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
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

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)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original and nine copies each of the following documents:

1. **Flex-N-Gate Corporation's MOTION TO STRIKE AFFIDAVITS FILED AND UNSUPPORTED STATEMENTS MADE IN SUPPORT OF COMPLAINANT'S SUMMARY JUDGMENT FILINGS AND MOTION FOR ADMONISHMENT OF COMPLAINANT;**

2. **Flex-N-Gate Corporation's MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT; and,**

3. **Flex-N-Gate Corporation's RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT I,**

copies of which are herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

Dated: July 8, 2005

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

Thomas G. Safley
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached MOTION TO STRIKE AFFIDAVITS FILED AND UNSUPPORTED STATEMENTS MADE IN SUPPORT OF COMPLAINANT'S SUMMARY JUDGMENT FILINGS AND MOTION FOR ADMONISHMENT OF COMPLAINANT; MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT; and RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT I, upon:

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 July 8, 2005; and upon:

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

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 July 8, 2005.

/s/ Thomas G. Safley
Thomas G. Safley

GWST:003/Fil/NOF and COS -- Motion to Strike

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
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v.	)	PCB 05-49
	)	
FLEX-N-GATE CORPORATION, an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

MOTION TO STRIKE AFFIDAVITS FILED AND UNSUPPORTED STATEMENTS MADE IN SUPPORT OF COMPLAINANT'S SUMMARY JUDGMENT FILINGS AND MOTION FOR ADMONISHMENT OF COMPLAINANT

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Motion to Strike Affidavits Filed and Unsupported Statements Made in Support of Complainant's Summary Judgment Filings and Motion for Admonishment of Complainant ("Motion to Strike and Admonish"), states as follows:

I. MOTION TO STRIKE AFFIDAVITS FILED IN SUPPORT OF COMPLAINANT'S SUMMARY JUDGMENT FILINGS

A. Background

1. On May 27, 2005, Flex-N-Gate filed its Motion for Summary Judgment as to All Counts of Complainant's Complaint and its Motion for Partial Summary Judgment as to Counts II through VI of Complainant's Complaint (collectively "Motions for Summary Judgment").

2. On June 20, 2005, Complainant mailed his Motion for Partial Summary Judgment as to Count I ("Complainant's Motion for Partial Summary Judgment") to counsel for Flex-N-Gate. See Complainant's Certificate of Service, dated June 20, 2005.

3. Complainant attempts to support his Motion for Partial Summary Judgment with an "Affidavit" dated June 20, 2005. See Complainant's Motion for Partial Summary Judgment at 2-3.

4. On June 24, 2005, Complainant filed his Responses to Flex-N-Gate's Motions for Summary Judgment.

5. Complainant also attempts to support those Responses with an "Affidavit" dated June 24, 2005. See Affidavit in Support of Responses to Motions for Summary Judgment.

6. As set forth below, these "Affidavits" are deficient, and the Illinois Pollution Control Board ("Board") should strike them.

B. Legal Standard for Affidavits Filed with Board in Support of or Opposition to a Summary Judgment Motion.

7. Illinois Supreme Court Rule 191(a) provides in relevant part that:

> Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure [735 ILCS 5/2-1005], . . . shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.

Ill. S. Ct. R. 191(a). (Emphasis added.)

8. The Board considers affidavits filed with it in support of or in opposition to motions for summary judgment "only to the extent that the affidavits meet the requirements of Illinois Supreme Court Rule 191(a)." Johnson v. ADM-Demeter, Hoopeston Div., PCB No. 98-31, 1999 Ill. ENV LEXIS 6, at *2 (Ill.Pol.Control.Bd.

Jan. 7, 1999). (Emphasis added.) See id. at *11, n.3 ("The Board will disregard these statements [in an affidavit], however, because they do not meet the requirements of Illinois Supreme Court Rule 191(a). Specifically, these statements are conclusory and ADM has not provided a factual basis for these statements.") Accord, People v. D'angelo Enterprises, Inc., PCB No. 97-66, 1998 Ill. ENV LEXIS 574, at *28 (Ill.Pol.Control.Bd. Nov. 19, 1998) (refusing to consider an affidavit filed in support of a motion for summary judgment that did not comply with Rule 191(a)).

9. Further, the Board has held that "[u]nder Illinois Supreme Court Rule 191(a), opinions and conclusions may not be included in an affidavit submitted in support of a motion for summary judgment" filed with the Board. Trepanier, et al. v. Speedway Wrecking Co., et al., PCB No. 97-50, 1998 Ill. ENV LEXIS 529, at **16-17 (Ill.Pol.Control.Bd. Oct. 15, 1998).

10. Thus, in Trepanier, the Board struck portions of an affidavit filed in response to a motion for summary judgment because the affidavit contained "opinions and conclusions" and because the affiant had "not been shown to be qualified to offer a medical opinion," and also struck a portion of another affidavit filed in support of that response because it "does not 'set forth with particularity the facts upon which claim . . . is based.'" Id.

11. Likewise, the Board has stricken portions of an affidavit filed in support of a motion for summary judgment which were "not information which was within [the affiant's] personal knowledge," other portions of the affidavit that were "based on hearsay," and other portions of the affidavit which the Board found to be "self-serving

and conclusory." Heiser v. Office of the State Fire Marshal, PCB 94-377, 1995 Ill. ENV LEXIS 895, at **8-9 (Ill.Pol.Control.Bd. Sept. 21, 1995). See also 2222 Elston LLC v. Purex Indus., Inc., et al., PCB No. 03-55, 2003 Ill. ENV LEXIS 359, at **17-19 (Ill.Pol.Control.Bd. June 19, 2003) (striking an affidavit that was "conclusory"); EPA v. Rhodes, PCB No. 71-53, 1972 Ill. ENV LEXIS 169, at *1 (Ill.Pol.Control.Bd. Jan. 24, 1972) (holding that the Board "[can] not grant relief . . . on the basis of a mere conclusion" in an affidavit.")

C. Complainant's "Affidavit" Filed in Support of Complainant's Motion for Partial Summary Judgment does not Meet the Requirements of Supreme Court Rule 191(a).

12. Complainant's "affidavit" filed in support of his Motion for Partial Summary Judgment states as follows:

> Complainant Morton F. Dorothy makes the following affidavit in support of his motion for partial summary judgment as to Count I:
>
> 1. Respondent, Flex-N-Gate Corporation, is conducting hazardous waste treatment and storage operations at the Guardian West facility.
>
> 2. Respondent has admitted, pursuant to complainant's Request to Admit, that it is treating hazardous waste on-site and that it does not have a RCRA permit or interim status.
>
> 3. There is no genuine issue of material fact as to Count I.

Complainant's Motion for Partial Summary Judgment at 2-3.

13. Paragraph one of this "affidavit" does not comply with Illinois Supreme Court Rule 191(a).

14. First, whether or not Flex-N-Gate "is conducting hazardous waste treatment and storage operations" at the facility is not a fact, it is a legal conclusion,

which is inappropriate for an affidavit. See Majca v. Beekil et al., 701 N.E.2d 1084, 1091-1092 (Ill. 1998) (upholding the striking of an affidavit "because the affidavit contained legal conclusions unsupported by facts.")

15. Second, even if this were an issue of fact, paragraph one of the "affidavit" is conclusory. That is, paragraph one concludes, without reference to any evidence, that Flex-N-Gate "is conducting hazardous waste treatment and storage operations" at the facility. Based on this conclusion, Complainant moves the Board to "find that respondent Flex-N-Gate Corporation is operating a hazardous waste treatment and storage facility without a RCRA permit or interim status." Complainant's Motion for Partial Summary Judgment at 2.

16. However, this paragraph does not "set forth with particularity the facts upon which the claim . . . is based," as Rule 191(a) requires. Thus, this paragraph violates the requirement of Rule 191(a) that an affidavit "shall not consist of conclusions but of facts admissible in evidence." Supreme Court Rule 191(a).

17. Regarding Complainant's conclusion that Flex-N-Gate "is conducting hazardous waste treatment . . . operations," Complainant does state in paragraph two of this "affidavit" that Flex-N-Gate "has admitted, pursuant to complainant's Request to Admit, that it is treating hazardous waste on-site and that it does not have a RCRA permit or interim status." Technically, this paragraph of the "affidavit" also does not comply with Supreme Court Rule 191(a) because it does not "have attached thereto sworn or certified copies of all papers upon which the affiant relies," that is, Flex-N-Gate's response to "complainant's Request to Admit." Ill. S. Ct. R. 191(a). Regardless, Flex-N-

Gate does not deny making the admission stated in paragraph three of Complainant's Motion for Partial Summary Judgment. However, Flex-N-Gate notes that this admission is irrelevant. Just because a generator of hazardous waste treats that hazardous waste does not mean that the generator becomes a "treatment storage or disposal facility" that is required to have a RCRA permit. RCRA allows generators of hazardous waste to treat that hazardous waste without obtaining a RCRA permit. For example, 35 Ill. Admin. Code § 703.123 provides in relevant part that:

> The following persons are among those that are not required to obtain a RCRA permit:
>
> * * *
>
> c) Persons that own or operate facilities solely for the treatment, storage, or disposal of hazardous waste excluded from regulations under this Part by 35 Ill. Adm. Code 721.104 or 721.105 (small generator exemption);
>
> d) An owner or operator of a totally enclosed treatment facility, as defined in 35 Ill. Adm. Code 720.110;
>
> e) An owner or operator of an elementary neutralization unit or wastewater treatment unit, as defined in 35 Ill. Adm. Code 720.110.

35 Ill. Admin. Code § 703.123. (Emphasis added.)

This includes generators accumulating waste pursuant to 35 Ill. Admin. Code § 722.134(a) prior to shipping the waste off-site for treatment, storage, or disposal. See, e.g., PERMITTING OF TREATMENT ACTIVITIES IN A GENERATOR'S ACCUMULATION TANKS OR CONTAINERS, USEPA Faxback 12694, PPC 9453.1986(04), July 25, 1986, attached hereto as Exhibit A ("Nothing in Section 262.34

[i.e., 722.134] precludes a generator from treating waste when it is in an accumulation tank or container covered by that provision.")

18. Thus, the fact that a generator of hazardous waste "treats" that hazardous waste does not mean that the generator is running a "treatment . . . operation[]" as Complainant alleges in paragraph two of his Motion for Partial Summary Judgment. Likewise, it does not mean that the generator's facility is a "treatment facility," as Complainant prays the Board to find at page two of his Motion for Partial Summary Judgment. Thus, the admission that Complainant references in paragraph two of his affidavit in support of his Motion for Partial Summary Judgment does not provide the "facts admissible in evidence" that would be necessary to establish the conclusion that Complainant reaches.

19. Regarding Complainant's conclusion that Flex-N-Gate "is conducting hazardous waste . . . storage operations," Complainant does not even attempt to provide any facts to establish such conclusion.

20. Third, the "affidavit" does not indicate that paragraph one thereof is "made on the personal knowledge of the affiant," and does not "affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Mr. Dorothy previously has stated that he worked at the facility at issue, but Flex-N-Gate submits that this fact is not sufficient to establish that Mr. Dorothy has personal knowledge and can testify to facts sufficient to establish the conclusions he makes, especially in light of the fact that Complainant has not even set forth such facts.

21. Paragraph three of this "affidavit" also does not comply with Supreme Court Rule 191(a), because it does not state a fact, it states a legal conclusion, that is, the conclusion that "[t]here is no genuine issue of material fact as to Count I."

22. For the reasons stated above, the Board should strike paragraphs one and three of Complainant's "affidavit" filed in support of his Motion for Partial Summary Judgment.

