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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

MORTON F. DOROTHY,)
)
 Complainant,)
)
 vs.)
)
 FLEX-N-GATE CORPORATION,)
 an Illinois Corporation,)
)
 Respondent.)

No. PCB 05-049

**COMPLAINANT'S MOTION FOR LEAVE TO REPLY INSTANTER AND REPLY TO
RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO COUNT I**

Complainant Morton F. Dorothy makes the following reply to Respondent Flex-N-Gate Corporation's Response to Complainant's Motion for Partial Summary Judgment as to Count I:

1. On June 20, 2005, Complainant served a Motion for Partial Summary Judgment as to Count I.
2. On July 8, 2005, Respondent filed a Response to Complainant's Motion for Partial Summary Judgment as to Count I.
3. On July 20, 2005, Complainant filed a separate Motion for Leave to Substitute Affidavits addressing some of the issues raised in the Response to Complainant's Motion for Partial Summary Judgment as to Count I.
4. On July 18, 2005, Complainant filed a separate Motion for Leave to Reply. In order to allow these motions to proceed more rapidly to a Board decision, Complainant is withdrawing the Motion for Leave to Reply, and substituting this Motion for Leave to Reply and Reply Instanter.
5. Complainant moves for leave to reply pursuant to Section 101.500(c) in order to prevent material prejudice.
 - a. 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 for Partial Summary Judgment as to Count I.

- b. Respondent has mischaracterized Complainant's arguments, and has advanced arguments that Complainant could not have anticipated.
6. Although Respondent has admitted in response to discovery that it is engaging in hazardous waste operations without a RCRA permit, it has not claimed in the Answer that those operations are exempt from the RCRA permit requirement. Based on the relevant facts in the record in this case, the operation is therefore illegal, independent of the incident alleged in the Complaint.
 - a. Complainant believes that, in light of the admissions made in discovery and other documents, he has established a prima facie violation of Section 21(f) of the Act and that, because Respondent has not alleged that it qualifies for any exemption from the permit requirement, any facts supporting such exemption would be irrelevant.
 - b. A decision on the legal issues raised by this motion would control the question of whether Respondent has to plead and prove compliance with the "wastewater treatment unit" exemption which it is arguing in connection with the incident, and which is discussed in connection with Respondent's Motions for Summary Judgment.
 - c. Deciding these issues in connection with Complainant's motion has the advantage that it decides a controlling legal issue without the Board having to deal with the complex factual issues of the main part of this case.
7. Respondent suggests that, if the Board ruled in favor of Complainant, that the Board should allow Respondent to file an amended answer. (Response, p. 20)
 - a. Complainant believes that a clear and correct ruling on the issues raised by this motion would clarify the real issues in this case, and would be important for public policy. Complainant therefore has no objection to Respondent's suggestion.
8. In summary, Respondent is arguing that the burden of pleading non-compliance with the permit exemptions is on the Complainant, along with the burden of proving non-compliance with the permit exemptions.
 - a. As detailed in Complainant's Response to Motion for Summary Judgment, placing the burden of pleading on the Complainant would encourage the confusion that has surrounded this case, in which Respondent has danced around the issue of whether it claims exemption pursuant to Section 722.134(a). (Complainant's Response to Motion for Summary Judgment, p. 6)

from 'introduc[ing] evidence showing compliance with" the permit exemptions. (Response p. 6).

- a. Respondent appears to have lost sight of the purpose of the complaint and answer: to frame the issues in the case in order to establish what is relevant and material in discovery and at hearing. Respondent has not alleged in the Answer that it qualifies for one or more exemption. Evidence directed to showing this would therefore be irrelevant.

12. Respondent is also claiming that Complainant is arguing that the Answer must contain "reasons" for denials. (Response, p. 7) This also mischaracterizes Complainant's position.

- a. Respondent appears to be arguing that the Complaint alleges that Respondent is required to have a permit, and Respondent has denied that allegation. On the contrary, the allegation is that Respondent does not have a permit. Respondent's denial therefore amounts to a false allegation that it does have a permit. The text of the allegations are as follow:

- i. Par. 1 of Count I of the Complaint alleges:

Respondent is operating a hazardous waste treatment and storage facility without a RCRA permit or interim status, in violation of Section 21(f) of the Act and 35 Ill. Adm. Code 703.121(a).

- ii. Respondent's Answer is as follows:

Flex-N-Gate denies the allegations of paragraph one of Count I of Complainant's Complaint.

- b. For the Answer to be truthful, Respondent should have admitted that it did not have a permit.

- i. If Respondent wished to raise the issue as to whether it was required to have a permit, Respondent was, at a minimum, required to add language such as:

Respondent affirmatively alleges that it is exempt from the permit requirement pursuant to Section 722.134, and as a "wastewater treatment unit" pursuant to ...

- ii. This would be an affirmative allegation of fact, as opposed to "reason for the denial".

