ILLINOIS POLLUTION CONTROL BOARD
February 3, 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, Morton F. Dorothy filed a six-count citizen's enforcement complaint against Flex-N-Gate Corporation (Flex-N-Gate). *See* 415 ILCS 5/31(d) (2002); 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 it produces bumpers for vehicles. The complaint alleges that as a result of an alleged spill of sulfuric acid at the facility on August 5, 2004, Flex-N-Gate violated the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq*. (2002)) and various provisions of the Board's hazardous waste rules.

This case involves the Resources Conservation and Recovery Act regulations that apply to facilities that treat, store and dispose of hazardous wastes. A single facility may consist of several types or combinations of operational units. Treatment, storage, and disposal facility (TSDF) is a term of convenience, grouping all such facilities together for the purpose of discussing the regulations.

For the reasons set forth below, the Board denies Flex-N-Gate's motion to dismiss and accepts this complaint for hearing.

THE COMPLAINT, MOTIONS, AND RESPONSES

Mr. Dorothy's September 9, 2004 complaint concerns an alleged August 5, 2004 spill of sulfuric acid at the Flex-N-Gate Urbana bumper manufacturing facility. Mr. Dorothy alleges that Flex-N-Gate violated Section 21(f) of the Environmental Protection Act (Act), 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.

On October 12, 2004, Flex-N-Gate filed a motion to dismiss for failure to state a claim on which relief can be granted. On October 14, 2004, Mr. Dorothy filed several motions including motions: (1) to join the Agency as a party in interest; (2) to extend the time for the Agency to respond to the motion; (3) to accept this matter for hearing; and (4) for expedited discovery. On October 20, Mr. Dorothy responded to the motion to dismiss. On November 3, 2004, Flex-N-Gate responded to Mr. Dorothy's pending motions.

On November 15, 2004, in reply to the respondent's November 3, 2004 response, Mr. Dorothy moved the Board for leave to supplement his response to Flex-N-Gate's motion to dismiss and also to withdraw his motion to join the Agency as a party in interest.

On November 18, 2004, the Board denied Mr. Dorothy's motion to accept for hearing prior to ruling on the motion to dismiss, granted Mr. Dorothy leave to withdraw his motion to join the Agency as a party in interest, and reserved ruling on the motion for expedited discovery.

APPLICABLE STATUTES AND BOARD REGULATIONS

Section 31(d) of the Act (415 ILCS 5/31(d) (2002)) allows any person to file a complaint with the Board. Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing." *Id.*; *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicitous if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicitous or frivolous. 35 Ill. Adm. Code 103.212(b).

Section 12(f) of the Act states in pertinent part:

No person shall:

> (f) Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program.

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:
>
> > 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.

MOTION TO DISMISS

For purposes of ruling on a motion to dismiss, all well-pled facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the non-movant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A complaint should not be dismissed for failure to state a claim unless it clearly appears that no set of facts

could be proven under the pleadings that would entitle complainant to relief. Shelton v. Crown, PCB 96-53 (May 2, 1996).

Section 101.504 of the Board's procedural rules regarding the content of motions and responses states:

> All motions and responses must clearly state the grounds upon which the motion is made and must contain a concise statement of the position or relief sought. Facts 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]. A brief or memorandum in support of the motion or response may be included.

Flex-N-Gate's did not support the motion to dismiss with an affidavit. However, attached to its response to Mr. Dorothy's motions to accept for hearing and for expedited discovery, Flex-N-Gate attached affidavits from three employees that support the facts set forth in Flex-N-Gate's motion to dismiss. For this reason, the Board will consider Flex-N-Gate's motion.

The Parties' Arguments

Summary of the Parties' Arguments

Flex-N-Gate does not admit any factual allegations of the complaint. Flex-N-Gate argues that regardless, even if all of the facts alleged were true, the complaint fails to state a claim on which relief can be granted. Accordingly, Flex-N-Gate moves the Board to dismiss the complaint in its entirety. Flex-N-Gate maintains that different wastestreams at the Urbana facility are exempt from RCRA permitting requirements under different exemptions. Under the complaint, Flex-N-Gate claims that the wastestream at issue is exempt under the exclusion for "wastewater treatment units."