D. <u>Complainant's "Affidavit" Filed in Support of Complainant's Motion for Partial Summary Judgment does not Meet the Requirements of Supreme Court Rule 191(a)</u>.

23. Likewise, Complainant's "Affidavit" filed in support of Complainant's Responses to Flex-N-Gate's Motions for Summary Judgment does not comply with Rule 191(a).

24. The specific deficiencies in this "Affidavit" are set forth below. As for the assertions in the Affidavit that are not addressed, Flex-N-Gate does not by this Motion intend to indicate that it agrees with such assertions, but simply does not feel that it is necessary to move to strike such assertions.

a. The first sentence of paragraph one of that affidavit references "all information available to the complainant," but does not state "with particularity" what that information is, does not indicate or establish that Complainant has "personal knowledge" of that information or whether it is hearsay, and does not "affirmatively show that [Complainant], if sworn as a witness, can testify competently thereto."

b. The second sentence of paragraph one of that affidavit, alleging a "continuing, intentional violation of Board rules" constitutes "conclusions" not "facts admissible in evidence."

c. The first sentence of paragraph two of that affidavit, which characterizes Complainant's Complaint, how the alleged violations

"could be easily fixed," and the alleged effects of such "fix," is conclusory and self-serving.

d. The second sentence of paragraph two does not set forth "with particularity" the alleged facts referenced (e.g., the identity of the alleged "safety equipment"), and further does not establish that Complainant has "personal knowledge" of the assertions made or that Complainant "can testify competently thereto."

e. The second sentence of paragraph three of that affidavit regarding "needed equipment" and "the cost of compliance" is conclusory, failing to set forth "with particularity" the facts upon which Complainant relies to reach these conclusions, and further does not establish that Complainant has "personal knowledge" of the assertions made or that Complainant "can testify competently thereto."

f. The third sentence of paragraph three regarding the alleged reason that Flex-N-Gate filed its Motions for Summary Judgment is conclusory and self-serving, improperly characterizes Flex-N-Gate's Motions for Summary Judgment as "hooligan motions" (see Motion for Admonishment of Complainant set out below), and improperly asserts that "respondent is seeking to delay this action" without establishing that Complainant has "personal knowledge" of the reason why Flex-N-Gate filed its Motions for Summary Judgment or that Complainant "can testify competently" regarding those reasons.

g. Paragraph four of that affidavit is conclusory, failing to set forth "with particularity the facts" that allegedly support Complainant's assertion that "[t]he contingency plan was deficient ab initio, in ways completely independent of the incident alleged in the complaint." This is made particularly clear by the fact that Complainant does not even identify the alleged "ways completely independent of the incident alleged in the complaint" that the contingency plan allegedly "was deficient."

h. The allegation of the third sentence of paragraph five of that affidavit that "the sludge and contaminated debris . . . cannot be . . . pumped to the wastewater treatment unit" is conclusory, failing to set forth the facts on which Complainant relies to make such assertion.

i. The statement in the fourth sentence of paragraph five of that affidavit that "[t]he sludge and contaminated debris is hazardous waste" states a legal conclusion, not a "fact[] admissible in evidence."

j. The statement in paragraph eight of that affidavit that "sulfide . . . was the source of the release" is conclusory, failing to identify any particular facts upon which Complainant relies to conclude that "sulfide . . . was the source of the release" (such as sampling results), and further fails to establish that Complainant can "testify competently" to this conclusion.

k. The further statement in paragraph eight of that affidavit that something "may have" happened:

(i) constitutes an "opinion and conclusion" which the Board has held "may not be included in an affidavit submitted in support of a motion for summary judgment" filed with the Board (Trepanier, PCB No. 97-50, 1998 Ill. ENV LEXIS 529, at **16-17); and,

(ii) further fails to establish that Complainant has "personal knowledge" or can "testify competently" that this "may have" happened.

l. The first sentence of paragraph nine of that affidavit is conclusory and does not establish that Complainant has any "personal knowledge" or "can testify competently" to the reason why "Respondent presents an account of the acid spill."

m. The statement in the second sentence of paragraph nine of that affidavit that "[t]his [account] is not consistent with what complainant observed as a witness to the immediate aftermath of the spill" is conclusory, failing to "set forth with particularity the facts" on which Complainant relies, that is, what facts allegedly make the "account" inconsistent with Complainant's observations.

n. The statement in the second sentence of paragraph nine of that affidavit that "[t]his [account] . . . is not consistent with the evidence produced in discovery" constitutes an "opinion and conclusion," does not "set forth with particularity the facts" on which Complainant relies (that is, the particular discovery responses Complainant references), and does not "have attached . . . sworn or certified copies of all papers upon which the affiant

relies" (that is, the particular discovery responses Complainant references).

o. Paragraph ten of that affidavit is deficient in that it references a "technical argument" produced "in the course of discovery" but does not "have attached . . . sworn or certified copies of all papers upon which the affiant relies," that is, the discovery response at issue.

p. The statement in the first sentence of paragraph eleven of that affidavit is conclusory in that it does not identify on the particular facts, such as sampling results, on which Complainant relies to support his allegation that he "directly observed the production of hydrogen sulfide gas." In other cases, the Board has held that observation alone is insufficient to establish that a material constitutes a particular substance. See People v. Community Landfill Co., Inc., PCB No. 97-193, 2002 Ill. ENV LEXIS 583, at *32 (Ill.Pol.Control.Bd. Oct. 3, 2002) ("A review of the deposition testimony and affidavits of Ms. Kovasznay establish[es] that she based her conclusions on merely observing materials she thought might contain asbestos. No testing was done on the materials and the materials were not marked as asbestos. The Board finds that this is not sufficient to support a finding of violation on this count.")

q. The second sentence of paragraph eleven is deficient in that it references "accounts" of "other witnesses" that "have been produced in discovery," but:

   (i) it does not even identify who these "witnesses" are; and,

   (ii) it does not "have attached . . . sworn or certified copies of all papers upon which the affiant relies," that is, these other "accounts . . . produced in discovery."

r. The second sentence of paragraph eleven further is conclusory and constitutes an impermissible "opinion" in an affidavit, in that it characterizes these undisclosed, un-attributed "accounts" as "consistent with hydrogen sulfide production."

s. The third sentence of paragraph eleven is deficient in that:

(i) it references hearsay (statements allegedly made by "[s]ome of these witnesses . . . to complainant") and seeks to support Complainant's conclusions by this hearsay;

(ii) it does not even identify who these "witnesses" are; and,

(iii) it offers a "opinion and conclusion" regarding these unidentified witnesses' alleged agreement "with complainant's assessment at the time."

t. The first sentence of paragraph twelve of that affidavit is deficient in that it alleges that "Respondent has refused to name any witnesses or other evidence that it intends to produce at hearing to show that the hydrogen sulfide emission did not occur," but does not "have attached . . . sworn or certified copies of all papers upon which the affiant relies," that is, any discovery requests from Complainant to Flex-N-Gate seeking such information or Flex-N-Gate's responses to such discovery requests "refusing" to provide such information. See further discussion of this issue in Flex-N-Gate's Motion for Admonishment. below.

u. The second sentence of paragraph twelve is deficient in that it alleges that Flex-N-Gate employee Denny Corbett "has made numerous false statements in connection with this incident," but:

(i) this constitutes a mere "opinion and conclusion" of Complainant that is improper in an affidavit;

(ii) Complainant does not identify the particular "facts admissible in evidence" upon which Complainant relies to reach this conclusion, that is, what Mr. Corbett allegedly said, when he said it, and what facts occurred that his statements allegedly misrepresent;

(iii) Complainant does not "attach[] . . . sworn or certified copies of all papers upon which [he] relies," that is, the documents in which Mr. Corbett allegedly made "false statements" (see Complainant's Motion to Compel Production of Documents, ¶9, alleging that Mr. Corbett made these false statements in written communications with the Occupational Health and Safety Administration ("OSHA")); and,

(iv) Complainant concludes, and asks the Board to conclude, that Mr. Corbett's "testimony would therefore not be believable," again, without providing any factual basis on which to make such an assessment, and at the summary judgment stage, where questions of credibility are not at issue. Ayh Holdings, Inc. v. Avreco, Inc., et al., 826 N.E.2d 1111, at 1124 (1st Dist. 2005). ("The trial court cannot make credibility determinations or weigh the evidence at the summary judgment stage.") (Citations omitted.)

See further discussion of this issue in Flex-N-Gate's Motion for Admonishment, below.

v. Paragraphs 13, 14, 15, 16, and 17 of that affidavit are deficient in that they state "opinions and conclusions," not "fact[s] admissible in evidence."

w. The first sentence of paragraph 18 of that affidavit is deficient in that it does not indicate or establish that Complainant has "personal knowledge" of the matter alleged (that is, that "[a]t the time RCRA rules were adopted, most plating such as that done at Guardian West was done in cyanide solution"), and does not "affirmatively show that [Complainant], if sworn as a witness, can testify competently thereto."

x. The second and third sentences of paragraph 18 are deficient in that they constitute "opinions and conclusions," and do not state or establish that Complainant has "personal knowledge" regarding "cyanide plating" and do not "affirmatively show that [Complainant], if sworn as a witness, can testify competently thereto."

y. The fourth sentence of paragraph 18 is deficient in that it does not state or establish that Complainant has any "personal knowledge" as to why the United States Environmental Protection Agency ("USEPA") "created . . . [the] category 'special waste'" or that Complainant "if sworn as a witness, can testify competently" as to why USEPA "created . . . [that] category."

z. Likewise, the last sentence of paragraph 18 is deficient in that it does not state or establish that Complainant has any "personal knowledge" as to what USEPA "intended" the "contingency planning requirements . . . to address," or that Complainant "if

sworn as a witness, can testify competently" as to what USEPA "intended" those "requirements . . . to address."

aa. Paragraph 19 of the affidavit is deficient in that it does not state or establish that Complainant has "personal knowledge" as to how "[t]he Guardian West facility was . . . designed," or the "reasons" that any particular design was chosen for the facility, nor does paragraph 19 "affirmatively show that [Complainant], if sworn as a witness, can testify competently" regarding how the facility was designed or why any certain design was chosen.

bb. The first and last sentences of paragraph 20 of the affidavit are deficient in that they state legal conclusions, not "facts admissible in evidence."

cc. The second sentence of paragraph 20 of the affidavit is deficient in that it does not state or otherwise establish that Complainant has "personal knowledge" of, or "if sworn as a witness, can testify competently" regarding, "sulfide-bearing waste."

dd. The first sentence of paragraph 21 of the affidavit is deficient in that:

(i) it constitutes an "opinion and conclusion" regarding Flex-N-Gate's alleged "attitude" regarding "hydrogen cyanide" and "hydrogen sulfide"; and,

(ii) it does not state or establish that Complainant has "personal knowledge" of, or "if sworn as a witness, can testify competently" regarding, Flex-N-Gate's alleged "attitude[s]" regarding this or any other issue.

ee. The remainder of paragraph 21 of the affidavit is deficient as it does not indicate or establish that Complainant has "personal knowledge" as to the medical opinions stated, nor does it "affirmatively show that [Complainant], if sworn as a witness, can testify competently" regarding these medical opinions.

ff. The first and second sentences of paragraph 22 of the affidavit are deficient in that they do not indicate or establish that Complainant has "personal knowledge" or could "testify competently" that "Guardian West has introduced sulfide into the plating process" (first sentence of paragraph 22) or, even if this had occurred, why it "is done" (second sentence of paragraph 22).

gg. The third sentence of paragraph 22 of the affidavit is deficient in that it constitutes an "opinion and conclusion" about what, to Complainant, "appears" to be happening, and it does not indicate or establish that Complainant has "personal knowledge" of the issues stated or is qualified to "testify competently thereto."

hh. Paragraph 23 of the affidavit is deficient in that:

(i) it is made up only of Complainant's "opinions and conclusions" regarding what happened at the facility, not "facts admissible in evidence" that establish what happened (as noted above, the Board has held that observation is insufficient to establish that a material constitutes a particular substance -- see Community Landfill Co., Inc., 2002 Ill. ENV LEXIS 583, at *32); and,

(ii) it does not state or establish that Complainant is qualified to "testify competently" to the statements of chemistry included therein; and,

(iii) the characterization in the third sentence of paragraph 23 of material as "hazardous waste" states a legal conclusion, not a "fact[] admissible in evidence."

ii. The first sentence of paragraph 24 of the Affidavit is deficient in that:

(i) it assumes "[t]he evolution of hydrogen sulfide from the waste on the plating room floor," which, as discussed above, constitutes a mere "opinion and conclusion" (see discussion of paragraph 23 above); and,

(ii) it does not state or establish that Complainant has "personal knowledge" regarding the drafting of the facility's contingency plan or what was or was not "contemplated when then contingency plan was drafted," or that Complainant could "testify competently thereto."

jj. The second sentence of paragraph 24 of the Affidavit is deficient in that it constitutes an "opinion and conclusion" regarding what Complainant characterizes as a "change[]" in "the response necessary in an emergency," not a "fact[] admissible in evidence."

kk. Paragraph 25 is deficient in that:

(i) it constitutes only Complainant's "opinions and conclusions" regarding what might happen in the future; and,

(ii) it does not state or establish that Complainant has any "personal knowledge" or the background to "testify competently" regarding the alleged possibility of an "indict[ment]" of Guardian West personnel.

