ILLINOIS POLLUTION CONTROL BOARD
October 20, 2005

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 05-49
	)	(Citizens Enforcement – Air, Land)
FLEX-N-GATE CORPORATION, an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by N. J. Melas):

On September 9, 2004, Mr. Morton F. Dorothy filed a six-count citizens' enforcement complaint against Flex-N-Gate Corporation (Flex-N-Gate). *See* 415 ILCS 5/31(d) (2004); 35 Ill. Adm. Code 103.204. The complaint concerns Flex-N-Gate's facility, known as Guardian West, located at 601 Guardian Drive, Urbana, Champaign County where Flex-N-Gate produces bumpers for vehicles. The complaint alleges that as a result of an alleged spill of sulfuric acid inside the facility on August 5, 2004, Flex-N-Gate violated the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq*. (2004)) and various provisions of the Board's hazardous waste rules.

This case involves the Board's Resources Conservation and Recovery Act (RCRA) regulations that apply to generators of hazardous wastes and facilities that treat, store and dispose of hazardous wastes (TSDFs). A single facility may contain several types or combinations of operational units.

On May 27, 2005, Flex-N-Gate filed a motion for summary judgment as to all counts of the complaint (Mot. for SJ), and in the alternative, a motion for partial summary judgment on counts II through VI of the complaint (Mot. for SJ II-VI). On June 23, 2005, Mr. Dorothy filed a motion for partial summary judgment as to count I of the complaint, accompanied by an affidavit (Mot. for SJ II-VI). The parties' responses and various other pleadings are discussed below.

Today the Board addresses the motions for summary judgment filed by both parties. The Board also addresses several outstanding motions filed in this proceeding, and the remaining discovery motions will be handled by the hearing officer. For the reasons set forth below, the Board grants summary judgment in favor of Flex-N-Gate as to counts II through VI of the complaint and denies both parties' motions for summary judgment on count I, directing the hearing officer to proceed expeditiously to hearing on that count.

PROCEDURAL HISTORY

On March 7, 2005, Flex-N-Gate answered the complaint. On April 15, 2005, Mr. Dorothy moved to strike Flex-N-Gate's answer.

Pursuant to a discovery schedule set by hearing officer order, Mr. Dorothy's discovery requests were to be mailed by March 17, 2005. Flex-N-Gate's responses were to be mailed by April 14, 2005. On April 28, 2005, Mr. Dorothy filed a motion to compel a response to interrogatories, to compel Flex-N-Gate to admit the truth of certain facts, and to compel the production of documents. Mot. to Compel. On May 27, 2005, Flex-N-Gate moved for summary judgment in its favor and also moved the Board for a protective order concerning Mr. Dorothy's discovery requests. Mr. Dorothy moved for partial summary judgment in his favor on June 6, 2005.

On June 7, 2005, Mr. Dorothy moved the Board for more time to respond to the motion for summary judgment, to withdraw his motion to strike Flex-N-Gate's answer, for sanctions against Flex-N-Gate for evasive pleadings (MD Mot. for Sanctions), and to reconsider the June 7, 2005 hearing officer order. Also on June 7, 2005, Mr. Dorothy responded to Flex-N-Gate's motion for a protective order. On June 27, 2005, Mr. Dorothy responded to Flex-N-Gate's motions for summary judgment (Resp. to Mot. for SJ and SJ II-VI), accompanied by an affidavit in support of his responses.

On July 18, 2005, Flex-N-Gate moved to strike unsupported statements included in affidavits filed by Mr. Dorothy in support of his motion for summary judgment (FNG Mot. to Strike) and respond to Mr. Dorothy's motion for partial summary judgment (Resp. to Mot. for SJ II-VIJ). Also on July 18, 2005, Flex-N-Gate requested leave to file a reply in support of its motion for summary judgment. Mr. Dorothy responded to the motions on July 20, 2005.

On July 22, 2005, Mr. Dorothy moved the Board to "strike false statements made in motions, and to admonish Respondent Flex-N-Gate Corporation to stick to the facts." MD Mot. to Strike. Also on July 22, 2005, Mr. Dorothy moved to substitute affidavits.

On July 28, 2005, Mr. Dorothy moved again to substitute affidavits, submitted a second amended affidavit (Dorothy Aff. 3), and responded to Flex-N-Gate's motion to strike and admonish (MD Resp.). Also on July 28, 2005, Flex-N-Gate responded to Mr. Dorothy's motion to substitute affidavits, responded to Mr. Dorothy's motion for leave to reply, and responded to Mr. Dorothy's motion to strike and for admonishment (FNG Resp.).

On August 11, 2005, Flex-N-Gate moved for leave to reply in support of its motion to strike Mr. Dorothy's affidavits and unsupported statements. On the same day, Flex-N-Gate also responded to Mr. Dorothy's second motion to substitute affidavits.

PRELIMINARY MATTERS

On June 7, 2005, Mr. Dorothy moved to withdraw his motion to strike. The Board grants Mr. Dorothy's motion to withdraw, making no findings regarding Mr. Dorothy's allegations.

The parties have both requested leave to file replies in support of their respective motions for summary judgment. The Board's procedural rules provide "[t]he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent

material prejudice." 35 Ill. Adm. Code 101.500(e). The Board grants both parties leave to reply to the respective motions for summary judgment, accepts their replies, and considers the replies in deciding the pending motions for summary judgment.

The Board also grants both Flex-N-Gate's (May 16 and June 3, 2005) and both Mr. Dorothy's (July 22 and 28, 2005) motions to substitute affidavits. The remaining motions, such as Mr. Dorothy's motions to compel and for reconsideration of the June 7, 2005 hearing officer order, and Flex-N-Gate's motion for a protective order, are denied as moot.

BACKGROUND

Flex-N-Gate owns and operates a vehicle bumper manufacturing facility located at 601 Guardian Drive in Urbana, Illinois (Guardian West facility). Comp. at 3-4. The manufacturing process includes a nickel and chromium electroplating line in which steel bumpers are cleaned, electroplated with several layers of nickel, electroplated with chromium, and rinsed. Comp. at 4. The cleaning, plating and rinsing operations take place in open-top tanks holding up to 10,000 gallons of various chemicals in water solution. Comp. at 5.

Wastewater at the Guardian West facility is treated. Comp. at 13. Following treatment, liquids are discharged to a publicly owned treatment works (POTW) operated by the cities of Champaign and Urbana, Illinois. Comp. at 8; Dodson Aff. at 2. Following the dewatering process of treatment, the remaining solids are placed into a satellite accumulation container in preparation for placement into 90-day accumulation containers and subsequently shipped off-site for recycling. Dodson Aff. at 2.

The wastewater treatment process at the Guardian West facility also produces sludge. Dodson Aff. at 4, 9, 18. The sludge is located in wastewater treatment equipment. Flex-N-Gate removes the sludge from the equipment and accumulates the sludge in containers prior to the transportation of the sludge off-site for recycling. *Id*. at 9. The Guardian West facility produces 10 other streams of RCRA hazardous waste. Ans. to Comp. Interrogs., No. 3.

On August 5, 2004, the pipe from bulk storage to Tank No. 8 separated at the fitting located above the valve in the vertical portion of the pipe that is outside the tank. Rice Aff. at 4. Flex-N-Gate claims that the separation occurred due to having used the wrong adhesive to join the pipe to the fitting. *Id*. The separation allowed a small quantity of sulfuric acid to be released to the plating room floor. *Id*.

At one time a "day tank," as identified by Mr. Dorothy in the complaint, was located in the plating room. Flex-N-Gate stopped using the day tank as described, however, and replumbed the system in December 2001, more than two and a half years before the separation occurred on August 5, 2004. Rice Aff. at 4. According to Flex-N-Gate, on August 5, 2004, the day tank did not contain any substance of any kind, and the separation of the pipe did not "empt[y] the day tank." Rice Aff. at 5. Further, Mr. Denny Corbett, the Corporate Safety Director for Flex-N-Gate Corporation, states that no fire or explosion occurred at the facility on August 5, 2004.

Ms. Jackie Christiansen is the environmental manager at the Guardian West facility. Christiansen Aff. at 1. Ms. Christiansen states that Flex-N-Gate has an Emergency Response and Contingency Plan for the facility, portions of which serve as both the facility's contingency plan under Subpart D to 35 Ill. Adm. Code Part 725 and the facility's emergency response plan under the Occupational Safety and Health Act (29 C.F.R. §1910.120(p)(8)(i)). Christiansen Aff. at 1-2. Ms. Christiansen states that the plan does not focus on hazardous waste, but "hazardous material spills," and addresses any type of hazardous substance at the facility. Christiansen Aff. at 2.

