

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MORTON F. DOROTHY,)	
)	
Complainant,)	
)	
v.)	PCB No. 05-49
)	
FLEX-N-GATE CORPORATION,)	
an Illinois corporation,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn	Carol Webb, Esq.
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	1021 North Grand Avenue East
Suite 11-500	Post Office Box 19274
Chicago, Illinois 60601	Springfield, Illinois 62794-9274
(VIA ELECTRONIC MAIL)	(VIA ELECTRONIC MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **RESPONDENT FLEX-N-GATE CORPORATION'S AMENDED ANSWER TO COMPLAINANT'S COMPLAINT**, a copy of which is herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

Dated: November 15, 2005

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

Thomas G. Safley
HODGE DWYER ZEMAN
3150 Roland Avenue
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CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached
RESPONDENT FLEX-N-GATE CORPORATION'S AMENDED ANSWER TO
COMPLAINANT'S COMPLAINT upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Carol Webb, Esq.
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Post Office Box 19274
Springfield, Illinois 62794-9274

via electronic mail on November 15, 2005; and upon:

Mr. Morton F. Dorothy
104 West University, SW Suite
Urbana, Illinois 61801

by depositing said documents in the United States Mail in Springfield, Illinois, postage
prepaid, on November 15, 2005.

/s/ Thomas G. Safley
Thomas G. Safley

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**RESPONDENT FLEX-N-GATE CORPORATION'S
AMENDED ANSWER TO COMPLAINANT'S COMPLAINT**

NOW COMES Respondent FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by its attorneys HODGE DWYER ZEMAN, pursuant to the Illinois Pollution Control Board's ("Board") Order dated October 20, 2005, and for its Amended Answer to Complainant's Complaint, states as follows:

ALLEGATIONS COMMON TO ALL COUNTS

1. Paragraph one of Complainant's Complaint states a legal conclusion that does not call for a response. To the extent that paragraph one makes any allegations of fact, Flex-N-Gate denies the same.
2. Flex-N-Gate has insufficient knowledge to either admit or deny the allegations of paragraph two of Complainant's Complaint, and therefore denies the same.
3. Flex-N-Gate admits the allegations of paragraph three of Complainant's Complaint.
4. Flex-N-Gate admits the allegations of paragraph four of Complainant's Complaint.

5. Flex-N-Gate admits the allegations of paragraph five of Complainant's Complaint.

6. Flex-N-Gate admits the allegation of the first sentence of paragraph six of Complainant's Complaint that "[t]he tanks are mounted on concrete piers above a coated concrete floor." Flex-N-Gate denies the allegations of the second sentence of paragraph six of Complainant's Complaint. In particular, Flex-N-Gate denies that any "chemicals" which "fall to the floor" of the room in which the "chrome plating line" (identified in paragraph four of Complainant's Complaint) is located are "spilled" and then "pumped to a hazardous waste treatment unit." Rather, Flex-N-Gate affirmatively states that the chrome plating line is engineered so that substances will fall from the bumpers at issue during the process of cleaning, plating, and rinsing, and land on the floor of the room in which that line is located, which floor constitutes part of a Wastewater Treatment Unit as defined in 35 Ill. Admin. Code § 703.110, not a "hazardous waste treatment unit." This process is intentional, and thus does not constitute "spillage." To the extent that paragraph six of Complainant's Complaint states any other allegations of fact, Flex-N-Gate denies the same.

7. Flex-N-Gate denies that any "spillage" is located "on the floor" as alleged in paragraph seven of Complainant's Complaint. See Answer to paragraph six above. Further, paragraph seven of Complainant's Complaint states a legal conclusion that does not call for a response. To the extent that paragraph seven of Complainant's Complaint makes any allegations of fact, Flex-N-Gate denies the same.

8. Flex-N-Gate denies that any "spillage" is located "on the floor" as alleged in paragraph eight of Complainant's Complaint. See Answer to paragraph six above.

Flex-N-Gate does not know what Complainant means by the term “complex mixture,” and therefore has insufficient knowledge to admit or deny this allegation, and therefore denies the same. Flex-N-Gate admits that “chromic acid, nickel sulfate from the nickel plating tanks[, and] sulfuric acid,” as well as cleaners and large amounts of water, could, at various times, be present on the floor of the room in which the “chrome plating line” is located. Flex-N-Gate further admits that one “proprietary . . . additive[] used in one of the nickel plating tanks to form a . . . corrosion resistant nickel layer” could, at various times, be present on the floor of the room in which the “chrome plating line” is located. Flex-N-Gate further admits that this proprietary additive contains approximately .15% sulfur. To the extent that paragraph eight of Complainant’s Complaint makes any further allegations of fact, Flex-N-Gate denies the same.