See also the further discussion of this issue in Guardian West's Motion for Admonishment below.

25. For these reasons, the Board should strike the portions of Complainant's "Affidavit" in support of Complainant's Responses to Flex-N-Gate's Motions for Summary Judgment identified above.

III. MOTION TO STRIKE UNSUPPORTED ASSERTIONS OF FACT MADE IN COMPLAINANT'S SUMMARY JUDGMENT FILINGS

26. "Facts asserted [in motions filed with the Board] 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." 35 Ill. Admin. Code § 101.504.

27. As just discussed, the Board should strike numerous portions of Complainants' "affidavits" filed in support of its Responses to Flex-N-Gate's Motions for Summary Judgment.

28. Once the Board strikes those portions of Complainants' "affidavits," the portions of Complainants' Responses that rely on those stricken portions of the "affidavits" will not "be supported" as required by Section 101.504.

29. In his Responses, Complainant does not cite to his "affidavits" or otherwise identify exactly which portions of his Responses he intends to support by his

"affidavits." However, it appears that the portions of Complainants' Responses which he intends to support by the portions of the affidavits that, as discussed above, should be stricken, are:

a. Complainants' Response to Motion for Summary Judgment:

Paragraphs 2, 3, 4, 8 (first sentence), 9.a (except last sentence), 9.b, 9.c, 9.d, 10 (first two sentences), 11 (first sentence), 12, 13, 20.a, 20.b, 20.b.i, 20.b.ii (first sentence), and 20.c (last sentence);

b. Complainant's Response to Motion for Partial Summary Judgment as to Counts II – VI:

Paragraphs 2 (first two sentences), 5 (first two sentences), 6, 7, 12, 12.a, 12.b, 12.b.i, 12.b.ii (first sentence), 12.c (last sentence) 22, 23, 24, 25, 26, 29, 34.a (first sentence), and 35 (first sentence).

30. Because Complainant cites no other support for these portions of his Responses other than the portions of Complainant's affidavits which the Board must strike, the Board also must strike these portions of Complainant's Responses.

31. In addition, Complainant makes numerous other assertions of fact in his Responses to Flex-N-Gate's Motions for Summary Judgment which are not "supported" by reference to his "affidavits" or otherwise, as Section 101.504 requires.

32. Specifically, in his Response to Motion for Summary Judgment, Complainant states the following opinions, assertions of fact, or conclusions of fact or law without citing any support for such statements:

a. paragraph 1 – entire paragraph;

b. paragraph 6 – second and third sentences;

c. paragraph 10 – last sentence;

d. paragraph 11 – last sentence;

e. paragraph 15 – first sentence;

f. paragraph 18.b.i – "respondent has now admitted, that respondent is conducting hazardous waste treatment and storage operations without a RCRA permit";

g. paragraph 20.b.ii – conclusions regarding what "Flex-N-Gate . . . consciously decided," what Flex-N-Gate "would have included in the contingency plan" and what "employee training" Flex-N-Gate would have "provided," implications as to what is and is not in the Facility's contingency plan and training without citation to the contingency plan or evidence of the training, conclusions as to what "motion" Flex-N-Gate's counsel "would have filed" and what Flex-N-Gate's counsel "has decided," and conclusion regarding "delay" of "this case";

h. paragraph 20.c, second sentence – conclusions regarding what "[a]n outsider" would be able to "know[]";

i. paragraph 21 – "respondent has admitted that it is conducting hazardous waste treatment and storage operations without a RCRA permit";

j. paragraph 24 and 24.a – implications as to what "complainant would dispute" and "would also question" without citation to any facts in support of these potential positions;

k. paragraph 27.a – entire paragraph;

l. paragraph 31.c – entire paragraph.

33. And, in his Response to Motion for Partial Summary Judgment as to Counts II – VI, Complainant states the following opinions, assertions of fact, or conclusions of fact or law without citing any support for such statements:

a. paragraph 2 – last sentence;

b. paragraph 17 – "respondent has admitted, but not alleged, that this facility is conducting hazardous waste treatment and storage operations without a RCRA permit";

c. paragraph 18.a – entire paragraph;

d. paragraph 26.a – entire paragraph;

e. paragraph 26.b – entire paragraph;

f. paragraph 28.b – entire paragraph;

g. paragraph 29.a – second sentence;

h. paragraph 30 – second sentence;

i. paragraph 31.a – entire paragraph;

j. paragraph 31.b – discussion of what training Flex-N-Gate does or does not provide to its employees;

k. paragraph 33 – entire paragraph;

l. paragraph 34 – all but first sentence.

34. Again, Section 101.504 of the Board's rules requires that facts asserted in motions filed with the Board must be supported by admissible evidence. Complainant does not even attempt to support these assertions of fact. Accordingly, in addition to striking portions of Complainant's "affidavits" and the portions of Complainant's Responses to Flex-N-Gate's Motions for Summary Judgment which rely on those stricken portions of the "affidavits," as discussed above, the Board also must strike these portions of Complainant's Responses to Flex-N-Gate's Motions for Summary Judgment.

IV. MOTION TO ADMONISH COMPLAINANT

35. In addition to striking Complainant's affidavits and unsupported statements of fact, for the reasons set forth below, Flex-N-Gate moves the Board to admonish Complainant to comply with the Board's procedural rules and maintain decorum in this action.

A. Introduction

36. The Board's procedural rules "govern how persons initiate and participate in all proceedings before the Board under the Environmental Protection Act and other statutes directing Board action." In the Matter of: Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, PCB No. R00-20, 2000 Ill. ENV LEXIS 791, at *1 (Ill.Pol.Control.Bd. Dec. 21, 2000).

37. Specifically, adjudicatory matters before the Board such as this case are governed by the Board's procedural rules set forth at 35 Ill. Admin. Code Part 101 and Part 103. See 35 Ill. Admin. Code § 103.100.

38. Compliance with the Board's procedural rules is not optional, and failure to comply can subject a party to sanctions under 35 Ill. Admin. Code § 101.800.

39. Further, as before a court, a party appearing before the Board must maintain proper decorum and respect for the Board and its proceedings. See Logsdon, et al. v. South Fork Gun Club, PCB No. 00-177, 2002 Ill. ENV LEXIS 692, at **5-6 (Ill.Pol.Control.Bd. Dec. 19, 2002) (holding that the Complainant's actions were "sanctionable" where, in part, the Complainant "behaved disrespectfully and inappropriately at the hearing."); E.G. Vogt Oil Co. v. Illinois EPA, PCB No. 00-141, 2002 Ill. ENV LEXIS 53, at *2 (Ill.Pol.Control.Bd. Feb. 7, 2002) ("the Board in no way intends to countenance the pattern of delay and disregard for the Board and its processes exemplified in these cases.")

B. Complainant has Repeatedly failed to Comply with the Board's Rules.

40. Flex-N-Gate has detailed above Complainant's failures to comply with the Board's rules and the Rules of Civil Procedure in Complainant's summary judgment filings. As detailed below, these failures are not isolated, but rather, Complainant has repeatedly failed to comply with the Board's Rules.

1. Complainant has Repeatedly Attempted to Base his Filings on Unsupported Factual Allegations.

41. It is axiomatic that, like a Court, the Board cannot decide cases based merely on unsupported allegations, but must base its decisions only on admissible evidence.

42. Thus, Section 101.504 of the Board's rules requires that "[f]acts asserted [in motions filed with the Board] 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." 35 Ill. Adm. Code § 101.504. (Emphasis added.)

43. Despite this requirement, Complainant has repeatedly attempted to base his filings on factual allegations which had no support. Specifically:

a. October 13, 2004: In his Motion to Accept for Hearing and for Expedited Discovery ("Motion to Accept for Hearing"), Complainant attempted to rely on unsupported allegations of fact, requiring Flex-N-Gate to point out in its Response to this Motion that these allegations were unsupported. See Flex-N-Gate's Response to Complainant's Motion to Accept for Hearing at ¶¶13-14.

b. March 15, 2005: In his Motion to Strike Answer, Complainant again attempted to rely on numerous unsupported conclusions of fact, again requiring Flex-N-Gate to devote a portion of its Response to this Motion to addressing this deficiency. See Flex-

N-Gate's Response to Complainant's Motion to Strike Answer at 6-7. Complainant later withdrew his Motion to Strike.

c. April 27, 2005: In his Motion to Compel Production of Documents, Complainant again attempted to rely on numerous unsupported allegations of fact, again requiring Flex-N-Gate to devote a portion of its Response to addressing this deficiency. See Flex-N-Gate's Response to Complainant's Motion to Compel Production of Documents at 2.

d. April 27, 2005. Likewise, in his Motion to Compel Respondent to Admit the Truth of Certain Facts, Complainant again attempted to rely on unsupported allegations of fact, forcing Flex-N-Gate to again address this issue in its Response. See Flex-N-Gate's Response to Complainant's Motion to Compel Respondent to Admit the Truth of Certain Facts at 2.

e. June 24, 2005: Finally, as discussed above, Complainant in his summary judgment filings again has attempted to rely on numerous unsupported allegations of fact, again requiring Flex-N-gate to address this issue through this Motion. See discussion above.

44. As discussed further below, the Board should admonish Complainant to comply with Section 101.504 of the Board's rules and cease making unsupported statements of fact in his filings.

2. When Complainant has Filed Affidavits, They Have Been Deficient.

45. In addition to attempting to support his filings with unsupported allegations of fact, when Complainant has filed affidavits, they have been conclusory, not based on personal knowledge, and otherwise deficient.

