

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD NOV 14 2005  
CHAMPAIGN COUNTY, ILLINOIS

STATE OF ILLINOIS  
Pollution Control Board

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

No. PCB 05-049

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that, on the 10 day of November, 2005, I served the listed documents, by first class mail, upon the listed persons:

**MOTION FOR RECONSIDERATION**

Thomas G. Safley  
Hodge Dwyer Zeman  
3150 Roland Avenue  
Post Office Box 5776  
Springfield, IL 62705-5776

Carol Webb  
Hearing Officer, IPCB  
1021 North Grand Avenue East  
Post Office Box 19274  
Springfield, IL 62794-9274

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 W. Randolph  
Suite 11-500  
Chicago, Illinois 60601

Morton F. Dorothy  
Morton F. Dorothy, Complainant

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

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**MOTION FOR RECONSIDERATION**

Complainant Morton F. Dorothy moves that the Board reconsider its Order of October 20, 2005, received on October 28, 2005, and as reason states as follows:

**STATUS OF REPLIES**

1. The Board Order contains conflicting statements as to the status of replies. On page 3 of the Order, the Board "accepts their replies, and considers the replies in deciding the pending motions." On page 20, however, the Board states that, although the Complainant moved to reply, he "has not subsequently filed a reply".
  - a. Although Respondent filed a motion for leave to reply, Complainant has not been served a copy of such reply, if one was filed.
  - b. Complainant did file a reply instanter on September 7, 2005

**THE ACT AND PROCEDURAL RULES DO NOT ALLOW DISMISSAL OF A CITIZEN COMPLAINT PRIOR TO HEARING**

2. Section 31(d) of the Environmental Protection Act provides as follows:

Any person may file with the Board a complaint against any person allegedly violating the Act or any rule or regulation thereunder or any permit or term or condition thereof. When the Board receives a citizen's complaint, unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing. [415 ILCS 5/31(d)]
3. Procedural Rule 103.212(b) provides as follows:

Motions made by respondents alleging that a citizen's complaint is duplicitous or frivolous must be filed no later than 30 days following the date of service of the complaint upon the respondent. (35 Ill. Adm. Code 103.212(b))

4. More than 30 days elapsed between the filing of the Complaint and the filing of Respondent's Motion for Partial Summary Judgment as to Counts II-VI.
5. The Act and Procedural Rules do not allow dismissal of a citizen's complaint prior to hearing, except pursuant to a "duplicitous or frivolous motion" filed within 30 days after the filing of the Complaint.

#### THE RELEASED GAS WAS DERIVED FROM HAZARDOUS WASTE

6. The Board has cited Helter v. AK Steel Corp., 1997 U.S. Dist LEXIS 9852(S.D. Oh. 1997) in support of its decision.
7. Helter involved a release of a byproduct gas from a broken pipe, which gas was not a "solid waste" or a "hazardous waste" prior to release. The plaintiff in that case had argued that RCRA applied to the released gas. The Court held that the gas did not become a "solid waste" upon release, because of the "uncontained gas" exclusion from the definition of "solid waste".
  - a. In the Helter case, the deciding Court specifically indicated that the result would have been different if the released gas had been a waste before it was released:

"Plaintiff's do not contend that the COG (coke oven gas) in Defendant's pipelines is solid waste. That COG has not been discarded and the pipelines do not constitute a means of disposal." (Helter, last page in LEXIS)
  - b. The Respondent in this case has not alleged that it uses hydrogen sulfide in any of its processes. Nor does Respondent claim that it manufactures hydrogen sulfide, as a product, byproduct, side product, or in any other fashion.
8. The Board has also cited to USEPA guidance regarding routine gaseous emissions from processes. The case before the Board is different in that it involved accidental emission from material that was already a hazardous waste.
  - a. If the incident alleged in the Complaint was indeed a process emission, Respondent would be required to have an air pollution permit to emit hydrogen sulfide.