THE COMPLAINT

Mr. Dorothy's September 9, 2004 complaint concerns an alleged August 5, 2004 spill of sulfuric acid at Flex-N-Gate's Guardian West bumper manufacturing facility. Mr. Dorothy alleges that Flex-N-Gate violated Section 21(f) of the Environmental Protection Act (Act) and Section 703.121, and Sections 725.151(b), 725.156(j), 725.154(b), 725.154(c) of the Board's Interim Status Standards For Owners And Operators Of Hazardous Waste Treatment, Storage, And Disposal Facilities. Mr. Dorothy alleges that Flex-N-Gate violated these provisions by: (1) operating the facility without a Resources Conservation Recovery Act (RCRA) permit or interim status; (2) failing to carry out a contingency plan; (3) failing to notify the Illinois Environmental Protection Agency (Agency); (4) failing to amend the contingency plan after the alleged spill; (5) failing to amend the contingency plan in response to changed circumstances; and (6) failing to amend the contingency plan as required by the plan.

APPLICABLE STATUTES AND BOARD REGULATIONS

Section 21(f) of the Act states in pertinent part:

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, or in violation of any condition imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; or
> >
> > (2) in violation of any regulations or standards adopted by the Board under this Act;
> >
> > * * *

Section 703.121(a) of the Board's procedural rules regarding RCRA permits states:

> a) No person may conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal operation as follows:
>
> 1) Without a RCRA permit for the HWM (hazardous waste management) facility; or
>
> 2) In violation of any condition imposed by a RCRA permit.

Section 703.123 of the Board's RCRA permitting regulations provides specific exclusions from the program:

> The following persons are among those that are not required to obtain a RCRA permit:
>
> a) Generators that accumulate hazardous waste on-site for less than the time periods provided in 35 Ill. Adm. Code 722.134;
>
> * * *
>
> e) An owner or operator of an elementary neutralization unit or wastewater treatment unit, as defined in 35 Ill. Adm. Code 720.110;

Section 720.110 defines "wastewater treatment unit" as "a device of which the following is true:"

> It is part of a wastewater treatment facility that has an NPDES permit pursuant to 35 Ill. Adm. Code 309 or a pretreatment permit or authorization to discharge pursuant to 35 Ill. Adm. Code 310; and
>
> It receives and treats or stores an influent wastewater that is a hazardous waste as defined in 35 Ill. Adm. Code 721.103, or generates and accumulates a wastewater treatment sludge that is a hazardous waste as defined in 35 Ill. Adm. Code 721.103, or treats or stores a wastewater treatment sludge that is a hazardous waste as defined in 35 Ill. Adm. Code 721.103; and
>
> It meets the definition of tank or tank system in this Section.

Section 720.110 defines facility as:

> All contiguous land and structures, other appurtenances, and improvements on the land used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).

* * *

Section 720.110 defines “tank” or “tank system” as:

> “Tank” means a stationary device, designed to contain an accumulation of hazardous waste that is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) that provide structural support.
>
> “Tank system” means a hazardous waste storage or treatment tank and its associated ancillary equipment and containment system.

Subsection 725.151(b) regarding the purpose and implementation of the contingency plan provides:

> b) The provisions of the plan must be carried out immediately whenever there is a fire, explosion, or release of hazardous waste or hazardous waste constituents that could threaten human health or the environment. 35 Ill. Adm. Code 725.151(b).

Subsections 725.154(b) and (c) discuss what occurrences trigger the amendment of a contingency plan:

> b) The plan fails in an emergency;
>
> c) The facility changes--in its design, construction, operation, maintenance, or other circumstances--in a way that materially increases the potential for fires, explosions, or releases of hazardous waste or hazardous waste constituents or changes the response necessary in an emergency. 35 Ill. Adm. Code 725.154(b), (c).

Subsection 725.156(j) concerning actions taken in response to an emergency states:

> j) The owner or operator must note in the operating record the time, date, and details of any incident that requires implementing the contingency plan. Within 15 days after the incident, it must submit a written report on the incident to the Agency. The report must include the following information:
>
> 1) The name, address, and telephone number of the owner or operator;
>
> 2) The name, address, and telephone number of the facility;
>
> 3) The date, time, and type of incident (e.g., fire, explosion, etc.);
>
> 4) The name and quantity of materials involved;
>
> 5) The extent of injuries, if any;

6) An assessment of actual or potential hazards to human health or the environment, where this is applicable; and

7) The estimated quantity and disposition of recovered material that resulted from the incident. 35 Ill. Adm. Code 725.156(j).

MR. DOROTHY'S MOTION FOR SANCTIONS

On June 7, 2005, Mr. Dorothy moved the Board to sanction Flex-N-Gate for evasive pleadings. Mr. Dorothy claims that an allegation contained in Flex-N-Gate's March 7, 2005 answer was not adequately specific, and therefore, evasive. In support, Mr. Dorothy cites to Section 2-610 of the Illinois Civil Practice Act. MD Mot. for Sanctions at 2; citing 735 ILCS 5/2-610. In terms of relief, Mr. Dorothy requests the hearing officer "to determine reasonable compensation for the complainant for expenses and unnecessary work as a result of respondent's evasive pleading."

While the Board does not have a procedural rule specifically applicable to evasive pleading, procedural rules exist governing when the Board may order sanctions. Section 101.800 states the Board may order sanctions where "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." 35 Ill. Adm. Code 101.800. The Board finds that Flex-N-Gate's answer was appropriately specific by simply denying the portion of Mr. Dorothy's complaint it found untrue. Flex-N-Gate maintains its original answer to the complaint. Finding that Flex-N-Gate did not unreasonably fail to comply with the Board's procedural rules, or with any Board or hearing officer order, the Board denies Mr. Dorothy's motion for sanctions.

FLEX-N-GATE'S MOTION TO STRIKE AFFIDAVITS AND FOR ADMONISHMENT

Flex-N-Gate's Arguments

Flex-N-Gate moves the Board to strike affidavits that Mr. Dorothy submitted in support of both his motion for partial summary judgment and his responses to Flex-N-Gate's motion for summary judgment, dated June 20 and 24, 2005, respectively. Flex-N-Gate further states that Mr. Dorothy's repeated violations of the Board's rules rise to sanctionable behavior under Section 101.800. However, rather than seeking sanctions against Mr. Dorothy, Flex-N-Gate asks only that the Board admonish Mr. Dorothy to comply with the Board's rules. FNG Mot. to Strike. at 30.

In the motion to strike, Flex-N-Gate lists the various statements within Mr. Dorothy's affidavits that it believes do not meet the legal standard for affidavits. Flex-N-Gate states that the Board only considers affidavits that meet the standards of Illinois Supreme Court Rule 191(a). FNG Mot. to Strike at 2; citing Johnson v. ADM-Demeter, Hoopeston Div., PCB 98-31, slip op. at 2 (Jan. 7 1999); People v. D'Angelo Enterprises, Inc., PCB 97-66 (Nov. 19, 1998).

More specifically, Flex-N-Gate states the Board has held that under Rule 191(a), affidavits submitted in support of a motion for summary judgment may not include opinions and conclusions. FNG Mot. to Strike at 3; citing Trepanier, *et al.* v. Speedway Wrecking Co., *et al.*, PCB 97-50, slip op. at 16-17 (Oct. 15, 1998). Further, Flex-N-Gate states that the Board has struck portions of an affidavit in the past that were not within the affiant's personal knowledge, and other portions of the affidavit that the Board found to be self-serving and conclusory. FNG Mot. to Strike at 3; citing Heiser v. OSFM, PCB 94-377, slip op. at 8-9 (Sept. 21, 1995); 2222 Elston LLC v. Purex Indus., Inc., *et al.*, PCB 03-55 slip op. at 17-19 (June 19, 2003); IEPA v. Rhodes, PCB 71-53, slip op. at 1 (Jan. 24, 1972).

Flex-N-Gate states that once the offending portions of Mr. Dorothy's affidavits are stricken, Mr. Dorothy's motion for partial summary judgment and response to the respondent's motion for summary judgment are no longer adequately supported. Flex-N-Gate states that Section 101.504 of the Board's procedural rules states that "[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." FNG Mot. to Strike at 16; citing 35 Ill. Adm. Code 101.504.