46. In particular:

a. October 13, 2004: Complainant attempted to rely on an "affidavit" to support his Motion to Join Agency as Party in Interest and to Extend Time to Respond to Motion to Dismiss ("Motion to Join Agency"), but that "affidavit" failed to attach documents to which

it referred and was conclusory. See Flex-N-Gate's Response to Complainant's Motion to Join Agency at 8-9. These facts required Flex-N-Gate to have to address these deficiencies in its Response to this Motion. See id.

b. October 13, 2004: Complainant attempted to rely on an "affidavit" to support his Motion to Accept for Hearing, but that "affidavit" was conclusory, did not demonstrate that Complainant had personal knowledge of the facts alleged, and also did not attach documents referenced. See Flex-N-Gate's Response to Complainant's Motion to Accept for Hearing at 4-9. This caused Flex-N-Gate to have to spend five pages of its Response pointing out these deficiencies. See id.

c. June 6, 2005: Complainant attempted to rely on an "affidavit" to support his Motion to Reconsider Hearing Officer Order, but that "affidavit" was conclusory and did not demonstrate that Complainant had personal knowledge of or the ability to testify regarding the facts alleged. See Flex-N-Gate's Response to Complainant's Motion to Accept for Hearing at 5-8. This caused Flex-N-Gate to have to address these deficiencies in its Response to this Motion. See id.

d. June 20, 2005: As discussed above, Complainant's "affidavit" filed in support of Complainant's Motion for Partial Summary Judgment does not comply with Supreme Court Rule 191, but makes legal conclusions, is otherwise conclusory, fails to attach documents referenced, and does not establish that Complainant has "personal knowledge" of, or the ability to "testify competently" to, the facts alleged.

e. June 24, 2005: Likewise, as discussed above, Complainant's "affidavit" filed in support of Complainant's Responses to Flex-N-Gate's Motions for Summary Judgment does not comply with Supreme Court Rule 191 and is deficient for the same reasons.

47. Flex-N-Gate further notes that the unsupported allegations that Complainant makes are not trivial. For example, in paragraph one of his Affidavit in Support of Responses to Motions for Summary Judgment, Complainant, without citation

to fact, concludes that Flex-N-Gate is committing a "continuing, intentional violation of Board rules protecting the environment and worker safety at a hazardous waste facility."

In paragraph 12 of that Affidavit, Complainant alleges, without citation to any fact or documents, that Flex-N-Gate has "refused" to respond to discovery requests. Flex-N-Gate strenuously disagrees with this assertion. See Flex-N-Gate's Motion for Leave to File Reply in Support of Motion for Complete Summary Judgment.

And, as discussed further below, Complainant on at least three occasions has alleged, without citation to any facts or documents, that Flex-N-Gate and/or its employees have knowingly lied to the OSHA regarding the "incident" at issue in this matter.

48. As discussed below, especially in light of the seriousness of these allegations, the Board also should admonish Complainant in the future to file proper affidavits which (1) state facts rather than legal or factual conclusions, (2) set those facts out "with particularity," (3) are made on personal knowledge, (4) demonstrate that the affiant has the ability to testify competently to the matters stated, and (5) attach admissible copies of any documents referenced or on which the affiant relies. Further, this should be the case whether or not an affidavit is filed in support of a motion that is explicitly referenced in Supreme Court Rule 191(a).

3. Complainant has Failed to Comply with other Board Rules.

49. In addition to the above, among other things, Complainant served a total of more than 120 interrogatories on Flex-N-Gate, without seeking or obtaining leave of the Hearing Officer as required by 35 Ill. Admin. Code § 101.620(a), forcing Flex-N-

Gate to have to file a Motion for Protective Order. See Flex-N-Gate's Motion for Protective Order.

50. The Board also should admonish Complainant to comply generally with the Board's rules.

C. Complainant has Repeatedly Disregarded Proper Decorum before the Board.

51. In addition to failing to comply with Board Rules, Complainant has repeatedly disregarded proper decorum in this action.

52. Specifically,

a. October 13, 2004: Complainant alleged in his affidavit filed in support of his Motion to Accept for Hearing, without any factual support whatsoever, and without providing copies of the documents he allegedly referenced, that Flex-N-Gate "knowingly" made false statements to OSHA – a crime – and that Flex-N-Gate would destroy documents relevant to this case. Complainant's Motion to Accept for Hearing at 2-3, ¶¶8-12, 14-16. This caused Flex-N-Gate to have to spend a portion of its Response to this Motion addressing the fact that these unsupported allegations were improper and prejudicial, and asking the Board to strike them. Response to Complainant's Motion to Accept for Hearing at 6-8.

b. April 27, 2005: Despite the fact that Flex-N-Gate pointed out in its Response to Complainant's Motion to Accept for Hearing that these statements were improper, as just discussed, Complainant in his Motion to Compel Production of Documents again alleged, this time without even citing to a conclusory affidavit, that a Flex-N-Gate employee "made several false statements, including statements made in writing to OSHA in its investigation of this incident." Motion to Compel Production of Documents, ¶9. This forced Flex-N-Gate to again have to address the fact that this unsupported allegation was conclusory, improper and prejudicial, and move the hearing officer to disregard it. Response to Motion to Compel Production of Documents at 3-4. Complainant later filed an Affidavit making this same statement, but that Affidavit did not attach the documents to which Complainant referred or set

forth the facts upon which Complainant relied to allege that the Flex-N-Gate employee had made "false statements."

c. June 24, 2005: Despite addressing this issue twice before, as discussed above, Complainant again in his summary judgment filings alleges that Flex-N-Gate has lied to OSHA, again without any citation to any evidence to support this allegation, and without providing copies of any documents in which Flex-N-Gate allegedly lied.

d. June 24, 2005: Further, in his Response to Motion for Summary Judgment, Complainant inappropriately accuses Flex-N-Gate of filing "hooligan motions" and "seeking to delay this action, recklessly endangering lives." Complainant's Response to Motion for Summary Judgment at ¶4.

e. June 24, 2005: And, in his Response to Motion for Partial Summary Judgment as to Counts II – VI, Complainant includes an inflammatory statement that "the management" of Flex-N-Gate "will certainly be indicted for reckless homicide." Complainant's Response to Motion for Partial Summary Judgment as to Counts II – VI, at ¶34.a.

53. As discussed further below, the Board should admonish Complainant to stop making such improper and prejudicial allegations.

D. Flex-N-Gate's Attempts to Address Complainant's Failures to Comply with Board Rules and Maintain Decorum have been Unsuccessful.

54. As is made clear from the above, Complainant has repeatedly committed the same infractions of the Board's rules, and has repeatedly disregarded proper decorum in this action.

55. As also is made clear from the above, Flex-N-Gate has attempted to address these actions by Complainant by pointing them out, but Complainant has continued to take the same actions.

56. These repeated actions by Complainant have forced Flex-N-Gate to needlessly incur costs in addressing these actions in its Responses to Complainants' Motions and in this Motion, and have forced or will force the Board and the Hearing Officer to waste time addressing these issues.

E. The Board should not Countenance Complainant's Disregard for the Board's Rules and Proper Decorum in this Action.

57. As is made clear above, Complainant has repeatedly violated the Board's rules despite his failure to comply being pointed out by Respondent.

58. As the Board has stated in the past, the Board cannot "countenance [a] pattern of . . . disregard for the Board and its processes." E.G. Vogt Oil Co., 2002 Ill. ENV LEXIS 53, at *2.

59. The reason for this is clear: if the Board does not enforce its rules, those rules are meaningless, and the Board has no credibility because litigants before it know that the Board will ignore their disregard of the Board's procedures.

60. Further, as discussed in Flex-N-Gate's Response to Complainant's Motion to Accept for Hearing, Illinois Courts have held that it is improper for litigants in Illinois to make accusations in their filings such as Complainant has made against Flex-N-Gate, and that such allegations are "scandalous and impertinent" and should be stricken. See Benitez, et al. v. KFC National Mgmt. Co., 714 N.E.2d 1002, 1037 (2d Dist. 1999) (finding that "plaintiffs' allegations in their second amended complaint that employee-defendants sold tainted food to customers and spied on female customers were 'scandalous and impertinent'" and that it was proper to strike those allegations). Accord, Biggs v. Cummins, 158 N.E.2d 58, 59 (Ill. 1959) (striking the appellant's brief as

containing "scandalous and impertinent material," where the appellant accused a judge of falsifying a court record, the Attorney General of withholding evidence, the Attorney General's assistant of "altering the record," and an assistant Attorney General of making "false and untrue statements to the court.")

61. Complainant's allegations that Flex-N-Gate knowingly made false statements to OSHA, and would destroy documents, are conclusory and are not supported by any facts.

62. Further, Complainant's characterization of Flex-N-Gate's Motions for Summary Judgment as "hooligan motions," of Flex-N-Gate as "seeking to delay this action, recklessly endangering lives," and of "the management" of Flex-N-Gate facing "indict[ment] for reckless homicide" are improper and inflammatory and have no place in filings with the Board or any other body.

63. Complainant clearly makes these allegations to prejudice Flex-N-Gate before the Board by trying to convince the Board that Flex-N-Gate is deceitful and a "bad actor."

64. The Board cannot allow such improper and prejudicial statements, which allege intentional deceit, criminal activity, and other improper actions by Flex-N-Gate, with no supporting facts whatsoever, to stand.

65. Flex-N-Gate further notes that Complainant is an attorney, licensed to practice law in the State of Illinois. Response to Complainant's Motion to Compel Response to Interrogatories, Exhibit E, at ¶¶6,7. Thus, even though he is representing himself in this action, the Board should not hesitate to hold Complainant to compliance

with the Board's rules and to proper decorum. Further, even if Complainant were not an attorney, the Board has held that "*pro se* parties must comply with the same rules as an attorney." SPILL, et al. v. City of Madison, et al., PCB No. 96-91, 1996 Ill. ENV LEXIS 250, at *6 (Ill.Pol.Control.Bd. March 21, 1996).

66. As noted above, failure to comply with the Board's rules can subject a party before the Board to sanctions under Section 101.800 of the Board's rules, 35 Ill. Admin. Code § 101.800.

67. Flex-N-Gate believes that Complainant's repeated violations of the Board's rules and of proper decorum set forth above rise to the level that sanctions under Section 101.800 are appropriate.

68. As detailed above, these violations of the Board's rules and of proper decorum have required Flex-N-Gate to incur costs to point out these violations, and have forced Flex-N-Gate to defend itself against repeated, unsupported allegations of intentional misconduct.

69. This has prejudiced Flex-N-Gate.

70. Further, Complainant's failure to comply with the Board's rules has increased the burden for the Board and the Hearing Officer in ruling on Complainant's Motions, or considering Complainant's Responses to Motions, because the Board and Hearing Officer are forced to consider whether Complainant's statements of fact are supported and thus can be relied on, or are unsupported and must be disregarded.

71. Despite these facts, Flex-N-Gate understands that the Board's main focus in any matter is on the facts, and therefore does not seek any sanction against

Complainant, but asks only that the Board admonish Complainant to comply with the Board's rules, and to maintain proper decorum, as more specifically set forth below.

F. Conclusion

72. For the reasons stated above, the Board should admonish Complainant to:

a. comply with 35 Ill. Admin. Code § 101.504, and cease making unsupported allegations of fact in his filings with the Board;

b. cease filing affidavits with the Board which:

i. make legal conclusions;
ii. make factual conclusions;
iii. do not affirmatively establish that the affiant has personal knowledge of the statements made;
iv. do not affirmatively establish that the affiant, if sworn as a witness, can testify competently to the statements made; and/or,
v. do not reference or rely on documents unless admissible copies of those documents are attached to the affidavit;

c. comply generally with the Board's procedural rules;

d. cease making unsupported allegations of deceit and/or criminal conduct on the part of Flex-N-Gate and/or its employees; and,

e. maintain proper decorum in this matter.