Flex-N-Gate asserts that in ruling on this motion, the Board must take all well-pled facts in the pleading as true, and all inferences from them must be viewed in a light favorable to the non-movant. Mot. at 2; citing Lone Star Indus., Inc. v. IEPA, PCB 03-94 (Mar. 6, 2003). Flex-N-Gate emphasizes, however, that the Board "must also disregard mere conclusions of law or fact unsupported by the facts alleged." Mot. at 3; citing Oravek by Brann v. Community School Dist. 146, 264 Ill. App. 3d 895, 898 (1st Dist. 1994). Flex-N-Gate further notes that the complaint must allege facts sufficient to state a claim on which relief can be granted. *Id*.

Mr. Dorothy maintains that this proceeding involves an incident where sulfuric acid spilled onto hazardous waste, resulting in a release of hydrogen sulfide, a toxic gas. Citing no caselaw in support of his arguments, Mr. Dorothy asserts that the accident demonstrated the inadequacy and inefficiency of Flex-N-Gate's contingency plan. Resp. at 1.

In his supplemental response to the motion, Mr. Dorothy contends that Flex-N-Gate's response to Mr. Dorothy's motion to join the Agency as a party of interest disposes of many

arguments made in the motion to dismiss. Flex-N-Gate claims exemption under Section 722.134(a) as a large quantity generator of hazardous waste, which is treated on site in tanks without a RCRA permit or interim status. Mr. Dorothy asserts that consequently, Flex-N-Gate must have a contingency plan for the "facility," a term that is defined as one or more treatment, storage, or disposal operational units. 35 Ill. Adm. Code 720.110, 722.134(a), 725.151.

Count I: Operating Without a RCRA Permit or Interim Status

In the first count of the complaint, Mr. Dorothy contends Flex-N-Gate is operating a hazardous waste treatment and storage facility without a RCRA permit or interim status in violation of Section 21(f) of the Act and Section 703.121(a) of the Board's regulations. Compl. at 4; citing 415 ILCS 5/21(f) (2002); 35 Ill. Adm. Code 703.121(a). Both the Act and Board regulations require all TSDFs to obtain an Agency-issued RCRA permit for the hazardous waste management facility. *Id.*

Regarding count I of the complaint, Flex-N-Gate asserts that the treatment system at the facility is a "wastewater treatment unit," and therefore, no RCRA permit or interim status is necessary. Flex-N-Gate asserts that the treatment system at the facility meets the definition of "wastewater treatment unit" as defined in Section 720.110 of the Board's regulations.

According to Flex-N-Gate, the treatment system discharges wastewater into a publicly owned treatment works (POTW), treats a hazardous waste influent, and that the coated floor and sump at the facility are included in the definitions of "tank" or "tank system." 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).

Mr. Dorothy maintains that Flex-N-Gate is conducting a hazardous waste treatment, storage, or disposal operation without a RCRA permit and without interim status. In his response, Mr. Dorothy stated it is the respondent's burden to show that the facility falls within an exclusion. Resp. at 2. Mr. Dorothy further contends 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 at 3. Mr. Dorothy asserts that Flex-N-Gate must show that all treatment or storage and disposal units, including the units at the facility for drying and storing hazardous waste sludge, and the paint line, are exempt.

Mr. Dorothy argues the Flex-N-Gate facility is subject to RCRA and, consequently, must have a contingency plan for the facility that meets Occupational Safety and Health Administration (OSHA) requirements. The contingency plan would not be required if the facility were exempt as "elementary neutralization units" or "wastewater treatment units." Resp. at 4. However, Mr. Dorothy claims that Flex-N-Gate must make these assertions by way of affirmative defense, not by means of a motion to dismiss.

Count II: Failure To Carry Out Contingency Plan

In count II of the complaint Mr. Dorothy claims Flex-N-Gate violated Section 725.151(b) of the Board's rules because it failed to properly carry out its contingency plan in response to the

spill. Compl. at 4-5; citing 35 Ill. Adm. Code 725.151(b). Flex-N-Gate contends that because the treatment system at the facility is a "wastewater treatment unit," as discussed above, it is exempt from the contingency plan requirement of Section 725.151(b). In a footnote, Flex-N-Gate notes that an exception exists for owners of wastewater treatment units that dilute hazardous ignitable wastes or reactive (D003) waste in order to remove the characteristic before land disposal. 35 Ill. Adm. Code 725.101(c)(10). However, Flex-N-Gate notes that because the facility discharges into a POTW, the facility falls into the exempt category.

Flex-N-Gate argues that even assuming Section 725.151(b) did apply, the alleged spill did not trigger the contingency plan provision because there was no fire, explosion, or release of "hazardous waste" or "hazardous waste constituents" as required by Section 725.151(b). Mot. at 8.