With respect to the request to admonish, Flex-N-Gate states that despite the Board's standards for asserting facts in Section 101.504, Mr. Dorothy has repeatedly attempted to base his filings on alleged facts with no support. FNG Mot. to Strike at 21. In addition to unsupported allegations, Flex-N-Gate claims that Mr. Dorothy's affidavits contain prejudicial allegations and conclusions not based on personal knowledge. *Id*. at 22, 26. Flex-N-Gate reminds the Board that Mr. Dorothy is an attorney, licensed to practice law in Illinois. Thus, the Board should not hesitate to require Mr. Dorothy to comply with the Board's rules. FNG Mot. to Strike at 28-29. Flex-N-Gate flatly states it has been prejudiced by Mr. Dorothy's unsupported allegations of intentional misconduct and other repeated violations of the Board's rules. Nonetheless, Flex-N-Gate does not request sanctions, but rather asks that the Board admonish Mr. Dorothy and demand his future compliance with Board rules and procedures. FNG Mot. to Strike at 30.

Mr. Dorothy's Response

In his July 28, 2005 response, Mr. Dorothy states that Rule 191(a) does not on its face apply to citizen's enforcement actions under the Act. MD Resp. at 2. Mr. Dorothy states he "does not feel that it is necessary to attach copies of documents that are already on file in this case," and he "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." MD Resp. at 4. Accordingly, Mr. Dorothy requests the Board to allow him to dispense with any requirement to attach to affidavits copies of documents already part of the Board's record.

Mr. Dorothy further states that although he 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.'" Mr. Dorothy also states he could make similar

objections to the respondent's affidavits, but that he "does not wish to further vex the Board." MD Resp. at 4.

Board Analysis

The Board is persuaded by Flex-N-Gate's argument and strikes all portions of Mr. Dorothy's affidavits that are opinions or draw legal conclusions, and all allegations of which he has not shown to have personal knowledge. The Board also denies Mr. Dorothy's request for leave from attaching supporting documentation to affidavits he files in this proceeding.

Concerning motions and responses in general, the Board's procedural rules state: "[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 [735 ILCS 5/1-109]." 35 Ill. Adm. Code 101.504. Further, it is well-established that the Board looks to Illinois Supreme Court Rule 191(a) with respect to filing affidavits in support of a motion for summary judgment. ADM-Demeter, PCB 98-31, slip op. at 2; D'Angelo Enterprise, Inc., PCB 97-66, slip op. at 28. The rule clearly states that certified or sworn copies of all documents the affiant relies on must be attached to an affidavit in support of (or in opposition to) a motion for summary judgment. The rule provides no exceptions and the Board has adopted none to date.

Mr. Dorothy's affidavits do not attach "thereto sworn or certified copies of all papers upon which the affiant relies." As the complainant in this proceeding, Mr. Dorothy has the burden to provide facts in support of the arguments he presents against the respondent. Further, despite the fact that Mr. Dorothy has twice requested leave to substitute affidavits submitted in support of his responses to the pending motions for partial summary judgment, he has not removed opinions from the affidavit such as: "By filing these hooligan motions, respondent is seeking to delay this action, recklessly endangering lives for no economic purpose whatsoever." *See* Dorothy Aff. 3.

The Board agrees with Flex-N-Gate that opinions and legal conclusions may not be included in an affidavit submitted in support of a motion for summary judgment and must be stricken. Trepanier, PCB 97-50, slip op. at 16-17. Mr. Dorothy sets forth several legal conclusions that are improper in an affidavit. For example, paragraph 3 of Mr. Dorothy's affidavit in support of his motion for summary judgment as to count I states: "[t]here is no genuine issue of fact as to Count I." Although a movant may *believe* that no genuine issue of material fact exists and the issues are ripe for summary judgment, that conclusion is for the Board to reach and cannot be made without supporting facts and evidence.

With respect to Mr. Dorothy's claim that he does not have the resources to attach the necessary copies, the Board notes that electronic filing is now available to the public through internet access. The Board grants Flex-N-Gate's motion to strike and admonish and strikes all opinions and legal conclusions included in Mr. Dorothy's affidavit. The Board notes that this finding also applies to the second substituted affidavit filed by Mr. Dorothy and accepted by the Board in support of his motion for partial summary judgment.

MR. DOROTHY'S MOTION TO STRIKE AND FOR ADMONISHMENT

Mr. Dorothy's Arguments

In his own July 22, 2005 motion to strike and for admonishment, Mr. Dorothy moves the Board to strike as unsupported two statements made on page 12 of Flex-N-Gate's response to Mr. Dorothy's motion for partial summary judgment as unsupported. The statements Mr. Dorothy seeks to have stricken are the following:

> Regarding the factual assertion that "respondent has not admitted, that respondent is conducting hazardous waste treatment and storage operations without a RCRA permit," . . . the Board must strike this assertion because it is unsupported.
>
> The same is true of Complainant's statement in paragraph 21 of his Response to Motion for Summary Judgment that "respondent has admitted that it is conducting hazardous waste treatment and storage operations without a RCRA permit."

Mr. Dorothy asserts he "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.'" Because he finds these positions incompatible, Mr. Dorothy moves the Board to strike the above statements from Flex-N-Gate's response to Mr. Dorothy's motion for summary judgment on count I of the complaint.

Flex-N-Gate's Response

In response, Flex-N-Gate states Mr. Dorothy's arguments are without merit because Mr. Dorothy argues under the assumption that Flex-N-Gate operates a TSDF. Instead, Flex-N-Gate states that it operates under Section 722 of the Board's waste disposal rules as a generator that accumulates hazardous waste prior to shipment off-site for treatment. Flex-N-Gate states that it does not operate under Sections 724 and 725 as a TSDF. For these reasons, Flex-N-Gate argues, Flex-N-Gate responded that it treats hazardous waste under the regulations applicable to generators, and therefore, does not need a RCRA permit.

According to Flex-N-Gate, Mr. Dorothy misunderstood Flex-N-Gate's response because the parties had "different understandings of the meaning of certain terms under RCRA." FNG Resp. at 5. Thus, Flex-N-Gate contends its statements are not inconsistent and there is no reason to strike any statements from Flex-N-Gate's filings or to admonish Flex-N-Gate in any way. Flex-N-Gate urges the Board to deny Mr. Dorothy's motion to strike and for admonishment.

Board Analysis

The Board denies Mr. Dorothy's motion to strike and admonish. The statements Mr. Dorothy urges the Board to strike are arguments, not allegations. Even more troubling is that those statements themselves are requests by Flex-N-Gate to strike allegations made by Mr. Dorothy as unsupported (referencing Flex-N-Gate's motion to strike). The Board above granted

Flex-N-Gate's motion to strike all allegations in Mr. Dorothy's affidavits that are unsupported opinions, or are based on Mr. Dorothy's legal conclusions. Further, the Board notes that while Flex-N-Gate supported its request to strike by citing to legal precedent for the principle that affidavits cannot contain legal conclusions, Mr. Dorothy simply states:

> 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."

The Board finds Mr. Dorothy's argument in support of his own motion to strike meritless. Regarding Mr. Dorothy's repeated failure to cite to sources for his allegations (for example, the failure to cite on page two of his motion to strike), the Board will not consider further improper pleadings. Mr. Dorothy's motion to strike and admonish is denied.

MOTIONS FOR SUMMARY JUDGMENT

Flex-N-Gate moves the Board to grant summary judgment in its favor as to all counts of the complaint. In the alternative, Flex-N-Gate moves the Board to grant partial summary judgment as to counts II through VI of the complaint. Throughout both motions, Flex-N-Gate asserts that the Board should grant judgment in its favor because Mr. Dorothy cannot prove all of the elements of his claims. In particular, Flex-N-Gate asserts that the Guardian West facility does not require a RCRA permit because it is a generator of hazardous waste, not a TSDF, as Mr. Dorothy alleges.

Mr. Dorothy filed a motion for summary judgment on count I of the complaint. Mr. Dorothy alleges generally that subsequent discovery conflicts with Flex-N-Gate's answer in which Flex-N-Gate denies that it operates its facility without a RCRA permit or interim status in violation of Section 21(f) of the Act and Section 703.121(a) of the Board's regulations. As discussed further below, the Board grants summary judgment in favor of Flex-N-Gate on counts II through VI, and denies both parties' motions for summary judgment regarding count I.

