to its boiling point.
- e. An image of the spill was literally etched onto the copper conductors in the vicinity of the separated pipe. The corrosion that is normally present on the conductors was completely cleaned, exposing bright copper metal.
 - i. The acid appeared to have streamed upward out of the separated pipe until it struck the upper portion of the pipe. From there it sprayed downward in a conical spray that was about six feet wide before it fell under the catwalk. The spray appeared to have been volumetric, that is not just on the surface of the cone, judging from the complete cleaning of the conductors on the inside of the pattern.
 - ii. Prior to the incident, Complainant had attempted to clean similar

conductors with a spray bottle of concentrated sulfuric acid and a wire brush. Based on the time and effort required to effect a minimal cleaning with a wire brush, Complainant concluded that concentrated sulfuric acid must have sprayed over the conductors for a considerable length of time, with considerable force, to have accomplished such a thorough cleaning.

- f. Anthony Rice observed that the level in Tank 8 was "about the same as it is everyday". (Statement of Anthony Rice, Request for Production of Documents, No. 8.)
10. In the course of discovery, respondent has produced a technical argument to the effect that hydrogen sulfide production was impossible in this accident. (Statement of Mike Trueblood, Response to Request for Production of Documents No. 12.) The technical argument was produced by a person who, although he may be qualified as an expert, did not observe the incident.
- a. Mike Trueblood was not present during the incident.
 - b. Complainant disagrees with many of the statements in this document, including, but not limited to, the following:
 - i. "No strong reducing agents are used on the plating process." (Par 15)
 - (1) The following strong reducing agents are used in the immediate vicinity of the spill: formaldehyde and 1,4-butyne diol.
 - ii. "Quite the opposite, chromic acid is a very strong oxidizing agent." (Par. 15)
 - (1) Although chromic acid is a strong oxidizing agent, it is used a considerable distance from the spill area, and the flow of liquid on the floor is from the area of the spill toward the chromic acid.
 - iii. "In order to make the sulfur compounds used in our plating process and form Hydrogen sulfide (sic), a strong reducing agent would have to be mixed with the sulfur compounds at a relatively high concentration or with heat."
 - (1) Under mild conditions, the disproportionation reaction is

capable of producing elemental sulfur from a mixture of sulfur compounds in a positive oxidation state, with some of the sulfur moving to a more positive oxidation state, while the rest of the sulfur moves to more negative states. Once formed, elemental sulfur reacts with water to form sulfide.

- (2) Because of the age of the sludge and debris on the plating room floor, biological reactions may have produced sulfide.
- (3) When the sulfuric acid spilled onto the floor, it reacted with water, liberating heat and producing high temperatures, yielding unusual chemical and thermodynamic conditions on the plating room floor.

- 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.
 - a. Complainant smelled the characteristic odor of hydrogen sulfide. Complainant is familiar with this odor, having produced the gas numerous times in laboratories, and for recreational purposes.
 - i. Complainant searched for a leaking propane cylinder, which might have produced a similar odor, but found none.
 - b. The following witness gave an account of the incident that is consistent with the production of hydrogen sulfide gas: "This morning at 5:30 I walked into the plant and it smelled like rotten eggs." (Request for Production of Documents, No. 8, Denny Corbett, e-mail to Tanvir, Jackie & Tony, Dated August 5, 2004, 7:36 am.)
 - c. Afiba Martin was the team leader for the plating line. He requested Complainant's help in locating the source of the odor and in dealing with the acid spill after it was discovered. Complainant took over leadership of the immediate response pursuant to this request.
 - d. The following witnesses were present in the immediate area in the immediate aftermath of the spill:
 - i. Afiba Martin
 - ii. Complainant

- iii. Joseph al-Hussani
 - iv. Denny Corbett
 - v. Anthony Rice
 - vi. Unidentified Maintenance man
- e. In the course of responding to the incident, Complainant stated to all of these persons that sulfuric acid had spilled onto the floor and was producing hydrogen sulfide gas. This information was essential to the response effort, and was made in the ordinary course of business. None of these people made any statement to Complainant whatsoever to the effect that they in any way disagreed with his assessment of the accident.
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.
- a. Complainant's Interrogatory No. 1 requested a list of witnesses. Respondent stated: "Flex-N-Gate has not yet determined what witnesses, if any, it intends to call at hearing".
 - b. Denny Corbett has made the following false statements in connection with this incident:
 - i. "We did not have a hazardous waste spill or a release of hydrogen sulfide gas at any time." Memorandum to Guardian West employees dated 9/14(?) /04, posted in response to an OSHA complaint, Request for Production of Documents, No. 12.
 - (1) Denny Corbett was present during the incident and expressed no disagreement at that time with Complainant's opinion that there was a release of hydrogen sulfide.
 - (a) Statements made during the incident were in the ordinary course of business.
 - (2) Respondent has failed to disclose in discovery any report or other document that was available to Denny Corbett at the

time he made the above statement that would have given him any basis for the quoted statement. Request for Production #8 requested: "Any written accounts of the incident on third shift, August 4-5, 2004, produced by or for respondent."