9. In this case, the gas originated from material that was already a hazardous waste and subject to the contingency planning requirements. The release of the gas was a trigger for implementation of the contingency plan with respect to the hazardous waste on the floor, regardless of whether the released gas would, by itself, be a "solid waste" or "hazardous waste".
  - a. The released gas was, however, a "hazardous waste" because it was derived from material that was already a hazardous waste.
  
10. The incident alleged in the complaint was a minor incident in which a few workers were sickened by a toxic gas, which dissipated without causing any known injury to the environment or to the public. The Board's ruling, however, would apply to any toxic gas release from hazardous waste operations, including management of reactive wastes capable of generating hydrogen cyanide or sulfide, regardless of the size of the incident. The Board's ruling means that hazardous waste operators in Illinois no longer have to:
  - a. Prepare contingency plans for toxic gas releases;
  - b. Train workers about the dangers of toxic gas emissions when mixing wastes with acids or other wastes;
  - c. Provide monitoring or safety equipment to deal with toxic gas emissions;
  - d. Notify local emergency response teams of the possibility of such releases; or
  - e. Notify the Agency and local emergency response teams in the event of an actual toxic gas release.
  
11. As a result of the Board's Order extending the Helter decision, the Illinois RCRA program is no longer "identical in substance" with Federal regulations as required by Section 22.4 of the Act.

THE VIOLATIONS ALLEGED IN COUNT VI DO NOT DEPEND ON WHETHER THE RELEASED GAS WAS "HAZARDOUS WASTE"

12. Respondent's attorney's arguments notwithstanding, Respondent in fact prepared a contingency plan for this facility. A copy of the plan has been produced. Copies of relevant pages have been attached as Exhibit A.
  - a. Page 6-4 of the Contingency Plan states that the "...Plan will be implemented in the following situations:... A spill that could cause the release of toxic liquids or fumes."
  - b. Page 6-12 of the Contingency Plan states that "This Contingency Plan has been prepared to fulfill the requirements of 40 CFR 265, Part D and 35 Illinois Administrative Code 725..."

13. Count VI of the Complaint alleges failure to follow the plan itself. By failing to implement the plan in response to "A spill that could cause the release of toxic liquids or fumes", Respondent failed to follow the plan itself. Failure to follow the plan is a violation of Section 725.151(b), regardless of whether the rules themselves would have required that the plan be implemented in response to a toxic gas emission.
  - a. The rationale of the Board Order, that "uncontained gases ... are not hazardous waste", does not apply to Count VI.

#### THE BOARD HAS MADE FINDINGS OF FACTS THAT ARE IN DISPUTE

14. In reaching its Order, the Board has made factual findings on issues with respect to which a material issue of fact remains, including the following:
  - a. P. 3, "a small quantity of sulfuric acid to be released". Complainant disputes the quantity of acid released.
  - b. P. 3, whether the spill came from the day tank is disputed.
15. On p. 17 of the Order, the Board states that Complainant "has not demonstrated that the generation of hazardous waste at Guardian West subjects the facility to RCRA permitting, or falls outside the exemptions provided by Board rules, or otherwise violates..."
  - a. This statement appears to be in conflict with other portions of the Order that place the burden of proving exemptions on the Respondent.
  - b. This statement could be interpreted as a finding of fact against the Complainant on Count I, which would contradict the Board's conclusion as to Count I.
16. On p. 25 of the Order, the Board appears to find that the Complainant "has not pled with certainty that hydrogen sulfide gas was in fact created..."
  - a. On the contrary, par. 15 of the common allegations of the Complaint states that: "The sulfuric acid reacted with the waste mixture on the floor, producing hydrogen sulfide gas".

#### THE BOARD HAS ATTRIBUTED RESPONDENT'S "STRAW MAN" ARGUMENTS TO COMPLAINANT

17. Rather than respond to Complainant's arguments on these motions, Respondent created arguments and then falsely attributed those arguments to the Complainant. To some extent this tactic has spilled over into the Board Order,

which attributes to the Complainant arguments the Complainant has not made.