Summary Judgment Standard

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. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis which would arguably entitle [it] to a judgment." Sutter Sanitation, Inc. *et al*. v. IEPA, PCB 04-187 slip op. at 9 (Sept. 16, 2004); citing Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

A review of the pleadings and the record in this matter, demonstrates there are no issues of material fact and that it may grant summary judgment as a matter of law. In determining whether to grant summary judgment, the Board must look to the burden of proof in an enforcement action and the arguments presented by the parties.

Burden of Proof

Section 31(e) states the burden of proof applicable to enforcement proceedings before the Board:

> In hearings before the Board under this Title the burden shall be on the Agency or other complainant to show either that the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or rule or regulation of the Board or permit or term or condition thereof. 415 ILCS 5/31(e) (2004).

The Board may only find in the complainant's favor if he has proven each element of the claim by a preponderance of the evidence. People v. Chalmers, PCB 96-111, slip op. at 4 (Jan. 6, 2000). Processing and Books, Inc. v. PCB, 64 Ill. 2d 68, 75-76, 351 N.E.2d 865 (1976); Village of South Elgin v. Waste Management of Illinois, Inc., PCB 03-106 (Feb. 20, 2003); citing People v. Fosnock, PCB 41-1, slip op. at 19 (Sept. 15, 1994). A proposition is proved by a preponderance of the evidence when it is probably more true than not. Village of South Elgin, slip op. at 19; citing Nelson v. Kane County Forest Preserve, PCB 94-244 (July 18, 1996).

CROSS MOTIONS FOR SUMMARY JUDGMENT AS TO COUNT I

The Board first discusses both parties' arguments in support of summary judgment on count I of the complaint. Then the Board will discuss Flex-N-Gate's various arguments in support of summary judgment concerning counts II through VI.

Flex-N-Gate moves the Board for summary judgment on count I because, it claims, Mr. Dorothy has not met his burden of proof. Section 21(f) of the Act prohibits the operation of a hazardous waste TSDF without an Agency-issued permit. Section 703.121(a) of the Board's hazardous waste regulations also prohibits the operation of a TSDF without a RCRA permit. 35 Ill. Adm. Code 703.121(a). Flex-N-Gate contends that to prove the alleged violations, Mr. Dorothy had the burden to show that Flex-N-Gate was required to obtain a RCRA permit but did not. According to Flex-N-Gate, Mr. Dorothy has failed to meet that burden.

For the reasons set forth below, the Board denies both parties' motions for summary judgment on count I of the complaint and sends the parties to hearing on the violations alleged in that count. Before the Board discusses the parties' arguments and reasons for today's decision, the Board provides a brief background of the applicable RCRA hazardous waste regulations.

Background of RCRA Hazardous Waste Regulations

Pursuant to Section 6922 of the Federal Resource Conservation and Recovery Act, the United States Environmental Protection Agency (USEPA) requires hazardous waste generators to comply with handling, recordkeeping, storage, and monitoring requirements. 42 USC §6922. However, much more stringent regulations apply to treatment, storage, and disposal facilities, including the RCRA permitting process (42 USC §6925; 40 C.F.R. 270) and the responsibility to take corrective action for releases of hazardous substances and to ensure the safe closure of each facility. 42 USC §6924; 40 C.F.R. 264. The State of Illinois implemented portions of the federal RCRA. The Act was signed into law in 1976 and the regulations became effective in 1980. Illinois received Phase I interim authorization from the USEPA on May 17, 1982.

Provided persons that generate hazardous waste in Illinois comply with conditions, standards, and requirements established specifically for generators, they remain explicitly excluded from RCRA permitting requirements for TSD facilities. Factors a hazardous waste generator must consider in determining whether a RCRA permit is necessary include, among other things, the amount of hazardous waste generated per month, the length of time the hazardous waste is stored, and the specific type of hazardous waste produced. Under the provisions of Section 722.134, generators are afforded specific periods of accumulation time for the on-site storage or treatment of hazardous waste without being subject to RCRA permitting or interim status. 35 Ill. Adm. Code 722.134. A preamble to federal amendments to hazardous waste management standards discusses the relationship between treatment, storage, and disposal. Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Consolidated Permit Regulations, 46 F.R. 2806-08 (Jan. 12, 1981). In the preamble, the USEPA noted that treatment can occur at a permitted storage or disposal facility without affecting the facility's regulatory status.

Subsequently the USEPA has stated that it believes treatment activities also should not change the regulatory status of generators. Memorandum: Hazardous Waste Generated in Laboratories, Elizabeth Cotsworth, Director Office of Solid Waste (Aug. 16, 2002) (a memorandum directed to the RCRA senior policy advisors, USEPA regions I through X). The USEPA reasoned that treatment often renders waste less hazardous and easier to ship off-site for further treatment or disposal, and requiring generators to obtain a permit for any on-site treatment would very likely discourage such practices. *Id*.

The Board adopted RCRA regulations identical in substance to the federal RCRA regulations, making only those changes necessary to fit the Illinois regulatory scheme and in ways that did not impact the regulations applicable to generators of hazardous waste. Proposed Regulations for RCRA, R81-22 (Feb. 4, 1982). Therefore, the Board adopts the USEPA interpretation of the RCRA definitions of treatment and storage as applicable to generators in Illinois.

Depending on the quantity of hazardous waste generated, a generator may store hazardous wastes for a limited amount of time and not become a RCRA TSDF so long as the owner or operator meets certain conditions in handling the waste. 35 Ill. Adm. Code 722.134(a), (d), 721.105(g).

For instance, the generator must place its wastes in containers or tanks and comply with the related TSDF standards that apply to containers and/or tanks. The generator must clearly and

visibly mark each container for inspection with its respective date of accumulation, clearly mark each container "hazardous waste," and comply with certain limited TSDF standards. 35 Ill. Adm. Code 722.134. If at any time, the generator violates any of these conditions, it loses the exemption and becomes subject to regulation as a RCRA TSDF. People v. S.C. Industries, Inc., PCB 83-93 slip op. at 40-41 (June 30, 1988).

A generator may also be regulated under different rules at different times. For example, if a person generates less than 100 kilograms (kg) of hazardous waste during June, the waste would be subject to requirements for conditionally exempt small quantity generators. *See* 35 Ill. Adm. Code 721.105. However, if the same person generates between 100 kg to 1,000 kg of hazardous waste in July, the person is subject to the management requirements for small quantity generators that month. *See* 35 Ill. Adm. Code 722.134(d).

Therefore, under the Act and the Board's RCRA regulations, the determination as to whether a facility requires a RCRA permit depends on site-specific facts related to the facility's waste generation and handling. As discussed in more detail below, because the parties disagree on whether Flex-N-Gate met all of the necessary requirements, the Board finds a genuine issue of material fact exists.

Burden of Proof

Mr. Dorothy's Arguments

Mr. Dorothy contends it is the respondent's burden to show that the facility falls within an exclusion. Resp. to Mot. for SJ at 7-8. Mr. Dorothy further maintains that a RCRA permit is a "facility permit" and Flex-N-Gate has not shown that the entire facility is exempt from permit requirements, but rather argued only that one unit is exempt. Resp. to Mot. for SJ at 9. Mr. Dorothy asserts that if Section 21(f) of the Act contained an exemption within the RCRA permit requirement, the burden would be on the complainant to plead and prove non-compliance with the exemption. Resp. to Mot. for SJ at 5; citing 415 ILCS 5/21(f) (2004). Mr. Dorothy states the exemptions to RCRA permitting requirements are not located in the Act, but rather in Board regulations.

Flex-N-Gate's Arguments

According to Flex-N-Gate, to prevail on his claims, Mr. Dorothy must demonstrate that Flex-N-Gate: (1) does not fall into any of the exempt categories listed in Section 703.123; (2) operated a hazardous waste treatment, storage, or disposal operation (TSDF); and (3) operated that TSDF without an Agency-issued RCRA permit under Section 39(d) of the Act. Flex-N-Gate contends Mr. Dorothy cannot establish even the first element of this test because Flex-N-Gate manages its hazardous waste under exemptions set forth in Section 703.123. Mot. for SJ at 21; citing 35 Ill. Adm. Code 703.123.