First, Flex-N-Gate states that Mr. Dorothy did not allege there was any fire or explosion. Second, Flex-N-Gate contends that hydrogen sulfide gas does not constitute a hazardous waste or hazardous waste constituent. Flex-N-Gate asserts that hydrogen sulfide gas is not a "waste" for the purposes of RCRA, as Board regulations define the term "hazardous waste." Mot. at 9; citing 415 ILCS 5/3.220. According to Flex-N-Gate, Section 3.535 defines 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…" 415 ILCS 5/3.535. Flex-N-Gate states that the alleged hydrogen sulfide gas was not "waste" regulated by RCRA because, as alleged, it wasn't contained. Mot. at 10; citing Helter v. AK Steel Corp., (1997); 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 alleges that the hydrogen sulfide gas was also not a "hazardous waste constituent." Flex-N-Gate cite Section 720.110 of the Board regulations that define hazardous waste constituents as "a constituent that caused the hazardous waste to be listed in 35 Ill. Adm. Code 721.Subpart D, or a constituent listed in 35 Ill. Adm. Code 721.124." 35 Ill. Adm. Code 720.110. Flex-N-Gate contends that because hydrogen sulfide is not listed in either section, hydrogen sulfide is not a hazardous waste constituent for the purposes of RCRA. Accordingly, Flex-N-Gate moves the Board to dismiss count II of the complaint.

Mr. Dorothy contends that if there is at least one non-exempt unit at the facility, then Section 725.151 requires a contingency plan for the entire facility. Resp. at 5. Mr. Dorothy states that OSHA rules also require the owner or operator of a facility to prepare an "Emergency Response Plan." *Id*. at 6.

Mr. Dorothy states that hydrogen sulfide is both a hazardous waste, listed as U135 in Part 721, and a hazardous waste constituent, listed in Appendix H of Part 721. Mr. Dorothy also notes that Section 721.123(a)(5) defines one type of DOO3, as a sulfide that when exposed to pH conditions between 2 and 12.5 can generate toxic gases, vapors, or fumes in a way that presents a danger to human health or the environment. 35 Ill. Adm. Code 721.123(a)(5). Mr. Dorothy adds that the contingency plan requirement applies whether the hydrogen sulfide gas is contained or not.

Finally, Mr. Dorothy contends that Flex-N-Gate waived the argument that Part 725 does not apply when it prepared a contingency plan for the facility. Resp. at 7.

Count III: Failure to Report the Incident to the Agency

According to Mr. Dorothy, Flex-N-Gate violated Section 725.156(j) by failing to report the sulfuric acid spill to the Agency within 15 days. Compl. at 6; citing 35 Ill. Adm. Code 725,156(j). Flex-N-Gate asserts that not only is their wastewater treatment unit exempt from the entire Part 725, but Section 725.156(j) only applies to an "incident that requires implementing the contingency plan." Mot. at 12; citing 35 Ill. Adm. Code 725.156(j). Flex-N-Gate contends that because no fire or explosion occurred and hydrogen sulfide gas is not a waste or hazardous waste constituent, the alleged release did not require Flex-N-Gate to implement any contingency plan. For these reasons, Flex-N-Gate moves the Board to dismiss this count.

Again, Mr. Dorothy argues that by preparing a contingency plan, Flex-N-Gate has waived any argument that it was not required to prepare such a plan. Resp. at 8.

Count IV: Failure to Amend the Contingency Plan to Address the Release

Count IV of the complaint asserts that Flex-N-Gate violated Section 725.154(b) of the Board's regulations by failing to amend its contingency plan in response to the alleged spill. Compl. at 6-7; citing 35 Ill. Adm. Code 725.154(b). Under this section of the Board's regulations, the owner or operator must review the facility's contingency plan if that plan fails in an emergency. *Id.*

Flex-N-Gate argues it did not violate Section 725.154(b) because the alleged release did not trigger the need for implementing any contingency plan. Mot. at 13. Flex-N-Gate reiterates that Part 725 does not apply to Flex-N-Gate's wastewater treatment unit. Further, Flex-N-Gate contends that Section 725.154(b) only applies where a contingency plan fails. Accordingly, because the alleged release did not trigger the contingency plan, the plan could not have failed. *Id*.