IV. CONCLUSION

WHEREFORE, for the reasons stated above, Respondent, FLEX-N-GATE CORPORATION, respectfully prays that the Illinois Pollution Control Board (1) strike the "affidavits" filed by Complainant in support of Complainant's Motion for Partial Summary Judgment and Complainant's Responses to Flex-N-Gate's Motions for Summary Judgment, (2) strike Complainant's unsupported statements of fact in his summary judgment filings, (3) admonish Complainant to comply with the Board's rules,

and (4) grant FLEX-N-GATE CORPORATION such other relief as the Illinois Pollution Control Board deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

Dated: July 8, 2005

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

Thomas G. Safley
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GWST:003/Fil/Motion to Strike and Admonish

FAXBACK 12694

PPC 9453.1986(04)

PERMITTING OF TREATMENT ACTIVITIES IN A GENERATOR'S ACCUMULATION TANKS OR CONTAINERS

July 25, 1986

Kevin A. Lehner
RMT, Inc.
Suite 124
1406 East Washington Avenue
Madison, Wisconsin 53703

Dear Mr. Lehner:

Thank you for your letter of April 4, 1986, requesting clarification of the Agency's recent statement with respect to permitting of treatment activities occurring in a generator's accumulation tanks or containers.

As noted in your letter, the preamble to the final small quantity generator regulations promulgated on March 24, 1986, states that "... no permitting would be required if a generator chooses to treat their hazardous waste in the generator's accumulation tanks or containers in conformance with the requirements of Section 262.34 and J or I of Part 265." Although this statement did appear in the small quantity generator regulations, it is applicable to all generators who accumulate waste in compliance with Section 262.34.

The following information may help to place this interpretation in context and assist you in advising your clients as to the most appropriate course of action. First, you should be aware that this statement is based upon an interpretation of what the existing rules allow at this point in time rather than a deliberate and significant shift in Agency policy with respect to accumulation or treatment. As the preamble states, "Nothing in Section 262.34 precludes a generator from treating waste when it is in an accumulation tank or container covered by that provision." The interpretation is predicated on the fact that the Agency has allowed certain types of storage to occur at generation sites (i.e., accumulation for periods of 90, 180, or 270 days, depending on generator type) without the requirement for permitting or interim status. Since the Agency has never developed standards specific to treatment, the same technical standards applicable to such storage (i.e., Subpart I or J of

EXHIBIT A

Part 265) would also be applicable to treatment.

Thus, we do not believe that allowing treatment to occur while wastes are being accumulated prior to subsequent management, in full compliance with all □262.34 requirements,

-2-

including applicable tank or container standards, is currently prohibited under the existing regulatory scheme.

Since the term "accumulation" is not defined in the regulations, the Agency would not distinguish between accumulation for handling other than treatment and accumulation for the sole purpose of on-site treatment. Thus, each of your process descriptions do not appear to be subject to permitting at this time, provided all of the Section 262.34 requirements are met.

With respect to the limits of treatment which may occur without a permit on-site, this interpretation only applies to treatment occurring in a generator's accumulation tanks or containers subject to, and in compliance with, Section 262.34. This means that the tank or container in which treatment occurs must be appropriately marked with the date the accumulation period began, the tank or container must be completely emptied every 90 days (or 180/270 days for generators of 100-1000 kg/mo), and must be operated in strict compliance with Subparts I or J of Part 265. Treatment in other than tanks or containers (e.g., incineration, land treatment or treatment in surface impoundments) would continue to require a permit.

We would expect that generators that treat hazardous waste on-site in tanks or containers and who have obtained interim status, a full permit, or have a Part B application pending might wish to exit the permit process on the basis of this interpretation. Since such on-site treatment without a permit has never been precluded under RCRA, those who now wish to avail themselves of this exemption may do so, provided they comply with all applicable rules respecting withdrawal of permit applications. Specifically, these facilities will need to comply with Part 264 or 265 facility closure requirements unless they can demonstrate that their treatment tank or container has always been operated in strict conformance with the requirements of Section 262.34. In addition, these generators would also be subject to Section 3008(h) corrective action provisions.

Finally, we would also caution those generators who may wish to alter their accumulation practices in order to conduct treatment without a permit, not to rely upon the continued

existence of this exemption, particularly where making process changes requiring substantial capital outlays may be involved. Specifically, EPA has recently published an advance notice of proposed rulemaking that discusses eliminating the accumulation exemption for large quantity generators. Should the Agency decide at some time in the future to either modify the accumulation rule in some manner or to write specific standards for treatment, the obligations of generators with respect to treatment in accumulation tanks could change.

If I can be of any further assistance, or if you have additional questions, please do not hesitate to contact me.

Sincerely,

Marcia E. Williams
Director
Office of Solid Waste

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 05-49
	)	
FLEX-N-GATE CORPORATION, an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

MOTION FOR LEAVE TO FILE REPLY
IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Motion for Leave to File Reply in Support of Motions for Summary Judgment, states as follows:

1. On May 27, 2005, Flex-N-Gate filed its Motion for Summary Judgment as to All Counts of Complainant's Complaint and its Motion for Partial Summary Judgment as to Counts II through VI of Complainant's Complaint (collectively "Motions for Summary Judgment").

2. On June 24, 2005, Complainant filed his Responses to these Motions for Summary Judgment.

3. In his Response to Motion for Summary Judgment, responding to Flex-N-Gate's Motion for Summary Judgment as to All Counts of Complainant's Complaint, Complainant argues:

> [Flex-N-Gate's] motions for summary judgment are not based on any facts adduced during discovery. They appear rather to be a repetition of the legal arguments advanced in the motion to dismiss, which the Board has already denied.

Complainant's Response to Motion for Summary Judgment at ¶7.

4. Complainant also incorporates this paragraph into his Response to Motion for Partial Summary Judgment as to Counts II – VI. See id. at ¶1.

5. Flex-N-Gate strongly disagrees with Complainant's characterization of the Illinois Pollution Control Board's ("Board") Order denying Flex-N-Gate's Motion to Dismiss, and asks the Board for leave to file a Reply in support of its Motions for Summary Judgment addressing this argument by Complainant, which Flex-N-Gate did not anticipate and could not have anticipated in its Motions for Summary Judgment.

6. Section 101.500(e) of the Board's procedural rules provides that a party that files a Motion before the Board may file a Reply in support of that Motion if "permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Admin. Code § 101.500(e).

7. The Board obviously knows the reason(s) for its Order denying Flex-N-Gate's Motion to Dismiss.

8. However, to the extent that the Board considers Complainant's argument on the import of that Order, Flex-N-Gate would be materially prejudiced if it also is not granted the opportunity to state its position regarding that Order for the Board's consideration.

9. In addition, in his Response to Motion for Summary Judgment, Complainant acknowledges that he "has the burden of proof in connection with" Counts II through VI of his Complaint, but nevertheless argues that even if "the evidence presented [to the Board is] insufficient to establish a violation of the contingency plan requirements" at issue in those Counts, "the Board should find respondent in violation of

the permit requirement." Complainant's Response to Motion for Summary Judgment at ¶¶29, 29.a; Complainant's Response to Motion for Partial Summary Judgment as to Counts II – VI at ¶¶20, 20.a. Flex-N-Gate does not completely understand how the "insufficien[cy]" of evidence to prove a violation of "the contingency plan requirements" at issue in Counts II through VI relates to "the permit requirement" at issue in Count I. Nevertheless, Flex-N-Gate did not and could not have anticipated this argument by Complainant, and to the extent that the Board considers this argument, Flex-N-Gate would be materially prejudiced if it is not granted the opportunity to address this argument so that the Board can consider Flex-N-Gate's position as well.

10. Finally, in paragraph 12 of his "Affidavit" in support of his Responses to Flex-N-Gate's Motions for Summary Judgment, Complainant alleges that Flex-N-Gate "has refused to name any witnesses or other evidence that it intends to produce at hearing to show that the hydrogen sulfide emission did not occur." As discussed in Flex-N-Gate's Motion to Strike Affidavits Filed and Unsupported Statements Made in Support of Complainant's Summary Judgment Filings and Motion for Admonishment of Complainant ("Motion to Strike and Admonish"), however, the Board must strike this portion of Complainant's Affidavit as it fails to comply with Supreme Court Rule 191. See Motion to Strike and Admonish at 12. In the event that the Board declines to strike this portion of Complainant's Affidavit, Flex-N-Gate moves the Board for leave to address this allegation in a Reply in support of its Motions for Summary Judgment. Flex-N-Gate strenuously denies that it has "refused" to answer any proper discovery request from Complainant, and would be prejudiced if the Board considers Complainant's

allegation that it did so without affording Flex-N-Gate the opportunity to reply to such allegation.

WHEREFORE, Respondent, FLEX-N-GATE CORPORATION, respectfully moves the Illinois Pollution Control Board to grant FLEX-N-GATE CORPORATION leave to file a Reply in Support of its Motions for Summary Judgment as set forth above, and to award FLEX-N-GATE CORPORATION all other relief just and proper in the premises.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

Dated: July 8, 2005

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

Thomas G. Safley
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GWST:003/Fil/Motion for Leave to File Reply in Support of Motions for Summary Judgment

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 05-49
	)	
FLEX-N-GATE CORPORATION, an Illinois corporation,	)	
	)	
Respondent.	)	

RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT I

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Response to Complainant's Motion for Partial Summary Judgment as to Count I ("Motion for Partial Summary Judgment"), states as follows:

I. INTRODUCTION

On May 27, 2005, Flex-N-Gate filed its Motion for Summary Judgment as to All Counts of Complainant's Complaint ("Motion for Complete Summary Judgment") and its Motion for Partial Summary Judgment as to Counts II through VI of Complainant's Complaint (collectively "Motions for Summary Judgment"). In its Motion for Complete Summary Judgment, Flex-N-Gate seeks summary judgment as to all counts of Complainant's Complaint, including Count I.

On June 20, 2005, Complainant mailed his cross-motion for summary judgment as to Count I of Complainant's Complaint – that is, Complainant's Motion for Partial Summary Judgment – to counsel for Flex-N-Gate. See Complainant's Certificate of Service, dated June 20, 2005.

On June 24, 2005, Complainant filed his Responses to Flex-N-Gate's Motions for Summary Judgment. In his Response to Motion for Summary Judgment (responding to Flex-N-Gate's Motion for Complete Summary Judgment), Complainant includes a section devoted to arguments in support of his Motion for Partial Summary Judgment. See Complainant's Response to Motion for Summary Judgment at 4-7. See also Complainant's Response to Motion for Partial Summary Judgment as to Counts II – VI, at 2-4.

For the reasons set forth below, the Illinois Pollution Control Board ("Board") should deny Complainant's Motion for Partial Summary Judgment.

II. FACTS

The facts of this matter that may be relevant to Complainant's Motion for Partial Summary Judgment are as follows:

Flex-N-Gate owns and operates a facility at 601 Guardian Drive in Urbana, Illinois ("Facility"). Complaint at ¶3. At the Facility, Flex-N-Gate primarily manufactures bumpers for vehicles. Id. at ¶4.

The Facility's wastewater treatment equipment generates wastewater treatment sludge. Affidavit of James Dodson ("Dodson Aff."), originally attached to Flex-N-Gate's Motion for Complete Summary Judgment, attached hereto as Exhibit A, at ¶¶4, 9, 18. While this sludge is located in the wastewater treatment equipment, Flex-N-Gate considers the sludge to be exempt from regulation under the Resource Conservation and Recovery Act ("RCRA"). Id. at ¶11. After Flex-N-Gate removes the sludge from this

equipment, the Facility accumulates the sludge in containers prior to the transportation of the sludge off-site for recycling. Id. at ¶9.