Flex-N-Gate asserts that no RCRA permit is necessary at the Guardian West facility because it manages each of its hazardous wastestreams pursuant to one of the exemptions from the RCRA permit requirement contained in 35 Ill. Adm. Code 703.123. Mot. for SJ at 23.

Board Analysis

The Board finds some of Flex-N-Gate's argument persuasive. The Board agrees that the complainant has the burden of proving all essential elements of the type of violation charged. Incinerator, Inc. v. PCB, 59 Ill.2d 290, 319 N.E.2d 794 (1974). In this case, Mr. Dorothy must prove by a preponderance of the evidence that Flex-N-Gate owned or operated a TSDF, and that the facility required a RCRA permit, but did not have one. The complainant has this burden because there would be no violation of 21(f) unless the facility was a TSDF and required a permit, but did not have one. The same reasoning applies to an alleged violation of Section 703.121(a).

However, the Board does not find that stating a claim under Section 21(f) of the Act would require the complainant to show that Flex-N-Gate does not fall into any of the exemptions. The Board agrees with Mr. Dorothy that to state a claim, the complainant need not prove a negative (*i.e*. that no exemption to RCRA permit requirements apply).

Whether Flex-N-Gate Operates a TSDF in Violation of Section 21(f) and Section 703.121(a)

Mr. Dorothy's Arguments

In count I of the complaint, Mr. Dorothy asserts that Flex-N-Gate is conducting a hazardous waste treatment, storage, or disposal operation without a RCRA permit and without interim status in violation of the Act and Board regulations. Mr. Dorothy further states that "[b]ecause of the age of the waste under the catwalk, chemical or biological reactions *may* have converted part of the sulfate waste to the sulfide form, allowing the formation of hydrogen sulfide gas on contact with acid." Comp. at 4 (emphasis added).

In responding to Flex-N-Gate's motion for summary judgment, Mr. Dorothy also states that "sludge and contaminated debris," which are hazardous wastes, accumulate under tanks at the Guardian West facility and "this practice is itself storage of hazardous waste, and that respondent is in violation of the accumulation time limitations of Section 722.134 for this reason alone." Resp. to Mot. for SJ at 3.

Flex-N-Gate's Arguments

Flex-N-Gate agrees that Agency-issued RCRA permits are required, in certain situations, by the Board's RCRA regulations. Mot. for SJ at 20. For example, states Flex-N-Gate, Section 703.123 of the Board's regulations "exempts specific categories of persons from the requirement of obtaining a permit under the Resource Conservation and recovery Act." *Id*.; citing Standards for Universal Waste Management (35 Ill. Adm. Code Parts 703, 720, 721, 725, 728 and 733), R05-8 (Feb. 3, 2005). Included in the categories of exempted facilities are: (1) "[g]enerators that accumulate hazardous waste on-site for less than the time periods provided in 35 Ill. Adm. Code 722.134;" and (2) "[a]n owner or operator of an elementary neutralization unit or wastewater treatment unit, as defined in 35 Ill. Adm. Code 720.110." Mot. for SJ, at 20-21; citing 35 Ill. Adm. Code 703.123.

Flex-N-Gate considers all of the hazardous wastestreams at the Guardian West facility to be exempt under one of the two exemptions listed above, and therefore, does not require a RCRA for the management of any of these wastestreams. Mot. for SJ, at 23. Flex-N-Gate considers Guardian West a generator of hazardous waste, operating under Section 722 of the Board's hazardous waste rules, rather than a TSDF, that would instead operate under Sections 724 and 725 of the hazardous waste rules. *Id*. at 21; Resp. to MD Mot. to Strike at 3.

Wastewater Treatment Unit Exemption. The first exemption Flex-N-Gate relies on is the wastewater treatment unit (WWTU) exemption under Subsection (e) of Section 703.123. Flex-N-Gate asserts that the treatment system at the Guardian West facility meets the definition of a "wastewater treatment unit" as defined in Section 720.110 of the Board's regulations. Mot. for SJ at 11-13. The hazardous waste sludge, according to Flex-N-Gate, remains exempt as long as it is contained in the WWTU. Mot. for SJ at 24.

According to Flex-N-Gate, the treatment system discharges wastewater into a publicly owned treatment works (POTW) (Mot. for S.J. at 13). Flex-N-Gate has provided a copy of the wastewater discharge permit that allows it to discharge into the Urbana & Champaign Sanitary District. Mot. for SJ, Exh. I. Flex-N-Gate states the system also treats a hazardous waste influent (Mot. for S.J. at 13-15), and that the coated floor and sump at the facility are included in the definitions of "tank" or "tank system." Mot. for S.J. at 16-18. Therefore, argues Flex-N-Gate, the facility's treatment system is a wastewater treatment unit exempt from RCRA permitting requirements under section 703.123(e). Mot. for SJ at 20-21.

Generator Accumulation Exemption. The second exemption on which Flex-N-Gate relies is the generator accumulation exemption under subsection (a) of Section 703.123. Mot. for SJ at 26. Flex-N-Gate states it handles the sludge, once it is removed from the WWTU, and other hazardous wastestreams at the Guardian West facility though on-site accumulation in containers prior to shipment off-site for treatment, storage, or disposal. Mot. for SJ at 26; citing Dodson Aff. at 9, 12. Flex-N-Gate attached an example of the manifests for shipping the hazardous wastewater treatment sludge off-site. Mot. for SJ, Exh. E. Flex-N-Gate states that this is authorized by Section 722.134(a), (c) of the Board's regulations applicable to generators of hazardous waste, and Section 703.123 of the Board's RCRA permit regulations. Mot. for SJ at 27.

Board Analysis

As discussed above, the burden is not Mr. Dorothy's to show that no exemptions apply to Flex-N-Gate, rather it is Flex-N-Gate's burden to show that it operations are exempt from RCRA permitting. Flex-N-Gate admits that it generates hazardous waste through the electroplating manufacturing process at its site, yet argues that because the facility is a generator, no RCRA permit is necessary. The Board agrees with complainant Mr. Dorothy that Flex-N-Gate bears the burden to prove it is exempt from the requirement to obtain a RCRA permit or interim status.

In seeking to meet that burden, Flex-N-Gate states that one of its hazardous wastestreams is treated by equipment that meets the definition of a WWTU and that this wastestream is exempt

while it remains within the WWTU. Flex-N-Gate states the remaining hazardous wastestreams are exempt under the accumulation exemption because the wastes are accumulated in containers before being transported off-site for treatment, storage, or disposal.

Mr. Dorothy claims that Flex-N-Gate does not comply with the all of the regulations applicable to generators. For example, Mr. Dorothy disputes that the equipment Flex-N-Gate uses to treat one of its wastestreams meets the definition of a WWTU. Mr. Dorothy also alleges that Flex-N-Gate accumulated hazardous waste for longer than the time limits allowed in Section 722.134.

The Board also disagrees with Mr. Dorothy's contention that an exemption can only apply on a facility-wide basis. Mr. Dorothy has provided no support for his interpretation of the Board's regulations. Section 703.123 regarding the Board's specific exclusions from the RCRA permit program explicitly provides that the exemptions apply to "persons" who generate in accordance with the accumulation exemption, or operate, for example, a waste water treatment unit. The only kind of facility that Section 703.123 explicitly exempts are TSDFs that handle specifically exempt solid wastes, or that are conditionally exempt small generators of hazardous waste (those facilities that generate no more than 100 kilograms of hazardous waste per month). 35 Ill. Adm. Code 703.123. The Board finds that exemptions can apply to individual waste streams.

Mr. Dorothy has not demonstrated that the generation of hazardous waste at Guardian West subjects the facility to RCRA permitting, falls outside of the exemptions provided by Board rules, or otherwise violates Section 21(f) of the Act or Section 703.121(a) of the Board's rules.

Flex-N-Gate disputes some of the facts Mr. Dorothy alleges in the complaint. Because the parties disagree on material facts, the Board finds summary judgment on count I is not appropriate at this time. The Board directs the parties to hearing on the alleged violations contained in count I.

Whether Flex-N-Gate Waived the Exemption Argument

Mr. Dorothy's Arguments

In his response to Flex-N-Gate's motion for summary judgment, Mr. Dorothy maintains that Flex-N-Gate's exemption argument is an affirmative defense. Because Flex-N-Gate did not raise the exemption argument as an affirmative defense in its answer, Mr. Dorothy claims Flex-N-Gate has waived that argument. Resp. to Mot. for SJ at 7-8.