- c. Respondent's general denial did not notify Complainant that Respondent was claiming to be exempt from the permit requirement. A fair reading of the denial was that Respondent was either claiming to have a RCRA permit, or was denying that it was managing hazardous waste.
13. Respondent cites the Board's test of whether a response to a complaint constitutes an "affirmative defense" as being whether the response "attacks the legal right to bring an action, as opposed to attacking the truth of the claim". (People v. Skokie Valley Asphalt Co.)
- a. Complainant agrees with the main thrust of Skokie Valley, that an affirmative defense is a defense that does not "attack the truth of the claim."
 - i. For example, in this case, Respondent should admit the obvious, that it is managing hazardous waste without a RCRA permit, and affirmatively allege compliance with a permit exemption.
 - b. Complainant believes that the language in Skokie Valley, restricting affirmative defenses to those which "attack the legal right to bring an action," is overly restrictive. Although some affirmative defenses, such as legal capacity, certainly go to the right to bring the action, most affirmative defenses are "so what" defenses that allow respondent to bring in additional facts that obviate the effect of the laws the complainant relies on.
 - i. For example, payment can be raised as an affirmative defense (735 ILCS 5/2-613(d)). Plaintiff alleges a debt. Defendant admits the validity of the debt, but alleges affirmatively that he has paid the debt. Plaintiff has the burden of proving the debt, defendant has the burden of showing payment. If the defendant is successful, he gets a judgment that the debt is paid, as opposed to a dismissal on the grounds that plaintiff "did not have the legal right to bring the action".
14. Respondent appears to now be denying that it is conducting hazardous waste treatment and storage operations without a RCRA permit. (Response, p. 12).
- a. Respondent has admitted that it "does not have a 'RCRA permit or interim status". Response to Request to Admit, Response 6)
 - b. Respondent has admitted "that it treats some of its hazardous waste 'on-site in tanks'".(Response to Request to Admit, Response 6).
 - c. Respondent has sworn that "Following dewatering, sludge is placed 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" (Par. 9, Affidavit of James Dodson that was attached to Exhibit C to Respondent's Motion for Summary Judgment.)

- i. Respondent has also argued that "accumulation" is somehow different from "storage". This distinction is not drawn in the definition of "storage":

"Storage" means the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere. (35 Ill. Adm. Code 720.110)

- d. 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."

15. Complainant believes that whether he has the burden of pleading and proving non-compliance with permit exemptions depends in part on how the permit requirement and exemptions are worded. (Response p. 12).

- a. In this case, Section 21(f) of the Act prohibits hazardous waste management operations without a RCRA permit with no reference to any exemptions. To make out a prima facie case, all Complainant has to do is show hazardous waste management operations and no RCRA permit. The burden then shifts to Respondent to allege and prove that some other provision obviates the effect of Section 21(f) of the Act.
- b. If, on the other hand, Section 21(f) were worded to prohibit hazardous waste management operations "without a RCRA permit or exemption from a RCRA permit", Complainant would arguably have to allege and prove non-exemption.

16. Respondent is also claiming that the discovery procedures obviate the need for Respondent to declare in the Answer the exemptions on which it intends to rely, and cites Complainant's success in extracting the correct information in discovery as proof that the traditional complaint/answer format is not needed. (Response, p. 18)

- a. This argument overlooks the fact that Complainant had to anticipate that Respondent was going to claim exemptions, and had to ask questions that were technically irrelevant, and therefore subject to objection, to discover which exemptions Respondent was claiming. (Complainant's Interrogatories, Question #3, Supplemental Interrogatories, Questions

1(a) - (j))

- b. Respondent has objected in discovery to the number of questions and to the need for supplemental discovery. (Respondent's Motion for Protective Order) The course suggested by Respondent would always require at least two rounds of discovery, the first for complainant to figure out which exemption respondent relies on, and the second to ask questions relevant to that exemption.
17. Respondent also argues that "The fact that a party manages hazardous waste cannot alone be a sufficient basis for a cause of action against that party..." (Response, p. 19) However, Section 21(f) of the Act is worded to say exactly that. "No person shall: ... (f) Conduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation: (1) without a RCRA permit for the site issued by the Agency under subsection (d) of Section 39 of this Act..."
18. Respondent also argues that, if the burden of proving compliance with the RCRA permit exemptions is on the Respondent, "the Complainant has a valid cause of action against every facility in the State of Illinois that generates hazardous waste". (Response, p. 19)
- a. The RCRA permit requirement attaches only to persons who manage hazardous waste, not to generators of hazardous waste. Complainant assumes Respondent meant "manages" hazardous waste.
 - b. Many facilities that manage hazardous waste have RCRA permits. These facilities have obtained permits from the Agency in a proceeding in which they had the burden of demonstrating compliance with the Act and rules.
 - c. Those facilities that are operating under a claim of exemption from the RCRA permit requirement have not gone through a permit-like procedure in which the Agency has certified that their claimed exemption is valid.
 - i. As discussed above, Respondent is arguing that each of these facilities managing hazardous waste without a permit is entitled to a presumption that their claim of exemption is valid, without them even having to identify the exemption under which they claim to operate.
 - d. Respondent is correct that, under Complainant's argument, some person could file enforcement actions against each of these facilities, forcing them to identify their claim of exemption by way of answer, and requiring them to prove that they qualify for the exemption.

- i. Under Respondent's argument, however, that person could do the same thing by merely alleging that each facility did not qualify for any exemption.
- ii. Respondent is actually arguing for a procedure that would be more cumbersome for the facilities who would be unable to raise exemption in defense until after discovery.

WHEREFORE complainant prays that the Board grant Complainant's Motion for Partial Summary Judgment as to Count I, or, in the alternative, order Respondent to file an amended answer naming the permit exemptions it intends to rely on, and affirmatively alleging facts to show that it qualifies for each exemption.

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