In addition, the Facility as part of its normal operations produces several (currently ten) other streams of RCRA hazardous waste. Flex-N-Gate Corporation's Answers to Complainant's Interrogatories, relevant portions of which are attached hereto as Exhibit B, at 1-2 (answer to Interrogatory No. 3). Pursuant to 35 Ill. Admin. Code § 722.134(a) and (c), Flex-N-Gate accumulates each of these hazardous wastestreams on-site in containers before shipping the waste off-site for treatment, storage or disposal. Id.; Dodson Aff. at ¶12.

III. ANALYSIS

A. Summary Judgment Standard

Flex-N-Gate has set forth the Board's standard of review for summary judgment motions at pages 10 to 11 of Flex-N-Gate's Motion for Complete Summary Judgment. Flex-N-Gate hereby incorporates that discussion into this Response.

In addition, Flex-N-Gate notes that the Board has held that in ruling on "[cross-] motions for summary judgment, the Board must consider the facts of each motion in the light most favorable to the non-movant." United Disposal of Bradley, Inc. v. Municipal Trust & Sav. Bank, PCB No. 03-235, 2004 Ill. ENV LEXIS 337, at *37 (Ill.Pol.Control.Bd. June 17, 2004) (citations omitted). Finally, as with any motion filed with the Board, in the case of a Motion for Summary Judgment:

> The burden is upon the movant to clearly state the reasons for and the grounds upon which a motion is made, [and] to timely file and adequately support a motion directed to the Board.

Goose Lake Ass'n v. Robert J. Drake, Sr., First Nat'l Bank of Joliet as Trustee, Trust No. 370, PCB No. 90-170, 1991 Ill. ENV LEXIS 432, at ** 1-2 (Ill.Pol.Control.Bd. June 6, 1991).

B. Complainant's Argument

As Complainant notes in his Motion for Partial Summary Judgment, paragraph one of Count I of Complainant's Complaint states:

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

Complainant, Count I.

Flex-N-Gate's Answer to this paragraph states:

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

Flex-N-Gate's Answer at 10.

In his Motion for Partial Summary Judgment, Complainant notes that he "has attached an affidavit stating that respondent is conducting hazardous waste treatment and storage operations at the Guardian West facility." Motion for Partial Summary Judgment at ¶2. Complainant then argues that Flex-N-Gate "has admitted . . . that it is treating hazardous waste on-site and that it does not have a RCRA permit or interim status," and that Flex-N-Gate has admitted that it "claims exemption from the RCRA permit requirement pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a) with respect to one

or more wastes generated by the Guardian West facility." Motion for Partial Summary Judgment, ¶¶3, 4.

Finally, Complainant argues:

> Although respondent admits that it claims exemption from the RCRA permit requirement pursuant to 35 Ill. Adm. Code 703.123(a) and 722.134(a), it has not alleged such exemption in its answer to Count I, and is therefore not allowed to introduce evidence showing compliance with those provisions as a defense to Count I.

Motion for Partial Summary Judgment, at ¶5.

For the reasons set forth below, Flex-N-Gate disagrees that Complainant is entitled to summary judgment on Count I of his Complaint.

C. <u>Flex-N-Gate is not Prohibited from Raising RCRA Exemptions.</u>

Flex-N-Gate does not entirely understand what Complainant is arguing. As far as Flex-N-Gate can tell, however, Complainant's argument is as follows:

(1) Flex-N-Gate treats and stores hazardous waste;

(2) Flex-N-Gate does not have a permit to do this;

(3) Flex-N-Gate needs a permit to do this;

(4) Flex-N-Gate argues that it is, in part, exempt from the RCRA permit requirement under 35 Ill. Admin. Code §§ 703.123(a) and 722.134(a);

(5) however, Flex-N-Gate did not raise these exemptions in its Answer to Complainant's Complaint;

(6) because Flex-N-Gate did not raise these exemptions in its Answer, Flex-N-Gate is, by some unidentified mechanism (see further discussion below), prevented from raising these exemptions now;

(7) because Flex-N-Gate is prevented from raising these exemptions now, the Board cannot consider Flex-N-Gate as claiming these exemptions;

(8) therefore, for purposes of this action, the Board must consider the hazardous waste that Flex-N-Gate states it is handling under these exemptions as not being handled under any exemption to the RCRA permitting requirement;

(9) therefore, Flex-N-Gate must be considered to need a permit for its handling of this waste;

(10) because Flex-N-Gate does not have a permit, it is in violation of the statute and regulation.

Flex-N-Gate does not understand the basis for this argument. Complainant cites no rule or caselaw in support of his argument that because Flex-N-Gate "has not alleged such exemption [that is, the 90-day accumulation provision and the wastewater treatment unit exemption] in its answer to Count I . . . [Flex-N-Gate] is therefore not allowed to introduce evidence showing compliance with those provisions as a defense to Count I." In his Motion for Summary Judgment, Complainant does not even identify the alleged legal principle or other mechanism (e.g., estoppel, waiver, etc.) that Complainant argues prevents Flex-N-Gate from "introduc[ing] evidence showing compliance with those provisions." See Complainant's Motion for Summary Judgment.

In the portion of his Response to Flex-N-Gate's Motion for Complete Summary Judgment which is devoted to arguments in support of his Motion for Partial Summary Judgment, Complainant restates his previous argument that Flex-N-Gate was required to raise the exemptions to the RCRA permit requirement as an affirmative defense. See Complainant's Response to Motion for Summary Judgment at 4-7. However, Complainant does not explicitly state that this "failure" is the basis for his Motion for Partial Summary Judgment. See id.

Complainant's failure to clearly articulate his argument or to explain the basis for or support that argument makes responding to Complainant's Motion for Partial Summary Judgment difficult. Nevertheless, for the following reasons, Flex-N-Gate disagrees that Complainant is entitled to summary judgment on Count I of his Complaint.

1. Flex-N-Gate is Not Required to State in its Answer the Reasons it Denies Allegations in Complainant's Complaint.

Complainant may be arguing that Flex-N-Gate is required in its Answer to state the reasons why it denies any allegations in Complainant's Complaint. If this is Complainant's argument, Flex-N-Gate disagrees.

In a Board enforcement action, a Respondent's answer of course may admit, "deny[], or assert[] insufficient knowledge to form a belief of, a material allegation in the complaint." People v. Champion Env. Serv., Inc., PCB No. 05-199, 2005 Ill. ENV LEXIS 412 (Ill.Pol.Control.Bd. June 2, 2005); 35 Ill. Admin. Code § 103.204(d). Accord, 735 ILCS 5/2-610. As Complainant notes in his Motion for Sanctions for Evasive Pleading ("Motion for Sanctions"), Section 2-610 of the Illinois Code of Civil Procedure provides that "[e]very answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates," and that "[d]enials must not be evasive, but must fairly answer the substance of the allegation denied." 735 ILCS 5/2-610(a), (c). See Motion for Sanctions at ¶8. Neither this rule, nor Section 103.204(d) of the Board's regulations, however, requires a respondent to state the reason why it denies an allegation in a Complaint. See id.; 35 Ill. Admin. Code § 103.204(d).

Further, the Comments to Supreme Court Rule 136 make clear that a party answering a pleading is not required to state the reason why it denies an allegation. Rule 136, "Denials," addresses responses to pleadings such as answers. See Illinois Supreme Court Rule 136. The Comments to Rule 136 state in relevant part:

> The new rule permits pleading substantially as in the following illustration:
>
> > "5. Defendant denies the allegations of paragraph 5 of the complaint and each of them."
>
> Or, if some of the allegations of a paragraph are to be admitted and some denied, the pleader may state substantially as follows:
>
> > "5. Defendant admits [stating facts admitted] and denies the remaining allegations of paragraph 5 and each of them."

Id., Comments.

These Comments do not state that, in addition to such statements, a party denying an allegation in a complaint must state the reason for its denial. Further, these model denials are similar to the language that Flex-N-Gate used in denying paragraph one of Count I of Complainant's Complaint, quoted above.

Further, in In re Estate of Joel F. Kirk, 611 N.E.2d 537, 540 (2d Dist. 1993), the Court held that an answer that denied each allegation of a Petition to Remove Executor by stating that the respondent "[denies] any and all allegations of wrong doing, ill-will, or breach of duty" was a sufficient. If this is the case, then Flex-N-Gate's Answer also is sufficient.

Complainant has cited no authority that a respondent, in addition to denying an allegation in a complaint, must state the reason for its denial, and, if it fails to do so, is

prevented from raising an argument later. Further, Flex-N-Gate is aware of no such authority. Therefore, to the extent that this argument is the basis of Complainant's Motion for Partial Summary Judgment, the Board should deny that Motion.

2. Exceptions to the RCRA Permitting Requirement are not Affirmative Defenses.

Second, Complainant may be arguing that the applicability of the exemptions to the RCRA permitting requirement is an affirmative defense and that Flex-N-Gate is "not allowed" to raise these exemptions because it did not raise them as affirmative defenses in its Answer. See Complainant's Response to Motion to Dismiss, ¶¶3.c, 6.b, 7.c (arguing that these exemptions must be raised by affirmative defense). For the reasons stated in Flex-N-Gate's Motion for Complete Summary Judgment, however, the exemptions to the RCRA permitting requirement are not "affirmative defenses." Thus, Flex-N-Gate does not have the burden of proving through an affirmative defense that it is not required to obtain a RCRA permit. Rather, Complainant has the burden of proving by his Complaint that Flex-N-Gate is required to obtain a RCRA permit. See Motion for Complete Summary Judgment at 30-32.

In his Response to Flex-N-Gate's Motion for Complete Summary Judgment – under a heading titled "Complainant's Motion for Partial Summary Judgment" – Complainant again argues that "[t]he exemptions from the RCRA permit requirement must be raised by affirmative defense." Response to Motion for Summary Judgment, ¶18. In support of this argument, Complainant first appears to argue that this position is necessary:

> in order to notify the complainant that respondent intends to rely on that defense; in order to list in the pleadings the facts respondent intends to prove to establish that the exemption applies to the case; in order to afford complainant the opportunity to admit or deny the facts ahead of hearing; and, in order to establish a framework by which the relevance of evidence can be decided during discovery and at hearing.

Id.

This argument assumes that the exemptions are "affirmative defenses." Complainant has alleged that Flex-N-Gate violated Section 21(f) of the Act and Section 703.121(a) of the Board's regulations, and Complainant has the burden to prove such violations. By definition, Flex-N-Gate can only have violated these provisions if it was required to have a RCRA permit and did not. Thus, by definition, Complainant has the burden to prove that Flex-N-Gate (1) was required to have a RCRA permit, and (2) did not.

Second, Complainant states: "On page 31 of the motion [for Complete Summary Judgment], respondent argues that affirmative defenses before the Board are limited to general legal defenses such as laches." Id. at ¶18.a. Flex-N-Gate does not know what Complainant means by "general legal defenses," and Flex-N-Gate did not use this term in its Motion for Complete Summary Judgment. Rather, Flex-N-Gate argued in its Motion for Complete Summary Judgment that affirmative defenses before the Board are limited to arguments that meet the definition that the Board has set for "affirmative defense," that is, "'a response to a claim which attacks the *legal* right to bring an action, as opposed to attacking the truth of claim.'" Id. at 31 (quoting People v. Skokie Valley Asphalt Co., Inc., et al, PCB No. 96-98, 2004 Ill. ENV LEXIS 585, at **19-20 (Sept. 2, 2004)). Flex-N-Gate identified laches as an example of such a defense, in contrast to the exemptions to

the RCRA permit requirement, which do not "attack[] the legal right to bring an action," but rather, "attack[] the truth of [Complainant's] claim" that Flex-N-Gate was required to have a RCRA permit. Flex-N-Gate also identified the statute of limitations as an "affirmative defense," and other "affirmative defenses" have been recognized by the Board in other situations.