In his own motion for summary judgment, Mr. Dorothy claims that a conflict exists between Flex-N-Gate's answer to the complaint and its responses to discovery requests. Mr. Dorothy again argues that because Flex-N-Gate did not affirmatively allege any exemption to the RCRA permit requirement in its answer to the complaint, Flex-N-Gate may not now introduce evidence showing compliance with those provisions as a defense to count I. Mot. for PSJ at 2.

For these reasons, Mr. Dorothy urges the Board to grant summary judgment on count I in his favor.

Flex-N-Gate's Arguments

First Flex-N-Gate states that it need not provide reasons for denying allegations in the answer. Rather, Flex-N-Gate argues, in a Board enforcement action, a respondent's answer may admit, deny or assert insufficient knowledge to form a belief of a material allegation in the complaint. Resp. to Mot. for PSJ. at 7; citing People v. Champion Env. Serv., Inc., PCB 05-199 (June 2, 2005); 735 Ill. Adm .Code 103.204(d). Further, Flex-N-Gate states that Section 2-610 of the Illinois Code of Civil Procedures provides that "denials must not be evasive, but must fairly answer the substance of the allegation denied." 735 ILCS 5/2-610. However, states Flex-N-Gate, neither rule requires the respondent to provide reasons why it denies an allegation in a complaint.

Flex-N-Gate also cites Supreme Court Rule 136 in support of its argument. Ill. SCt. Rule 136. According to Flex-N-Gate, the comments to Rule 136 regarding "denials" provide model pleadings, and none of the models demonstrate that denials must include reasons for the denial. Resp. to Mot. for PSJ at 8. Further, contends Flex-N-Gate, Mr. Dorothy cited no authority for his conclusion that if a respondent fails to state the reason for its denial, it is prevented from raising an argument later. Resp. to Mot. for PSJ at 9.

Flex-N-Gate disputes Mr. Dorothy's contention that the applicability of exemptions to the RCRA permitting requirement is an affirmative defense at all. Flex-N-Gate states it does not have the burden to prove that it does not need to obtain a RCRA permit, rather the burden is Mr. Dorothy's to prove that Flex-N-Gate is required to obtain a RCRA permit. Resp. to Mot. for PSJ at 9. Flex-N-Gate explains that the complaint states that Flex-N-Gate violated Section 21(f) of the Act and Section 703.121(a) of the Board's regulations and that Mr. Dorothy has the burden to prove these violations. In light of the alleged violations, Flex-N-Gate contends Mr. Dorothy must show that Flex-N-Gate was required to have a RCRA permit, but did not.

Further, Flex-N-Gate states that the Board's test as to whether a response to a complaint constitutes an affirmative defense is whether the response attacks the *legal* right to bring an action as opposed to attacking the *truth* of a claim. Resp. to Mot. for PSJ at 11; citing People v. Skokie Valley Asphalt Co., Inc., *et al*., PCB 96-98 slip op. at 8 (Sept. 2, 2004). Flex-N-Gate asserts the exemptions to the RCRA permit requirement do not attack the legal right to bring an action, but rather attack the truth of Mr. Dorothy's claim that Flex-N-Gate is required to have a RCRA permit.

Flex-N-Gate also disagrees that the exemption issue should be considered an affirmative defense as a matter of efficiency and to save paper needed to brief the issues in this proceeding. Flex-N-Gate contends that "efficiency" is the incorrect standard and, again, the correct standard is whether or not an argument attacks the legal right to bring an action, as opposed to attacking the truth of the claim. Resp. to Mot. for PSJ at 14; citing Skokie Valley Asphalt, PCB 96-98, slip op. at 8.

Next, Flex-N-Gate states its method of record-keeping does not impact whether Flex-N-Gate's answer constitutes an affirmative defense. Nor does the issue of whether a response constitutes an affirmative defense hinge on how simple it would be for a complainant to draft his complaint. Resp. to Mot. for PSJ at 14.

In summary, Flex-N-Gate states that it has provided Mr. Dorothy with information identifying each hazardous wastestream the facility produces, the RCRA classification for each wastestream, and the RCRA permit requirement exemption on which Flex-N-Gate relies for each wastestream. Resp. to Mot. for PSJ at 18. Finally, Flex-N-Gate states Mr. Dorothy is advancing an untenable legal position by demanding that Flex-N-Gate prove that the facility falls within an exclusion. Flex-N-Gate argues that this would create absurd results because then complainants would have a valid cause of action against every facility in the state of Illinois that generates hazardous waste, with each of those facilities having to prove that the RCRA permit does not apply. Rather, the burden, states Flex-N-Gate is on the complainant to establish that a RCRA permit is required. Resp. to Mot. for PSJ at 19.

Flex-N-Gate argues that in the event the Board determines that the exemptions Flex-N-Gate argues apply are, in fact, affirmative defenses, then the Board's decision would be precedential. Flex-N-Gate states that never before has the Board granted summary judgment because affirmative defenses were mispled. According to Flex-N-Gate, the proper course would not be to find that Flex-N-Gate waived its right to assert affirmative defenses, but to grant Flex-N-Gate leave to amend its answer. Resp. to Mot. for PSJ at 20; citing People v. Petco Petroleum Corp., PCB 05-66, slip op. at 7-9 (May 19, 2005).

Board Analysis

The Board finds that a respondent need not provide reasons for denying an allegation in its answer. Mr. Dorothy contends, in his unsuccessful motion for sanctions, that Flex-N-Gate's answer was evasive because it did not provide the reasons for denying certain allegations. Accordingly, claims Mr. Dorothy, because Flex-N-Gate failed to state the reason for its denial, it is prevented from doing so later.

The Board's procedural rules regarding denials state: "A denial must fairly address the substance of the requested admission." 35 Ill. Adm. Code 101.618(f). The Board finds nothing evasive about Flex-N-Gate's answer. Flex-N-Gate clearly denied the truth of Mr. Dorothy's allegation that Flex-N-Gate operated a TSDF without a RCRA permit or interim status. Further Mr. Dorothy has provided no support for his argument regarding what constitutes an evasive answer. The Board finds Flex-N-Gate's answer properly pled and that it has not waived the argument claiming exemption from RCRA permitting.

The Board agrees that Flex-N-Gate's exemption argument is an affirmative defense to Mr. Dorothy's alleged violation of Section 21(f) of the Act and Section 703.121 of the Board's regulations. In its answer, Flex-N-Gate states that even if all of the allegations in Mr. Dorothy's complaint are true, the Guardian West facility is exempt under the Board's regulations applicable to generators. Further, the Board has found in the past that a claimed exemption under Board regulations to a statutory requirement is a valid affirmative defense. *See eg.* People v. QC

Finishers, Inc., PCB 01-07 (June 19, 2003). Consequently, the Board agrees with Mr. Dorothy that Flex-N-Gate's claim of being exempt from RCRA permitting is an affirmative defense.

However, the Board does not find that Flex-N-Gate waived its right to assert an affirmative defense because it failed to so plead in its answer. The Board has discretion to grant a respondent leave to amend pleadings. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 329, 91 S.Ct. 795, 802 (1971); citing Foman v. Davis, 371 U.E. 178, 182 (1962). In this case, there is no Board or other Illinois precedent discussing whether a generator's claim of exemption is an affirmative defense to a cause of action under Section 21(f) of the Act and Section 703.121 of the Board's regulations. Accordingly, the Board allows Flex-N-Gate to amend its answer.

Failure to Properly Plead

In response to Mr. Dorothy's motion for partial summary judgment, Flex-N-Gate contends Mr. Dorothy's argument must fail because he has not cited any rule or caselaw in support of his argument or even alleged what legal principle would support his position. Resp. to Mot. for PSJ at 6.

Flex-N-Gate also states that as discussed in its motion to strike and admonish, Mr. Dorothy's "affidavits" are deficient and must be stricken. As a result, Flex-N-Gate argues that without an affidavit, Mr. Dorothy has provided no other factual support, and for this reason, the Board must deny his motion for partial summary judgment. Resp. to Mot. for PSJ at 20.

Mr. Dorothy moved to reply in support of his motion for summary judgment on July 20, 2005. However, Mr. Dorothy has not subsequently filed a reply. In his motion for leave, Mr. Dorothy states that "complainant does not feel that it is necessary to attach copies of documents that are already on file in this case."