9. Flex-N-Gate denies that any “spillage” is located “on the floor” as alleged in paragraph nine of Complainant’s Complaint. See Answer to paragraph six above. Further, Flex-N-Gate does not know what Complainant means by the terms “contaminated debris and sludge beds.” Accordingly, Flex-N-Gate has insufficient knowledge to either admit or deny the allegations of paragraph nine of Complainant’s Complaint, and therefore denies the same.

10. Flex-N-Gate denies that “the facility includes a hazardous waste treatment unit,” as alleged in paragraph ten of Complainant’s Complaint, but Flex-N-Gate admits that “the facility” includes a Wastewater Treatment Unit as defined in 35 Ill. Admin. Code § 703.110. Flex-N-Gate further denies that the Wastewater Treatment Unit conducts “reduction of hexavalent chromium with sodium metabisulfite,” but rather, affirmatively states that it conducts reduction of hexavalent chromium with magnesium

bisulfite. Flex-N-Gate admits the remaining allegations of paragraph ten of Complainant's Complaint.

11. Flex-N-Gate admits the allegations of paragraph 11 of Complainant's Complaint.

12. Flex-N-Gate denies the allegation contained in the first sentence of paragraph 12 of Complainant's Complaint. The remainder of paragraph 12 states legal conclusions that do not call for a response. To the extent that paragraph 12 states any further allegations of fact, Flex-N-Gate denies the same.

13. Flex-N-Gate admits the allegations of paragraph 13 of Complainant's Complaint.

14. In response to paragraph 14 of Complainant's Complaint, Flex-N-Gate states as follows. The facility stores approximately 93% concentrated sulfuric acid in a "bulk storage" tank. Several pipes lead from this bulk storage tank to various other tanks at the facility, including a pipe that leads to Tank No. 8, which is part of the "chrome plating line" and contains a solution of approximately 10% sulfuric acid and 90% water. Near Tank No. 8, this pipe approaches that tank traveling horizontally at a level lower than the top of the tank (pipe segment 1), then travels vertically to a level higher than the top of the tank (pipe segment 2), then travels horizontally to a position over the top of the tank (pipe segment 3), then descends vertically into the top of the tank (pipe segment 4). On August 5, 2004, this pipe separated at a fitting that is located in the vertical portion of the pipe that is outside the tank, i.e., in pipe segment 2. This allowed a small quantity of sulfuric acid that was in the portion of pipe segment 2 above the location of this fitting, and potentially sulfuric acid contained in pipe segments 3 and 4, to be released to the

floor of the room in which the chrome plating line was located. In addition, back siphoning could have occurred in this situation, which would have allowed some amount of the approximately 10% sulfuric acid solution contained in Tank No. 8 to be released to the floor as well. Sulfuric acid is transferred from bulk storage to Tank No. 8 by use of a pump that is located at the bulk storage tank, which pump is controlled by a button located adjacent to Tank No. 8. A valve is located in pipe segment 2, below the fitting that separated, which valve must be opened to allow material to be pumped from bulk storage to Tank No. 8. The pump was not operating at the time of the separation in the pipe. Thus, sulfuric acid was not pumped from bulk storage through the separation in the pipe and onto the floor. To the extent that paragraph 14 of Complainant's Complaint states any further factual allegations, Flex-N-Gate denies the same.

15. Flex-N-Gate denies the allegations of paragraph 15 of Complainant's Complaint.

16. Flex-N-Gate admits the allegation contained in the first sentence of paragraph 16. Flex-N-Gate states that the regulations quoted and cited in the second and fourth sentences of paragraph 16 speak for themselves, and therefore, Flex-N-Gate makes no response to these statements. Flex-N-Gate has insufficient information to either admit or deny the allegation contained in the third sentence of paragraph 16, and therefore denies the same. To the extent that paragraph 16 states any further allegations of fact, Flex-N-Gate denies the same.

17. The regulation quoted in paragraph 17 of Complainant's Complaint speaks for itself, and therefore Flex-N-Gate makes no response to this allegation. To the extent that paragraph 17 states any allegations of fact, Flex-N-Gate denies the same.