18. On p. 17 of the Order, the Board has cited to Complainant's "contention that an exemption can apply only on a facility-wide basis". Complainant has not made this argument, and does not believe it to be correct.
  - a. Many of the exemptions, such as the "WWTU" exemption apply to specific units within a facility. There can be many exempt units within the facility.
  - b. On the other hand, the exemptions of Section 722.134 are worded so as to apply to the entire facility, and make sense only with that interpretation. If a person elects to operate as a conditionally exempt large quantity generator of hazardous waste, then the entire facility is exempt from the permit requirement, but must comply with the stated conditions for exemption.
    - i. The Board correctly notes on p. 17 of the Order that the Section 722.134 exemptions apply to persons, i.e. the generator, as opposed to individual treatment units.
    - ii. The Board correctly finds, on p. 22 of the Order, that, although the facility exemption of Section 722.134 is specific that a contingency plan is required for the facility, the WWTU exemption doesn't specifically exempt those units from contingency planning.
19. On p. 18 of the Order, the Board states that Complainant "cited no authority for his conclusion that if a respondent fails to state a reason for its denial, it is prevented from raising an argument later." Complainant has not made this argument, and does not believe it to be correct.
  - a. The point on this issue was that the Answer contained a false allegation. This issue has, however, been rendered moot by the Board's correct decision to require Respondent to file an amended answer affirmatively alleging the exemptions it was claiming.

#### QUANTITY LIMITATIONS REFER TO THE TOTALS PRODUCED BY THE FACILITY

20. On p. 17 of the Order, the Board has stated that the quantity limitations for generation of hazardous waste "apply to individual wastestreams". This is wrong. The quantity limitations generally refer to the total quantity of hazardous waste generated by the entire facility. [35 Ill. Adm. Code 721.105(c)]

#### THE BOARD SHOULD ALLOW TIME FOR COMPLAINANT TO FILE EXHIBITS

21. Complainant's motions included specific references to documents produced in:

discovery in the case, which documents had been filed with the Hearing Officer. None of the rules cited by the Board specifically prohibits citation to such documents.

22. The Board needs to acknowledge the difficulty faced by a citizen complainant in transporting a large file to a crowded public place, laying out the file in the limited space available, and making copies of selected text while fending off other people who want to use the same space and copying machine.
23. The Board's suggestion that the exhibits could have been filed electronically poses the same problem: Complainant would have had to go to a public place and payed to scan exhibits into a form that could be filed electronically.
24. By countenancing this war of affidavits, the Board is allowing a polluter to delay or avoid a hearing by forcing the Complainant to not only prepare lengthy written responses to motions, but also affidavits and massive copies. The "duplicitous or frivolous" provision of the Act was intended in part to avoid this result: once a citizen complainant is past this point, he is entitled to a hearing regardless of the amount of paper the Respondent dumps on him.
25. The Board should have ruled separately on the motions waive the requirement to attach copies of such documents, and allowed Complainant time to file such documents.
26. Complainant's receipt of the Board Order in this case was delayed because it was not mailed to the correct address.

WHEREFORE Complainant prays that the Board reconsider its Order of October 20, 2005, and deny Respondent's Motion for Summary Judgment as to Counts II-VI, or, alternatively, allow Complainant time to submit revised affidavits and exhibits in support of his response to that Motion.

MORTON F. DOROTHY  
Morton F. Dorothy, Complainant

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

1. Emergency recognition and the level of spill response involvement
2. Notification of Emergency Coordinator if needed for spill response
3. Call appropriate emergency response agencies (fire, police, rescue)
4. Evacuation of employees

The **Spill Teams** are comprised of selected employees throughout the facility who have adequate training to deal with a broad range of chemical emergencies. Special attention is afforded areas that have hazardous wastes. Provision is also made for areas where loading and off-loading of hazardous materials occurs and along pathways for internal distribution of hazardous chemicals. Responsibilities for team members include:

1. Emergency recognition and determination of the level of spill response involvement
2. Safe evacuation of employees from the spill area
3. Notification of the incident to the Emergency Coordinator.
4. Spill containment, control, and clean up of incident materials