As discussed above, the Board granted Flex-N-Gate's motion to strike and admonish. As a result, Mr. Dorothy's affidavits no longer include his opinions or legal conclusions. While making no finding on this issue, the Board notes that Mr. Dorothy's failure to properly plead impacts heavily on the Board's decision regarding burden of proof.

Conclusion on Count I of the Complaint

Because genuine issues of material fact remain, the Board denies both parties' requests for summary judgment on count I. The Board finds that Flex-N-Gate bears the burden to prove it falls within one or more exemptions from RCRA permitting requirements. The Board further finds that Flex-N-Gate did not waive the exemption argument and may amend its answer to count I to reflect this affirmative defense. Finally, the Board finds that Mr. Dorothy sufficiently stated a claim under Section 21(f) of the Act and Section 703.121 of the Board's regulations.

MOTION FOR SUMMARY JUDGMENT ON COUNTS II THROUGH VI

As discussed in further detail below, the Board disagrees with Flex-N-Gate's first argument set forth in its motion for summary judgment on all counts that Mr. Dorothy must prove that the alleged incident did not involve a WWTU. Rather, the Board finds that Mr. Dorothy has not demonstrated that the uncontained hydrogen sulfide gas constitutes a "hazardous waste" or "hazardous waste constituent."

The Board explicitly sets forth the regulations applicable to hazardous waste generators, including those that require a contingency plan for the facility:

> The Board's RCRA regulations require that all generators which store hazardous wastes comply with certain of the interim T/S/D facility standards. This is true of all generators, whether they merely store the wastes one day past the date of generation, or they store the wastes for extended periods and thereby become a T/S/D facility for the purposes of regulation. People v. S.C. Industries, Inc., PCB 83-93, slip op. at 26-27 (Jun. 30, 1988); citing 35 Ill. Adm. Code 722.134, 725.101(c)(7) (1984).
>
> The relevant, applicable portions of the interim T/S/D facility standards of Part 725 of the Board rules include . . . the contingency plan . . . requirements of Subpart D, Sections 725.150 through 725.156. These are very explicit and somewhat detailed requirements. S.C. Industries, Inc., PCB 83-93, slip op. at 27.

The current Section 722.134 also requires generators to comply with Subparts I, AA, BB, and CC (35 Ill. Adm. Code 722.134(a)(1)(A)) as well as Subparts C and D (35 Ill. Adm. Code 722.134(a)(4)) of Part 725. Mr. Dorothy alleges violations of Sections 725.151(b), 725.156(j), and 725.154(b) and (c), all under Subpart D of Part 725.

Mr. Dorothy Failed to Present Facts that Would Arguably Entitle Him to Judgment

Flex-N-Gate's Arguments

In moving for summary judgment on counts II through VI, Flex-N-Gate again contends that Mr. Dorothy has not proved the essential elements of the alleged violations.

Flex-N-Gate contends that the facility has a contingency plan, and that it is part of the facility's "Emergency Response and Contingency Plan." Mot. for SJ at 36. Flex-N-Gate states it prepared the plan because it manages some of the hazardous waste it generates pursuant to the accumulation provision of Section 722.134(a), which requires Guardian West to have this plan. *Id*.; citing 35 Ill. Adm. Code 722.134(a)(4).

Flex-N-Gate states, however, that Section 725.101(c) exempts the owner or operator of a WWTU from the requirements of Part 725. Mot. for SJ at 36; citing 35 Ill. Adm. Code 725.101(c). It follows then, argues Flex-N-Gate, that to prove a violation of any of the contingency plan regulations that complainant alleges in counts II though VI, Mr. Dorothy must first prove that the incident does not involve a WWTU. Mot. for SJ at 37.

According to Flex-N-Gate, Mr. Dorothy alleges that the release occurred from the floor of the plating room, which Flex-N-Gate states is part of the facility's WWTU. Flex-N-Gate contends, therefore, that because none of Part 725 applies to the facility's WWTU, Flex-N-Gate is entitled to summary judgment on counts II through VI of the complaint. Mot. for SJ at 38.

Flex-N-Gate disputes that the release of sulfuric acid could have or did, in fact, create hydrogen sulfide. Mot. for SJ at 8. Despite this factual dispute, however, Flex-N-Gate states the Board can still grant summary judgment in its favor. This is because, Flex-N-Gate argues, whether the release occurred is not a material fact necessary for the Board to consider in granting summary judgment on counts II through VI.

Flex-N-Gate states that RCRA does not regulate uncontained gases. Therefore, contends Flex-N-Gate, although the parties dispute whether the alleged August 5, 2004 release of sulfuric acid even created hydrogen sulfide gas, that issue is not material to the essential elements of the cause of action. Mot. for SJ at 45. Thus, states Flex-N-Gate, the Board can grant summary judgment even if the parties disagree on this issue. *Id*.

Flex-N-Gate states that excluding WWTUs from RCRA contingency plan requirements does not leave them unregulated. According to Flex-N-Gate, the USEPA has found that the "protection of human health and the environment is ensured by regulation under the CWA rather than RCRA." Mot. for SJ at 43. Flex-N-Gate concludes that because the incident involved a WWTU and Mr. Dorothy did not prove otherwise, the Board should grant summary judgment on counts II through VI in its favor.

Mr. Dorothy's Arguments

In response, Mr. Dorothy states that Flex-N-Gate's motions for summary judgment are not based on any facts, but rather a repetition of legal arguments presented in its motion to dismiss. Mr. Dorothy again contends that Flex-N-Gate's exemption argument is an affirmative defense and, therefore, not properly pled.

Mr. Dorothy continues that generator accumulator exemption of Section 722.134(a)(4) requires a contingency plan for the *facility*. Mr. Dorothy interprets the term "facility" to include units that may be exempt under other provisions. Mr. Dorothy notes that the WWTU exemption does not mention any contingency plan because the "obvious interpretation is that the operator of a Section 722.134 facility has to prepare a contingency plan for the entire facility." Resp. to Mot. for SJ at 9.

Board Analysis

The Board disagrees with Flex-N-Gate's interpretation that the WWTU at the Guardian West facility is exempt from Part 725 contingency plan requirements. Flex-N-Gate relies on the exemption in Section 725.101(c)(10) for owners or operators of WWTUs. The Board notes that that exemption is found in Subpart A of Part 725. Flex-N-Gate claims it operates under Section 722.134 as a generator of hazardous waste. That section sets forth specific parts of Part 725 with which generators must comply to qualify for the exemption, including the contingency plan

requirements of Subpart D. The exemption does not mention either Section 725.101 specifically, or Subpart A of Part 725, generally.

The Board also notes that in the letter Flex-N-Gate attaches as Exhibit O to its motion for summary judgment, the Agency is interpreting the WWTU exemption *from RCRA permitting requirements*, rather than the requirements applicable to hazardous waste *generators*, as that exemption relates to a facility NPDES permit. Large quantity generators do not need a RCRA permit if they meet very specific requirements. Those requirements include having a contingency plan for the facility. This interpretation makes sense in light of the Agency's stated goal to avoid overregulation of such units be requiring both a NPDES permit and a RCRA permit for the same unit. Applying the contingency plan requirements as required by the generator accumulation exemption would not subject Flex-N-Gate's WWTU to overregulation because it is still be covered by only the NPDES permit.

The Board disagrees with Flex-N-Gate with its interpretation of the Board's Part 725 regulations, but ultimately finds that Mr. Dorothy has not demonstrated that the alleged August 5, 2004 release of sulfuric acid triggered any contingency plan at the Guardian West Facility.

MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS II THROUGH VI

In his response, Mr. Dorothy states that after reviewing Flex-N-Gate's arguments, "complainant is forced to agree that the release of hydrogen sulfide, or hydrogen cyanide, does not amount to the release of a 'hazardous waste constituent' as that term is used in the regulations." Resp. to Mot. for SJ II-VI, par. 28. Therefore, the Board discusses only the parties' arguments regarding whether uncontained hydrogen sulfide constitutes a hazardous waste.