18. Paragraph 18 of Complainant's Complaint states a conclusion of law which does not call for a response. To the extent that paragraph 18 states any allegations of fact, Flex-N-Gate denies the same.

19. Paragraph 19 of Complainant's Complaint states a conclusion of law which does not call for a response. To the extent that paragraph 19 states any allegations of fact, Flex-N-Gate denies the same.

20. Flex-N-Gate admits the allegations of paragraph 20 of Complainant's Complaint.

21. Flex-N-Gate admits the allegations of paragraph 21 of Complainant's Complaint as they relate to solution attendants and lab technicians at the facility. Flex-N-Gate does not know what Complainant means by the term "line worker," as the facility has no such position. Accordingly, Flex-N-Gate has insufficient information to either admit or deny the allegations of paragraph 21 of Complainant's Complaint as they relate to "line workers," and therefore denies the same. Flex-N-Gate denies any further factual allegations of paragraph 21.

22. Flex-N-Gate denies that "the hazwoper-trained line workers" "determin[ed] that a hydrogen sulfide release was occurring," as alleged in paragraph 22 of Complainant's Complaint. Flex-N-Gate does not know what Complainant means by his allegation that "[a]fter discovering the acid spill . . . the hazwoper-trained line workers began an immediate response," and therefore has insufficient information to either admit or deny this allegation, and denies the same. Flex-N-Gate admits that "[a]fter discovering the acid spill" an employee at the facility "paged safety." To the

extent that paragraph 22 of Complainant's Complaint makes any further factual allegations, Flex-N-Gate denies the same.

23. In response to paragraph 23 of Complainant's Complaint, Flex-N-Gate states that it does not know what Complainant means by the term "line workers," and therefore has insufficient information to admit or deny the allegations of paragraph 23 to the extent they relate to "line workers," and denies the same. Flex-N-Gate admits that when the facility safety officer on duty at the time of the separation of the pipe leading to Tank No. 8 arrived at the location of that tank after being paged, Complainant explained to that safety officer that the pipe had separated, expressed Complainant's opinion that the release of sulfuric acid had created hydrogen sulfide gas, and "requested that [the safety officer] get a hydrogen sulfide probe." Flex-N-Gate has insufficient knowledge as to why Complainant made this request, whether "to determine whether the levels [presumably of the alleged hydrogen sulfide] were safe" or otherwise, and can neither admit nor deny that Complainant made this request "to determine whether the levels were safe," and therefore denies this allegation. To the extent that paragraph twenty-three of Complainant's Complaint states any further allegations of fact, Flex-N-Gate denies the same.

24. In response to paragraph 24 of Complainant's Complaint, Flex-N-Gate states that it does not know what Complainant means by the term "line workers," and therefore has insufficient information to admit or deny the allegations of paragraph 24 to the extent they relate to "line workers," and therefore denies the same. Flex-N-Gate further denies that the facility safety officer on duty at the time of the separation of the pipe "responded that he did not know what a hydrogen sulfide probe was," but admits

that the facility safety officer did at that time state to Complainant that he “did not know whether [such a probe] was present at the facility.” To the extent that paragraph 24 states any other allegations of fact, Flex-N-Gate denies the same.

25. In response to paragraph 25 of Complainant’s Complaint, Flex-N-Gate states that it does not know what Complainant means by the term “line workers,” and therefore has insufficient information to admit or deny the allegations of paragraph 25 to the extent they relate to “line workers,” and therefore denies the same. Flex-N-Gate admits that Respondent “told [the facility safety officer on duty at the time of the separation of the pipe] that hydrogen sulfide was a toxic gas, that the Urbana Fire Department had a hydrogen sulfide probe, and that safety” should consider evacuating the facility. Flex-N-Gate further admits that the safety officer contacted the plating department manager regarding the issue and also told all employees in the room of the facility in which the chrome plating line is located to leave the room. Flex-N-Gate further states that the safety officer on duty at the time of the separation of the pipe has no recollection of the discussion that Complainant alleges regarding fans, and therefore, Flex-N-Gate has insufficient information to admit or deny Complainant’s allegations regarding such discussion, and denies the same. Flex-N-Gate further has insufficient information regarding whether “[s]afety then departed and was not seen again by the first responders for the remainder of the immediate response,” because (a) Flex-N-Gate does not know what Complainant means by the term “first responders,” (b) Flex-N-Gate has no knowledge as to what the “first responders,” Complainant, or any other person allegedly saw or did not see, and (c) Flex-N-Gate does not know what Complainant means by the term “remainder of the immediate response.” Therefore, Flex-N-Gate

denies the allegations of the last sentence of paragraph twenty-five of Complainant's Complaint. To the extent that paragraph twenty-five of Complainant's Complaint states any other allegations of fact, Flex-N-Gate denies the same.