- ii. We did have a break in one of the discharge pipes in the chrome plating tank #8 which was a diluted sulfuric acid content..." Memorandum to Guardian West employees dated 9/14(?)04, posted in response to an OSHA complaint, Request for Production of Documents, No. 12.
 - (1) The break was in the pipe used to fill tank 8 with concentrated sulfuric acid, not the discharge pipe. (Exhibit B, pars. 21 - 26, Exhibit F attached to Respondent's Motion for Summary Judgment.)
 - (2) The account of the incident given by Tony Rice at the same time as the statement of Denny Corbett stated that the release came from the line used to fill Tank 8 with concentrated sulfuric acid. (Statement of Anthony Rice, dated September 14, 2005, Request for Production of Documents, No. 8.),
- iii. "We do not have any chemicals that would produce hydrogen sulfide gas." Memorandum to Guardian West employees dated 9/14(?)04, posted in response to an OSHA complaint, Request for Production of Documents, No. 12.
 - (1) Sulfuric acid was present at the facility. It is capable of generating hydrogen sulfide on contact with sulfide.
 - (2) Respondent has failed to disclose any document that would have given Denny Corbett any basis for the quoted statement. Request for Production #8 requested: "Any written accounts of the incident on third shift, August 4-5, 2004, produced by or for respondent."
- iv. "Guardian West did not have a hazardous waste spill or a release of hydrogen sulfide gas on August 05,2004." Fax to Peggy A. Zweber, OSHA, 9/14/05, Request for Production of Documents, No. 12.
 - (1) Denny Corbett was present during the incident and expressed no disagreement at that time with Complainant's

opinion that there was a release of hydrogen sulfide.

- (2) Respondent has failed to disclose in discovery any report or other document that was available to Denny Corbett at the time he made the above statement that would have given him any basis for the quoted statement. Request for Production #8 requested: "Any written accounts of the incident on third shift, August 4-5, 2004, produced by or for respondent."
- v. "We did have a pipe break in our plating department, which contained a diluted acid content." Fax to Peggy A. Zweber, OSHA, 9/14/05, Request for Production of Documents, No. 12.
 - (1) The break was in the pipe used to fill tank 8 with concentrated sulfuric acid, not the discharge pipe. (Exhibit B, pars. 21 - 26, Exhibit F attached to Respondent's Motion for Summary Judgment.)
 - (2) The account of the incident given by Tony Rice at the same time as the statement of Denny Corbett stated that the release came from the line used to fill Tank 8 with concentrated sulfuric acid. (Statement of Anthony Rice, dated September 14, 2005, Request for Production of Documents, No. 8.),
- vi. "And is a very disgruntled employee, we have received threat letters that if we did not hire this employee back he would make it difficult for Guardian West by calling local and federal agencies." Fax to Peggy A. Zweber, OSHA, 9/14/05, Request for Production of Documents, No. 12.
 - (1) Complainant has written no "threat letters".
 - (2) Complainant has never asked to be hired back at Guardian West.
 - (3) Although Complainant in fact contacted local and federal agencies, he never threatened to do so.
 - (4) Complainant has requested copies of the "threat letters" in discovery, but Respondent has refused to provide same. (Request for Production of Documents #18)
- vii. "We have not had any spills or releases." Fax to Peggy A. Zweber,

OSHA, 9/14/05, Request for Production of Documents, No. 12.

- (1) Denny Corbett was present during the incident and expressed no disagreement at that time with Complainant's opinion that there was a release of hydrogen sulfide.
 - (a) Statements made during the incident were in the ordinary course of business.
 - (2) Respondent has failed to disclose in discovery any report or other document that was available to Denny Corbett at the time he made the above statement that would have given him any basis for the quoted statement. Request for Production #8 requested: "Any written accounts of the incident on third shift, August 4-5, 2004, produced by or for respondent."
- 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.
 - a. Respondent is suggesting a system in which the Complainant would be required to list each of the many permit exemptions in the complaint, and allege that the conditions of each exemption have not been met.
 - b. Complainant is suggesting a system in which the Respondent lists only the permit exemptions it intends to rely on, and alleges compliance with the conditions for each.
 - c. Except in the situation in which the Respondent alleges compliance with all of the possible exemptions, Complainant's suggested system would require a smaller volume of paper. If the Respondent claimed all of the exemptions, the volume of paper would be equal.
- 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.