Third, Complainant argues:

> The exemptions from the permit requirement operate in the same way as the general legal defenses in that they are 'so what' defenses; even if the facts in the complaint are taken as true, there are other facts, not alleged in the complaint, which, if proved, would defeat the complaint.

Complainant's Response to Motion for Summary Judgment, at ¶18.b.

Flex-N-Gate strenuously disagrees. Again, 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 claim." People v. Skokie Valley Asphalt Co., Inc., et al, 2004 Ill. ENV LEXIS 585, at **19-20. An exemption to the RCRA permit requirement does not "attack[] the legal right to bring an action"; therefore, it is not an affirmative defense. To put it another way, Complainant's claim is that Flex-N-Gate was required to have a permit but did not. Whether or not an exemption applies goes to the truth of the claim that Flex-N-Gate was required to have a permit, not Complainant's legal right to bring this claim.

In further support of this argument, Complainant states:

> For example, in this case, complainant has alleged, and respondent has now admitted, that respondent is conducting hazardous waste treatment and storage operations without a RCRA permit. Respondent could still

> win by affirmatively alleging and proving compliance with the exemption in Section 722.134.

Complainant's Response to Motion for Summary Judgment, at ¶18(b)(i).

Flex-N-Gate responds above to the legal arguments made in this paragraph. Regarding the factual assertion that "respondent has now admitted, that respondent is conducting hazardous waste treatment and storage operations without a RCRA permit," as discussed in Flex-N-Gate's Motion to Strike Affidavits Filed and Unsupported Statements Made in Support of Complainant's Summary Judgment Filings and Motion for Admonishment of Complainant ("Motion to Strike and Admonish"), the Board must strike this assertion because it is unsupported. Motion to Strike and Admonish at 18. 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." Id.

Fourth, Complainant next abandons his earlier position that the exemptions to the RCRA permit requirement are an affirmative defense because of the way in which they operate, and now argues that:

> If Section 21(f) of the Act itself contained an exemption within the operative words of the permit requirement, the burden would be on the complainant to plead and prove non-compliance with the exemption. . . . In this case, however, the exemptions are located in the regulations as complicated rules that stand by themselves.

Response to Motion for Summary Judgment at ¶19(a) and (b).

That is, Complainant here takes the position that whether or not an exemption constitutes an affirmative defense depends on where the exemption is located: if the rule and exemption are in the same statutory or regulatory section, the exemption is not an

affirmative defense; if the rule and exemption are in different sections, the exemption is an affirmative defense. This reasoning, in addition to abandoning Complainant's earlier position, places form over substance. When determining whether a response to a complaint constitutes an affirmative defense, it makes no legal difference where the legal basis for the response is located. For example, authority for a laches defense is located only in caselaw, not Section 21(f), and the five-year statute of limitations is located in 735 ILCS 5/13-205, not Section 21(f), but the fact that the authority for these defenses is not located in Section 21(f) does not make them any less "affirmative defenses." Again, what matters, as the Board has held, is whether or not the response "attacks the *legal* right to bring an action, as opposed to attacking the truth of claim." People v. Skokie Valley Asphalt Co., Inc., et al, 2004 Ill. ENV LEXIS 585, at **19-20.

As for Complainant's argument that the RCRA regulations are "complicated rules," and that it would be difficult for a complainant to allege a claim under Section 21(f) of the Act or 35 Ill. Admin. Code § 703.121(a) unless the exemptions to the RCRA permit requirement are considered an affirmative defense, the test of whether or not a response constitutes an affirmative defense is not how complicated it is or how difficult it is to allege. See Response to Motion for Summary Judgment, at ¶¶19.b., 20, 20.c.

Fifth, Complainant argues that the exemptions to the RCRA permit requirement should be considered an affirmative defense "[a]s a matter of administrative efficiency" so as to "reduce[] the volume of paper needed to define the issues." Id. at ¶20.a. Again, however, the test of whether or not a response to a complaint constitutes an affirmative defense is not whether it would be "efficient" for it to constitute an affirmative defense or

whether or not it would save paper if it constituted an affirmative defense. The test is whether or not the response "attacks the *legal* right to bring an action, as opposed to attacking the truth of claim." People v. Skokie Valley Asphalt Co., Inc., et al, 2004 Ill. ENV LEXIS 585, at **19-20.

Sixth, Complainant argues:

> As a matter of public policy, people who are in the business of managing hazardous waste need to either get a RCRA permit, or else make a conscious decision to operate pursuant to an exception, and collect and maintain the documentation needed to establish that they qualify for the exception. If a complaint is filed against them, they should be expected to have a simple answer as to which exception applies, and the required documentation already prepared, so that pleading the exception should impose no burden on them whatsoever.

Complainant's Response to Motion for Summary Judgment, at ¶20.b.

Whether or not Complainant's record-keeping suggestion makes sense "[a]s a matter of public policy," however, just as the test of whether or not a response to a complaint constitutes an "affirmative defense" does not hinge on how complicated it is for a complainant to draft his compliant (see discussion above), whether or not a response constitutes an "affirmative defense" does not hinge on how "simple" it allegedly would be for a respondent to act if the response is considered an "affirmative defense." The issue is not ease of pleading but burden of proof. A complainant has the burden of proving his case, and that burden does not shift to the respondent because the statutory or regulatory scheme at issue is complicated, or because it allegedly would be "easier" for the respondent to shoulder the burden of proof.

Seventh, Complainant argues that Flex-N-Gate "is suggesting a system that would encourage people managing hazardous waste to take a 'we probably qualify for some

exception or another, so let's hope we don't get caught, but if we do, let's go to the hearing, and then argue that we qualify for an exemption' attitude." Complainant's Response to Motion for Summary Judgment, at ¶20.b.i. Flex-N-Gate does not understand how the fact that the exemptions to the RCRA permit requirement are not affirmative defenses could lead to a cavalier attitude about compliance with RCRA requirements.

Eighth, Complainant states that Flex-N-Gate "has clearly taken this approach in this case." Id. at ¶20.6.ii. As noted in Flex-N-Gate's Motion to Strike and for Admonishment at ¶13, however, Complainant's only attempt to support this conclusion – a repetition of this sentence in paragraph 15 of Complainant's Affidavit in Support of Responses to Motions for Summary Judgment – is deficient because it constitutes an "opinion and conclusion," not a "fact[] admissible in evidence."

Complainant attempts to support this conclusion by arguing:

> If Flex-N-Gate had consciously decided before the incident that the plating room floor was part of a "wastewater treatment unit" so it did not have to follow the contingency plan on the plating room floor, it would have included this in the contingency plan and provided employee training to that effect.

Response to Motion for Summary Judgment, at ¶20.b.ii.

Again, however, this argument is an attempt by Complainant to support his position that the fact that the exemptions to the RCRA permit requirement are not affirmative defenses somehow promotes a cavalier attitude toward RCRA compliance. Flex-N-Gate does not understand how this allegedly is the case. Further, Complainant does not cite any affidavit or other authority in support of this sentence, and

Complainant's Affidavit in Support of Responses to Motions for Summary Judgment does not contain any statements in support of this statement, much less explain how Complainant would have "personal knowledge" or be in a position to "testify competently" regarding what "Flex-N-Gate . . . consciously decided before the incident" regarding "the plating room floor." Thus, as stated in Flex-N-Gate's Motion to Strike and Admonish, the Board must strike this sentence of Complainant's Response to Motion for Summary Judgment. See Motion to Strike and Admonish at ¶18.

In a further attempt to support his position that the fact that exemptions to the RCRA permit requirement are not affirmative defenses somehow promotes a cavalier attitude toward RCRA compliance, Complainant argues:

> Moreover, counsel would have filed a motion to dismiss focused on the wastewater treatment unit argument, instead of the multiple exemptions argued in that motion. Counsel is clearly making after-the-fact excuses, and has decided that the wastewater treatment unit is the best of the earlier excuses.

Response to Motion for Summary Judgment, at ¶20.b.ii.

Flex-N-Gate does not understand this argument either. As to Complainant's assertion that "[c]ounsel is clearly making after-the-fact excuses," assuming that by "after-the-fact" Complainant means after the incident, again, Complainant has cited no support for his characterization of Flex-N-Gate's actions before the incident, nor has he demonstrated that he has "personal knowledge" of or the ability to "testify competently" regarding Flex-N-Gate's actions. See Motion to Strike and Admonish at ¶18.

Further, Flex-N-Gate's Motion to Dismiss was solely "focused on the wastewater treatment unit argument." As to Count I of Complainant's Complaint, which is the only

count at issue for purposes of this discussion, Flex-N-Gate's Motion to Dismiss cited only 35 Ill. Admin. Code § 703.123(e) (which contains the "wastewater treatment unit" and "elementary neutralization unit" exemptions), and only argued that the wastewater treatment unit exemption applied. See Motion to Dismiss at ¶¶14-33. Flex-N-Gate did not raise any other exemption to the RCRA permit requirement, much less "multiple exemptions."

Thus, even if it were relevant to the question of whether or not an exemption to the RCRA permit requirement is an "affirmative defense" (which, as discussed above, it is not), there is no evidence that Flex-N-Gate is "making . . . excuses," that Flex-N-Gate is making "after-the-fact [exemption arguments]" (or as Complainant characterizes them, "excuses"), or that Flex-N-Gate "has decided that the wastewater treatment unit is the best of the earlier [exemption arguments]." Flex-N-Gate did not make any "earlier [exemption arguments]." Rather, Flex-N-Gate has consistently maintained the same position throughout this litigation: that Flex-N-Gate is not required to have a RCRA permit for the waste managed in its wastewater treatment unit because of the operation of the wastewater treatment unit exemption.

Ninth, Complainant states:

> Respondent is arguing that, in RCRA enforcement cases in general, the complainant should be required to take the case to hearing without knowing which permit exemptions are being raised, and that respondent should be allowed to comb through the rule books on closing argument in search of additional exemptions, without affording complainant the opportunity to present evidence that the exemption does not apply.

Response to Motion for Summary Judgment, at ¶20.d.

With all due respect, this argument ignores the Board's discovery procedures, which Complainant has utilized in this case. Interrogatory No. 3 of Complainant's Interrogatories asks:

> By which provisions has respondent, prior to August 5, 2004, claimed exemption from the RCRA permit requirement for the Guardian West facility?

Complainant's Interrogatories, a copy of which is attached hereto as Exhibit C, at Interrogatory No. 3.

Flex-N-Gate responded to this Interrogatory, identifying each hazardous wastestream that the facility produces, the RCRA classification for each wastestream, and the exemption from the RCRA permit requirement on which Flex-N-Gate relies to conclude that it is not required to obtain a RCRA permit for its management of such wastestream, either 35 Ill. Admin. Code § 703.123(a) or 35 Ill. Admin. Code § 703.123(e). Exhibit B, answer to Interrogatory No. 3. Thus, Complainant is not "required to take the case to hearing without knowing which permit exemptions" apply to the facility, and Flex-N-Gate never has argued otherwise. Further, if Flex-N-Gate raised a new exemption "on closing argument" at hearing "without affording complainant the opportunity to present evidence that the exemption does not apply," Complainant clearly would have grounds for a motion to exclude such argument by Flex-N-Gate on the grounds that Flex-N-Gate had failed to comply with Section 101.616(h) of the Board's procedural rules, which requires parties to update their responses to discovery requests. Thus, Flex-N-Gate does not understand how the fact that exemptions to the RCRA permit

requirement are not affirmative defenses can be translated into prejudice to Complainant at hearing.

Tenth, Flex-N-Gate submits that Complainant is the party advancing an untenable legal position. Again, Complainant's position is as follows:

> Complainant's burden is to show that respondent falls within the general rule [requiring a RCRA permit]. If respondent wishes to show that this facility falls within an exclusion, respondent needs to raise that exclusion by way of affirmative defense, and to introduce evidence as to the applicability of the exclusion. (35 Ill. Adm. Code 103.205(d)).