Mr. Dorothy maintains that the contingency plan failed in this incident regardless of whether the incident triggered the plan because the safety officer did not know what a hydrogen sulfide meter was or whether the facility had one. Resp. at 8. Mr. Dorothy alleges that workers did not have the proper training or equipment to address the release, a fact he blames on a deficiency of the contingency plan. *Id.*

Count V: Failure to Amend the Contingency Plan in Response to a Change in the Facility

In the complaint, Mr. Dorothy alleges that Flex-N-Gate violated Section 725.154(c) for failing to amend its contingency plan in response to the alleged release. Compl. at 7-8. In moving to dismiss this count, Flex-N-Gate argues that in addition to the arguments set forth above, the alleged release did not trigger implementation of a contingency plan. Therefore,

according to Flex-N-Gate, by definition no "emergency" for the purposes of Section 725.154(c) occurred. For these reasons, Flex-N-Gate moves the Board to dismiss count V of the complaint.

Mr. Dorothy maintains that Flex-N-Gate changed its operation several months before the incident when Flex-N-Gate began using High Sulfur Additive-90 in its process. Mr. Dorothy contends that pursuant to Section 725.154(c), Flex-N-Gate should have amended the contingency plan in response to the "changed operations." Resp. at 9.

Count VI: Failure to Carry Out the Contingency Plan as Required by the Plan

In count IV, Mr. Dorothy alleges Flex-N-Gate violated Section 725.151(b) of the Board's regulations by failing to carry out the contingency plan in response to the alleged sulfuric acid spill. Compl. at 9, 19; citing 35 Ill. Adm. Code 725.151(b). For the reasons discussed above, Flex-N-Gate again asserts it was under no obligation to carry out the obligations of the contingency plan because nothing triggered its application. Mot. at 15.

Mr. Dorothy claims that whether required or not, Flex-N-Gate prepared a contingency plan and represented to the Agency, Emergency Services and Disaster Agency, and Urbana Fire Department that the plan was prepared to meet the requirements of Part 725. Resp. at 10. As a result, argues Mr. Dorothy, Flex-N-Gate is "estopped from arguing that it intentionally failed to prepare an OSHA emergency response plan by relying on a sham RCRA plan." *Id*.

Board Analysis

Mr. Dorothy alleges that Flex-N-Gate falls within a category of facilities that is regulated under RCRA, yet does not have a RCRA permit or interim status. Flex-N-Gate contends it does not have a RCRA permit or interim status because each hazardous wastestream at the facility falls under one exclusion or another from RCRA permitting and interim status requirements. Illustrating this point, contends Flex-N-Gate, the alleged release occurred from a wastestream that qualifies as an excluded wastewater treatment unit at the facility. For these reasons, Flex-N-Gate argues the complaint must be dismissed because it fails to state a claim on which the Board can grant relief.

Mr. Dorothy maintains that Flex-N-Gate is a large quantity generator of hazardous waste that is required to prepare and follow a contingency plan for the facility regardless of any other exemptions it might claim. Supp. Resp. at 2. Similarly, Mr. Dorothy argues that Flex-N-Gate is also required to have a RCRA permit unless it can demonstrate compliance with the conditions applicable to large quantity generators of hazardous waste. *Id*.; citing 35 Ill. Adm. Code 722.134(a).

The Board denies Flex-N-Gate's motion to dismiss. The Board finds that Mr. Dorothy's complaint indeed states a claim for which the Act and Board regulations provide a remedy and is legally sufficient. Taking all well-pled facts as true and viewing them in a light most favorable to the non-movant, the Board finds there is a set of facts that could entitle Mr. Dorothy to relief.

Accordingly, the Board denies Flex-N-Gate's motion to dismiss and accepts the petition for hearing. The Board expects that additional facts and evidence regarding the alleged spill and conflicts between the conditions of Flex-N-Gate's various permits or exclusions from them and the referenced statues and regulations will be disclosed at hearing and in further pleadings.

ACCEPT FOR HEARING

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d) (2000); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if Flex-N-Gate fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider Flex-N-Gate to have admitted the allegation. 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2000). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

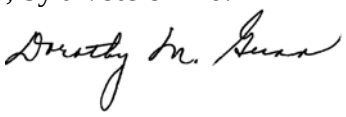
Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any, including whether to impose a civil penalty, and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any, including a specific dollar amount, and supporting its position with facts and arguments that address any or all of the Section 42(h) factors.

CONCLUSION

The Board denies Flex-N-Gate's motion to dismiss and accepts the complaint for hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 3, 2005, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board