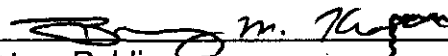
16. Based on Complainant's experience in this facility, it would be impossible as a practical matter to prepare multiple contingency plans for different portions of a facility, and to provide meaningful training to factory employees, while drawing the convoluted distinctions counsel is attempting to 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.
 - a. At the time the RCRA rules were adopted, Complainant was the Board employee assigned to the task of developing the Illinois version of these rules. Complainant has extensive personal knowledge as to the history and background of these rules, including knowledge gained from attending professional conferences concerning hazardous waste management during the early years of the RCRA program.
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.
 - a. Jackie Christianson, environmental manager for Guardian West, made the above statement in response to questions during training of employees in the ordinary course of business.
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.


- a. At the time the RCRA rules were adopted, Complainant was the Board employee assigned to the task of developing the Illinois version of these rules. Complainant has extensive personal knowledge as to the history and background of these rules, including knowledge gained from attending professional conferences concerning hazardous waste management during the early years of the RCRA program.
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.
- a. Complainant has a BS in chemistry. Toxicity of the common hazardous materials are routinely taught as part of this program.
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.
- a. Complainant was employed as a lab tech at the Guardian West facility. During the course of that employment, he was responsible for maintenance of the chemicals in Tank 20, in which the high-sulfide layer is produced. He received employee training as to how the controlled corrosion system worked, and had direct contact with the vendors of the chemicals used in this system. He was the employee primarily responsible for trouble-shooting chemical processes on the plating line, including problems with the high-sulfur layer produced by Tank 20.
 - b. During the incident, Complainant observed hydrogen sulfide evolution following an acid spill into waste on the plating floor. This event was exactly analogous to hydrogen cyanide evolution following an acid spill under a cyanide plating line.
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.

- a. Complainant was present and observed that hydrogen sulfide was produced when sulfuric acid was spilled onto the plating room floor.
 - b. Because the sulfuric acid used at Guardian West did not exhibit the odor of hydrogen sulfide, it could not have contained sulfide, which would have been rapidly emitted from a highly acidic solvent.
 - c. Because the sulfide did not come from the sulfuric acid, it must have come from sulfide on the floor.
 - d. Complainant has a degree in chemistry, and is well acquainted with the high school level chemistry involved in the above statements. Complainant has prepared hydrogen sulfide in the laboratory, and is qualified to recognize its odor.
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.
- a. Respondent has repeatedly offered statements that hydrogen sulfide evolution was impossible from this facility, including the statement of Mike Trueblood, Response to Request for Production of Documents #12, par. 13.
 - b. Complainant has examined the contingency plan for the facility, and has found no specific references to hydrogen sulfide in that plan. The plan does not include employee training on recognizing hydrogen sulfide and safely dealing with it. The plan does not require the ready availability of meters to measure hydrogen sulfide levels, or the availability of respirators for use with hydrogen sulfide.
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 27th day of July, 2005.


Notary Public



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

Morton F. Dorothy
104 W. University, SW Suite
Urbana IL 61801
217/384-1010

Morton F. Dorothy
804 East Main
Urbana IL 61802-2822

217/384-1010
MDor4248@AOL.COM

November 8, 2004

Bill Keller
Champaign County ESDA
1905 East Main
Urbana IL 61802

Dear Mr. Keller:

This letter to confirm our telephone conversation of this day in which you stated that, as of this day, ESDA has not received a modified contingency plan from Guardian West since the hydrogen sulfide release incident of August 5, 2004.

I have filed a formal complaint with the State to enforce these rules. Based on your statement to me, I will amend my complaint to allege a continuing violation through November 8, 2004.

Sincerely,

Morton F. Dorothy

EXHIBIT A

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Manufacturer: Industrial Scientific Corp.

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Ju

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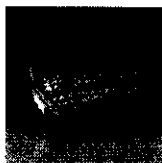
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Manufacturer Item #: 6002
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Manufacturer Item #: 6004
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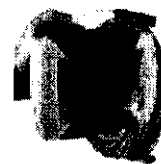


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