26. In response to paragraph 26 of Complainant's Complaint, Flex-N-Gate admits that employees "directed water hoses" onto the floor of the room in which the "chrome plating line" is contained. Flex-N-Gate further admits that after doing so, those employees left that room. Flex-N-Gate further admits that the water "diluted the acid" and any other substance on the floor of the room. Flex-N-Gate denies that the water "washed" any material "to the hazardous waste treatment unit"; as noted above, the floor of the room constitutes part of a Wastewater Treatment Unit as defined in 35 Ill. Admin. Code § 703.110. Flex-N-Gate does admit that the water would have washed any material on the floor further into pipes and tanks that also make up the Wastewater Treatment Unit. To the extent that paragraph 26 states any further allegations of fact, Flex-N-Gate denies the same.

27. In response to paragraph 27 of Complainant's Complaint, Flex-N-Gate states that it does not know what Complainant means by the terms "line worker" or "release." Flex-N-Gate does admit that after the separation of the pipe and leak of sulfuric acid onto the floor, at least one employee reported to the facility safety officer that he felt ill. To the extent that paragraph 27 of Complainant's Complaint states any further allegations of fact, Flex-N-Gate denies the same.

COUNT I

OPERATION WITHOUT A RCRA PERMIT OR INTERIM STATUS

Flex-N-Gate reincorporates and realleges its responses to Complainant's Allegations Common to All Counts in response to Count I of Complainant's Complaint.

1. Flex-N-Gate denies the allegations of paragraph one of Count I of Complainant's Complaint.
2. Flex-N-Gate denies the allegations of paragraph two of Count I of Complainant's Complaint.
3. The statutory section cited in paragraph three of Count I of Complainant's Complaint speaks for itself, and therefore Flex-N-Gate makes no response to this allegation. To the extent that paragraph three of Count I of Complainant's Complaint states any allegations of fact, Flex-N-Gate denies the same.
4. The regulations cited in paragraph four of Count I of Complainant's Complaint speak for themselves, and therefore Flex-N-Gate makes no response to this allegation. To the extent that paragraph four of Count I of Complainant's Complaint states any allegations of fact, Flex-N-Gate denies the same.

WHEREFORE, Respondent, FLEX-N-GATE CORPORATION, prays that the Illinois Pollution Control Board find against Complainant on Count I of his Complaint, that Complainant take nothing by way of Count I his Complaint, and that the Illinois Pollution Control Board grant Flex-N-Gate all relief just and proper in the premises.

COUNTS II THROUGH VI

By its Order dated October 20, 2005, the Board granted Flex-N-Gate summary judgment as to Counts II through VI of Complainant's Complaint. Therefore, Flex-N-Gate makes no answer to those Counts.

AFFIRMATIVE DEFENSE

For its affirmative defense to Count I of Complainant's Complaint, Flex-N-Gate states as follows:

1. The federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.*, sets forth requirements for the handling of hazardous waste.
2. The Board has promulgated regulations that implement the requirements of RCRA in the State of Illinois.
3. One of those requirements is that certain persons who handle hazardous waste in Illinois obtain a permit from the Illinois Environmental Protection Agency.
4. However, under the Board's regulations, certain persons who generate hazardous waste in Illinois are exempt from the requirement to obtain a RCRA permit.
5. Specifically, the Board's regulations establish several exemptions to the requirement to obtain a RCRA permit.
6. These exemptions can apply to individual hazardous waste streams at a generator's facility.
7. Thus, a generator of hazardous waste may manage some hazardous waste streams under one exemption to the RCRA permit requirement, and other hazardous waste streams under a different exemption.
8. 35 Ill. Admin. Code § 703.123(e) provides in part that "[t]he following persons are among those that are not required to obtain a RCRA permit: . . . (e) An owner or operator of . . . [a] wastewater treatment unit, as defined in 35 Ill. Adm. Code 720.110."