The **Department Associates** are trained to provide response capabilities within their own department. Due to their experience and knowledge of the chemicals within the departments, they are able to respond appropriately to the threat. They may request assistance from the spill team members at any time. Responsibilities for all Associates include:

1. Emergency recognition and determination of the level of spill response involvement
2. Leak control and spill clean-up of incident materials in their department
3. Safe evacuation of employees from the spill area
4. Notification of incident to a member of Management

## IMPLEMENTATION

Implementation of the plan does not necessarily mean that Guardian West will take a "hands-on" response to every incident listed below. All Associates are instructed to first notify a member of the Management Team in the event of a release. Only if the Associates are absolutely sure that they can respond to a small spill safely, are they then allowed to contain, abate, or otherwise respond to the incident. In a situation where the incident is a large spill or, by virtue of other mitigating circumstances, beyond the scope of their training or ability to respond safely, off-site contractors/agencies will be contacted to control and clean-up the spill.

This section of the Emergency Response and Contingency Plan will be implemented in the following situations:

Fires:

1. A fire that causes the release of toxic fumes.
2. Where the use of water or a chemical fire suppressant could result in contaminated run-off.
3. When there is danger of an explosion igniting hazardous materials or wastes.

4. When an explosion has occurred on-site, creating the potential for hazardous waste to be generated.

#### Spills/Material Releases:

1. When a spill could result in the release of flammable liquids or vapors, causing a fire or explosion.
2. A spill that could cause the release of toxic liquids or fumes.
3. A spill that cannot be safely contained, resulting in soil contamination and /or water pollution.
4. A spill generates hazardous waste as a result of containment and clean up activities.

#### Injuries:

Injuries resulting from involvement with hazardous materials/wastes will be handled according to the severity of the injury, including first aid and/or transport to a local medical facility.

## RESPONSE ACTIONS

### Initial Response/Discovery:

When a spill occurs, the Associate will implement what containment measures they can safely perform, such as shutting off pumps, deploying absorbents or uprighting a container. They will then immediately notify a Management Team member. If necessary the Management Team member will contact the Emergency Coordinator. The Emergency Coordinator will determine who should perform the containment and clean up, and whether it will be done in-house or by outside contractors.

It is important to emphasize that the initial responsibility in any emergency is to protect human health and safety, and any responders will use the recommended PPE. Information can be gathered from container labels, material safety data sheets, and vendor supplied information. It is imperative to review and understand this information prior to handling chemicals, to permit rapid and safe containment activities in the event of a chemical spill.

### Small spills:

Guardian West Associates will contain a small spill, usually of a volume of 55 gallons or less or a material of low hazard, which occurs within a small area. This is to be accomplished either by the Associate in the immediate work area or Spill Team members, as determined by the Emergency Coordinator or Management Team member.

If the clean up is to be performed by Associates in the immediate work area, the Management Team member or Emergency Coordinator will provide appropriate personal protective equipment. The Management Team member or Emergency Coordinator will direct the work, including the selection of appropriate containment and clean up materials. The Management Team member or Emergency Coordinator will also insure proper disposition of the spilled

Be prepared to provide the following information:

1. The chemical name or identity of any substance involved in the release
2. An indication if it is an Extremely Hazardous Substance (Attachment A)
3. Estimate of the quantity, in pounds and/or gallons, released to the environment
4. Time and duration of the release
5. Specific location of the release
6. The media impacted (air, land, and water)
7. Any know health risk
8. Proper precautions to take, including evacuation
9. Name and telephone number of a contact person for further information

All reportable environmental releases must be reported in writing within 15 days to the Champaign County Emergency Planing Commission and the State Emergency Response Commission. An Emergency Coordinator will provide the notification.

A member of the Management team will fill out a Chemical Spill Report (Tab 15 of the Plan) for all spills resulting in activation of this plan. This must be turned into the Environmental Manager by the end of the following workday.

**This Contingency Plan has been prepared to fulfill the requirements of 40 CFR 265, Part D and 35 Illinois Administrative Code 725, and updated as required. In addition, the following pages are to be used in the event of a spill by Guardian West associates as an abbreviated guide to the Plan.**