Whether Uncontained Hydrogen Sulfide Gas is a Hazardous Waste

Flex-N-Gate's Arguments

The Board's rules define a hazardous waste as a solid waste, as defined in Section 721.102, if certain things are true. 35 Ill. Adm. Code 721.103(a). First, a solid waste is defined as "any discarded material that is not excluded by Section 721.104(a) or that is not excluded pursuant to 35 Ill. Adm. Code 720.130 and 720.131." 35 Ill. Adm. Code 721.102(a)(1). Flex-N-Gate states that the United States District court for the Southern District of Ohio held in an unpublished opinion that the term solid waste under federal RCRA regulations does not include uncontained gases. Helter v. AK Steel Corp., 1997 U.S. Dist. LEXIS 9852 (S.D. Oh. 1997). Flex-N-Gate quotes the court's holding:

> in order to be considered a solid waste for RCRA purposes, the gaseous material must be both discarded and contained, [and therefore,] the plain language of 42 U.S.C. §9603(27) excludes the leaked COG, in its gaseous form, from the definition of "solid waste" and, thus, from RCRA's coverage. Mot. for SJ II-VI at 6; citing Helter, 1997 U.S. Dist. LEXIS 9852 slip op. at 30.

Flex-N-Gate states that the federal regulations themselves dictate that uncontained gases are not "solid wastes" under RCRA:

> All materials are either: (1) Garbage[,] refuse, or sludge; (2) solid, liquid, semi-solid or contained gaseous material; or (3) something else. No materials in the third category are solid waste. Mot. for SJ II-VI at 7; citing 40 C.F.R. 260, App. I.

Flex-N-Gate concludes that under existing caselaw and the federal RCRA standards, uncontained gas "must fall into the category of 'something else' and the regulations clearly state that 'no materials in the [something else] category are solid waste.'" Mot. for SJ II-VI at 7; citing Gallagher v. T.V. Spano Bldg. Corp., 805 F. Supp. 1120, 1129 n.7 (D.Del. 1992). Flex-N-Gate notes that the Appendix I to the federal RCRA regulations has been adopted into the Board's RCRA regulations at Appendix A to Part 720. 35 Ill. Adm. Code 720.App. A.

Flex-N-Gate continues that the USEPA has interpreted RCRA regulations as limited to contained or condensed gases. Hazardous Waste Management System: Identification and Listing of Hazardous Waste CERCLA Hazardous Substance Designation; Reportable Quantity Adjustment, 54 FR 50968, at 50973 (Dec. 11, 1989). Flex-N-Gate states that in interpreting RCRA process vent regulations, the USEPA clarified that "noncontainerized gases emitted from hazardous wastes are not themselves hazardous wastes because the RCRA statute implicitly excludes them." Mot. for SJ II-VI at 14; citing Hazardous Waste TSDF – Technical Guidance Document for RCRA Air Emission Standards for Process Vents and Equipment Leaks, EPA-450/3-89-021, at p.2-3 (July 1990) (attached as Exhibit C).

Further proof that uncontained gases are not regulated as a "solid waste," asserts Flex-N-Gate, is the Act's definition of "waste" as:

> Any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material . . .. Mot. for SJ II-VI at 8; citing 415 ILCS 5/3.535.

Flex-N-Gate concludes that because uncontained gases are not "solid wastes," they cannot be "hazardous wastes" under Section 721.133(f) or otherwise. Mot. for SJ II-VI at 11. If uncontained gases are not hazardous wastes then the alleged release of hydrogen sulfide, assuming it did occur, did not trigger the applicability of the facility's contingency plan under Part 725. Accordingly, Flex-N-Gate moves the Board to grant summary judgment regarding counts II though VI in its favor.

Mr. Dorothy's Arguments

In his response to Flex-N-Gate's motion for partial summary judgment and in his second substituted affidavit, Mr. Dorothy makes many references to statements made in the course of discovery. However, much of the discovery Mr. Dorothy references has not been filed with the Board. Since it is not part of the Board's record, the Board cannot consider it in this analysis.

Mr. Dorothy states he is not trying to impose RCRA regulations on the escaping gas. Rather, Mr. Dorothy argues that the accidental release of the gas, from a material that was already a hazardous waste, was a proper trigger for implementation of the contingency plan. Resp. to Mot for SJ II-VI, at par. 30.

Mr. Dorothy states he "was present during the incident and directly observed the production of hydrogen sulfide gas." In his second substituted affidavit, Mr. Dorothy states "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." Dorothy Aff. 3, at 6. According to Mr. Dorothy, he 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." *Id*. Mr. Dorothy states he has a B.S. in chemistry and "is well acquainted with the high school level chemistry involved in the above statements." *Id*. at 15.

Mr. Dorothy argues that because Helter is a federal district court case, the Board is not bound by the precedent it sets. Resp. to Mot for SJ II-VI, at par. 30(b). Mr. Dorothy again contends that Flex-N-Gate's exemption argument is an affirmative defense and, therefore, not properly pled. Resp. to Mot. for SJ II-VI at par. 9, 10.

Board Analysis of Counts II Through VI

The Board finds that uncontained gases are not solid wastes, and therefore, do not fit the definition of "hazardous waste" as that term is defined by the Act and Board regulations.

The Board finds that Mr. Dorothy has not pled with certainty that hydrogen sulfide gas was in fact created at the Guardian West facility on August 5, 2004. For example, Mr. Dorothy supports his motions with his own affidavits, and in his second amended affidavit, Mr. Dorothy states that "the sulfide that was the source of the release *may* have been produced by chemical or biological reactions in the sludge and debris," and "[b]ecause the sulfide did not come from the sulfuric acid, it *must have come* from sulfide on the floor." Dorothy Aff. 3, at par. 8. Although it is apparent to the Board that Mr. Dorothy's allegations are not well-pled, the Board will consider this motion as if they were.

Even assuming the release of sulfuric acid on August 5, 2004, created hydrogen sulfide gas, Mr. Dorothy's allegations in support of counts II through VI do not set forth the essential elements of his claims. As noted above, the Board disagrees that Mr. Dorothy had the burden to prove that the alleged release "did not involve a WWTU" at the Guardian West facility. Nonetheless, to have a cause of action under the alleged violations of Part 725, Subpart D of the Board's rules, Mr. Dorothy had to present a factual basis for the essential elements of his claims. One of the essential elements is that there was a release of a hazardous waste or hazardous waste constituent. Section 725.151(b) provides:

> The provisions of the plan must be carried out immediately whenever there is a fire, explosion, or release of hazardous waste or hazardous waste constituents that could threaten human health or the environment. 35 Ill. Adm. Code 725.151(b).

The Board has never before addressed the issue of whether an uncontained gas could fall under the definition of a hazardous waste. As discussed above, the Board adopts the federal interpretation of RCRA regulations that were adopted as "identical in substance" by the Board. The Board finds Flex-N-Gate's argument that uncontained gases are not included within the Board's definition of hazardous waste persuasive.

The Board finds support for this conclusion explicitly set forth in 40 C.F.R. 260.App. I, adopted by the Board at Section 720. App. A. Appendix I, entitled "Overview of Subtitle C Regulations," explains that the appendix is to help people to determine what regulations, if any, apply. In defining "solid waste," Appendix I states:

> All materials are either: (1) Garbage refuse, or sludge; (2) solid, liquid, semi-solid or contained gaseous material; or (3) something else. No materials in the third category are solid waste. 40 C.F.R. 260, App. I.

Mr. Dorothy asserts that the triggering event was the release of hydrogen sulfide gas. The Board finds that clearly, uncontained gas does not fit into either of the first two categories of materials. The Board notes that while not binding, other court decisions support today's findings. *See e.g.* Helter, 1997 U.S. Dist. LEXIS 9852; Gallagher, 805 F. Supp. 1120.

For these reasons, the Board finds Mr. Dorothy has not demonstrated there was any release of hazardous waste or hazardous waste constituents that would have triggered implementation of the Part 725, Subpart D requirements, and that Mr. Dorothy has no cause of action under the alleged violations of Part 725, Subpart D regulations. The Board's finding on this issue makes discussion of the parties' remaining arguments unnecessary. Accordingly, the Board grants summary judgment in favor of Flex-N-Gate on counts II through VI.

CONCLUSION

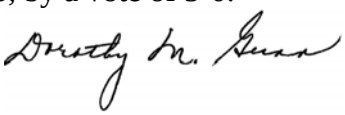
The Board grants summary judgment in favor of Flex-N-Gate on counts II through VI of the complaint. The Board denies both parties' motions for summary judgment on count I of the complaint. The Board also grants Flex-N-Gate's motion to strike and admonish, and denies Mr. Dorothy's motion to strike and admonish. The Board directs the hearing officer to resolve the remaining outstanding motions relating to discovery and to proceed expeditiously to hearing on count I of the complaint.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2004); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois

Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 20, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board