9. Flex-N-Gate's Guardian West facility relies in part on this Wastewater Treatment Unit ("WWTU") exemption to the RCRA permit requirement.
10. 35 Ill. Admin. Code § 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. Admin. Code 309 or a pretreatment permit or authorization to discharge pursuant to 35 Ill. Admin. Code 310; and

It receives and treats or stores an influent wastewater that is a hazardous waste as defined in 35 Ill. Admin. Code 721.103, or generates and accumulates a wastewater treatment sludge that is a hazardous waste as defined in 35 Ill. Admin. Code 721.103, or treats or stores a wastewater treatment sludge that is a hazardous waste as defined in 35 Ill. Admin. Code 721.103; and

It meets the definition of tank or tank system in this Section."
11. Flex-N-Gate's Guardian West facility contains tanks and other associated equipment in which wastewater is treated (the "facility WWTU").
12. The facility WWTU treats wastewater generated by various processes at the facility, including, but not limited to, wastewater from the "chrome plating line" (identified in paragraph four of Complainant's Complaint) which is the subject of this matter.
13. Flex-N-Gate's Guardian West facility has been issued authorization to discharge treated wastewater from the facility WWTU to the Urbana Champaign Sanitary District pursuant to 35 Ill. Admin. Code 310.
14. The facility WWTU generates and accumulates a wastewater treatment sludge.
15. This sludge is a hazardous waste and is assigned the F006 code under the Board's RCRA regulations.
16. The floor of the room at the facility in which the plating line is located (the "Plating Room") is coated with an epoxy and is sloped towards the center of the room, where two concrete pits are located.
17. The Plating Room floor is deliberately designed to convey material which falls from the plating line to the floor into the pits in the center of the floor.

18. The pits are constructed of concrete and are stationary devices.
19. Material that is collected in the pits in the Plating Room floor is conveyed to tanks for treatment via hard-piping and associated pumps and other ancillary equipment.
20. The Plating Room floor and associated piping and other ancillary equipment from the pits to the wastewater treatment tanks, between the wastewater treatment tanks, and between the wastewater treatment tanks and the connection with the Urbana Champaign Sanitary District, meet the definitions of tank system and ancillary equipment set forth in 35 Ill. Admin. Code §720.110.
21. Pursuant to the WWTU exemption set forth in 35 Ill. Admin. Code 703.123(e), the facility is exempt from the RCRA permit requirement with respect to any hazardous waste that might be present on the Plating Room floor.
22. Pursuant to the WWTU exemption set forth in 35 Ill. Admin. Code 703.123(e), the facility is exempt from the RCRA permit requirement with respect to any hazardous waste that might be present in the pits located in that floor.
23. Pursuant to the WWTU exemption set forth in 35 Ill. Admin. Code 703.123(e), the facility is exempt from the RCRA permit requirement with respect to any hazardous waste that might be present in ancillary piping and other ancillary equipment between the pits and the wastewater treatment tanks at the facility, between the wastewater treatment tanks, and between the wastewater treatment tanks and the connection with the Urbana Champaign Sanitary District.
24. Pursuant to the WWTU exemption set forth in 35 Ill. Admin. Code 703.123(e), the facility is exempt from the RCRA permit requirement with respect to any hazardous waste that might be present in the wastewater treatment tanks at the facility.
25. 35 Ill. Admin. Code § 703.123(a) provides that “[t]he 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.”
26. The facility relies on this generator accumulation exemption for all other hazardous waste generated at the facility.

27. 35 Ill. Admin. Code § 722.134 allows generators to accumulate hazardous waste in “containers” prior to the transportation of the waste to an off-site facility for treatment, storage, or disposal.
28. 35 Ill. Admin. Code § 720.110 defines “container” as “any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled.”
29. The facility accumulates all other hazardous waste generated at the facility in portable devices which meet this definition of “container.”
30. Pursuant to the generator accumulation exemption set forth in 35 Ill. Admin. Code 703.123(a), the facility is exempt from the RCRA permit requirement with respect to any hazardous waste that it accumulates in containers prior to shipment for off-site treatment, storage or disposal.

CONCLUSION

WHEREFORE, Respondent FLEX-N-GATE CORPORATION, by its attorneys HODGE DWYER ZEMAN, prays that Complainant take nothing by way of his Complaint, and that the Illinois Pollution Control Board award FLEX-N-GATE CORPORATION all relief just and proper in the premises.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

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

Dated: November 15, 2005

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GWST:003/Fil/Amended Answer