Complainant's Response to Motion to Dismiss, ¶3.c.

If it is true that Complainant's only "burden is to show that respondent falls within the general rule" requiring a RCRA permit, then Complainant has a valid cause of action against every facility in the State of Illinois that generates hazardous waste, regardless of the circumstances, with every facility having the burden of proving that the RCRA permit requirement does not apply to it. The fact that a party manages hazardous waste cannot alone be a sufficient basis for a cause of action against that party; otherwise, persons who for some reason are opposed to industry could just obtain a copy of the list of entities in Illinois with generator identification numbers indicating that they ship hazardous waste off-site for treatment, storage or disposal, and, in good faith, file a complaint against each of these companies to force them to spend money defending themselves. Managing hazardous waste is not against the law. What is against the law is managing hazardous waste without a permit when a permit is required. Thus, the burden of a complainant is, and must be, to establish that a permit was required.

3. Even if the RCRA Permitting Exemptions were Affirmative Defenses, The Proper Course Would Be to Allow Flex-N-Gate to Amend its Answer to Assert Those Defenses.

As discussed above, the RCRA permitting exemptions are not affirmative defenses. If for some reason the Board disagreed, however, and found that these exemptions did constitute affirmative defenses, and therefore that the Board could not grant summary judgment to Flex-N-Gate on Count I of Complainant's Complaint, this would be a decision of first impression, as the Board has never before issued such a holding. In this circumstance, the proper course would be not to hold that Flex-N-Gate had waived its right to assert these exemptions and on that basis grant Complainant summary judgment, but to grant Flex-N-Gate leave amend its Answer to assert these exemptions. See People v. Petco Petroleum Corp., PCB No. 05-66, 2005 Ill. ENV LEXIS 384, at **7-9 (Ill.Pol.Control.Bd. May 19, 2005) (holding that in ruling on a motion for leave to amend a pleading, " the Board looks to Section 2-616 of the Code of Civil Procedure for guidance"); 735 ILCS 5/2-616(a) (stating, in relevant part, that "[a]t any time before final judgment amendments may be allowed on just and reasonable terms, . . . adding new causes of action or defenses, and in any matter, either of form or substance, in any . . . pleading . . . which may enable . . . the defendant to make a defense or assert a cross claim.")

D. Complainant's "Affidavit" is Deficient, and Does Not Establish that Complainant is Entitled to Summary Judgment.

As discussed above, Flex-N-Gate is not barred from arguing that it is exempt from the RCRA permit requirement. Furthermore, even if it was, the alleged factual basis for Complainant's Motion for Partial Summary Judgment – Complainant's "Affidavit" (see

Complainant's Motion for Partial Summary Judgment at ¶2) – is deficient and does not establish that Complainant is entitled to summary judgment.

As discussed in Flex-N-Gate's Motion to Strike and Admonish, Complainant's "Affidavit" does not comply with Illinois Supreme Court Rule 191, because (1) it states legal conclusions and "opinions and conclusions" rather than "facts admissible in evidence," (2) it fails to attach sworn or certified copies of documents on which Complainant relies for information set forth in the Affidavit, and (3) it does not establish that Complainant has "personal knowledge" of the statements made or that Complainant, "if sworn as a witness, can testify competently thereto." Motion to Strike and Admonish at 4-8. Therefore, for the reasons stated in Flex-N-Gate's Motion to Strike and Admonish, the Board must strike this "Affidavit."

Further, as discussed in Flex-N-Gate's Motion to Strike and Admonish, the "admission" which Complainant references in paragraph three of his Motion for Partial Summary Judgment is irrelevant. See id. at 5-7.

Thus, as the Board must strike Complainant's "Affidavit," and Complainant has provided no other factual support for his Motion for Partial Summary Judgment, the Board for this reason also must deny Complainant's Motion for Partial Summary Judgment.

III. CONCLUSION

As noted above, the Board has held that when any motion is filed with it, "[t]he burden is upon the movant to clearly state the reasons for and the grounds upon which a motion is made, [and] to timely file and adequately support a motion directed to the

Board." Goose Lake Ass'n, 1991 Ill. ENV LEXIS 432, at **1-2. Here, Complainant argues that it is entitled to summary judgment because Flex-N-Gate "is not allowed to introduce evidence showing compliance with" the 90-day accumulation provisions of RCRA. However:

(1) Complainant cites no statute, rule, or caselaw that allegedly disallows Flex-N-Gate's argument;

(2) Complainant does not even identify the legal principle that allegedly disallows Flex-N-Gate's argument;

(3) Flex-N-Gate's Answer is not required to state the reason why it denies allegations in Complainant's Complaint;

(4) the exemptions to the RCRA permitting requirement are not affirmative defenses; and,

(5) Complainant's "Affidavit" is deficient and does not establish that he is entitled to summary judgment.

Thus, it is abundantly clear that Complainant has failed to "clearly state the reasons for and the grounds upon which [his] motion is made," and that Complainant has failed to "adequately support [his] motion."

WHEREFORE, for the reasons stated above, Respondent, FLEX-N-GATE CORPORATION, respectfully prays that the Illinois Pollution Control Board deny

Complainant's Motion for Partial Summary Judgment and award FLEX-N-GATE CORPORATION such other relief as the Illinois Pollution Control Board deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

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

Dated: July 8, 2005

Thomas G. Safley
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

GWST:003/Fil/Response to Motion for Partial Summary Judgment as to Count I

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 05-49
	)	
FLEX-N-GATE CORPORATION, an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

AFFIDAVIT OF JAMES DODSON

James Dodson, being first duly sworn, deposes and states under oath, and if sworn as a witness, would testify, as follows:

1. I have personal knowledge of the matters set forth in this affidavit.

2. I am employed as Corporate Environmental Director for Flex-N-Gate Corporation ("Flex-N-Gate").

3. The electroplating line at the facility at issue in this matter ("Facility"), as described on page three of Flex-N-Gate's Motion for Summary Judgment as to All Counts of Complainant's Complaint ("Motion for Complete Summary Judgment"), is a standard design for plating operations.

4. The table set forth at pages four and five of Flex-N-Gate's Motion for Complete Summary Judgment accurately describes the pieces of equipment involved in treating wastewater at the Facility as of August 2004, the material out of which such equipment is/was constructed, and the purpose of each piece of equipment, in the order that wastewater enters each piece of equipment.

EXHIBIT A

5. The sludge dryer referenced in that table was removed from the Facility in March 2005.

6. All of this equipment (hereinafter "Wastewater Treatment Equipment") is located on-site, within the boundaries of the Facility.

7. The diagram attached to Flex-N-Gate's Motion for Complete Summary Judgment as Exhibit D roughly illustrates the layout of the wastewater treatment system.

8. Following treatment in the Wastewater Treatment Equipment, liquids are discharged to a Publicly Owned Treatment Works ("POTW") operated by the Cities of Champaign and Urbana, Illinois ("UCSD").

9. Following dewatering, sludge is placed into a satellite accumulation container in preparation for placement into 90-day accumulation containers, where it is accumulated before it is shipped off-site for recycling.

10. The document attached to Flex-N-Gate's Motion for Complete Summary Judgment as Exhibit E is a true and accurate copy of a manifest by which Flex-N-Gate has had such sludge transported off-site recycling.

11. While the wastewater treatment sludge is located inside the equipment that is used to treat the Facility's wastewater, Flex-N-Gate considers the sludge to be exempt from RCRA pursuant to 35 Ill. Admin. Code § 703.123(e).

12. Pursuant to 35 Ill. Admin. Code §§ 703.123(a) and 722.134(a), Flex-N-Gate accumulates each hazardous wastestream identified in the table set forth on page 9 of Flex-N-Gate's Motion for Complete Summary Judgment on-site in containers before shipping the waste off-site for treatment, storage or disposal.

13. The wastewater that the Facility discharges to the UCSD includes wastewater from the Plating Room floor.

14. Flex-N-Gate discharges to the UCSD pursuant to an authorization that UCSD issued to Flex-N-Gate, a copy of which authorization is attached to Flex-N-Gate's Motion for Complete Summary Judgment as Exhibit I.

15. The sludge that the Facility's Wastewater Treatment Equipment generates is a hazardous waste as defined in 35 Ill. Adm. Code § 721.103.

16. The Facility's wastewater treatment sludge "has not been excluded from the lists in Subpart D of this Part under 35 Ill. Adm. Code 720.120 and 720.122."

17. This Facility's Wastewater Treatment Equipment:

(a) is stationary;

(b) is "designed to contain an accumulation of hazardous waste," i.e., the F006 sludge that the treatment of the wastewater creates;

(c) is "constructed primarily of nonearthen materials (e.g., wood, concrete, steel, plastic)," in this case, Fiberglass Reinforced Plastic and steel; and,

(d) these "nonearthen materials . . . provide structural support."

18. When wastewater treatment sludge is initially generated at the Facility, it is located inside the Facility Wastewater Treatment Equipment.

19. The only equipment at the Facility to which "includes pH adjustment, reduction of hexavalent chromium . . . , and precipitation of a nickel and chromium hydroxide sludge" is the Facility's WWTU.

20. By the terms "sludge drying unit"/"unit[] for drying . . . hazardous waste sludge," Complainant is referring to the Sludge Dryer that was part of the Facility's

WWTU prior to March 2005, and/or the Filter Press, which are/were used to dewater sludge produced in the WWTU; this is the only equipment at the Facility used to dry "sludge."

21. By the terms "sludge storage unit"/"unit for . . . storing hazardous waste sludge," Complainant is referring to the tank used to store sludge before dewatering and/or the satellite accumulation container into which sludge is placed after dewatering.

22. The Facility has a RCRA contingency plan.

23. Flex-N-Gate prepared this contingency plan because it manages some of the hazardous waste generated at the Facility pursuant to the accumulation provision of 35 Ill. Admin. Code § 722.134(a).

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

FURTHER AFFIANT SAYETH NOT.

James Dodson

Subscribed and sworn to before
me this 7th day of May, 2005.

Notary Public

"OFFICIAL SEAL"
Patti L. Tucker
Notary Public, State of Illinois
My Commission Exp. 07/12/2008

GWST:003/Fil/Affidavit of James Dodson – Complete MSJ

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

FLEX-N-GATE CORPORATION'S
ANSWERS TO COMPLAINANT'S INTERROGATORIES

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, pursuant to 35 Ill. Admin. Code § 101.620, and for its Answers to Complainant's Interrogatories, states as follows:

1. List any witnesses respondent intends to call at hearing, including name, address, phone number, and whether the witness is to testify as an expert witness.

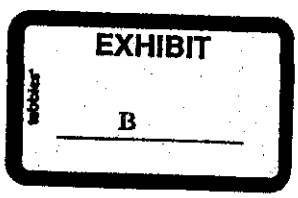
ANSWER: Flex-N-Gate has not yet determined what witnesses, if any, it intends to call at hearing. Flex-N-Gate will supplement its response to this Interrogatory pursuant to 35 Ill. Admin. Code § 101.616(h) at such time that it makes such determination.

2. List any documentary or physical evidence respondent intends to introduce at hearing.

ANSWER: Flex-N-Gate has not yet determined what documentary or physical evidence, if any, it intends to introduce at hearing. Flex-N-Gate will supplement its response to this Interrogatory pursuant to 35 Ill. Admin. Code § 101.616(h) at such time that it makes such determination.

3. By which provisions has respondent, prior to August 5, 2004, claimed exemption from the RCRA permit requirement for the Guardian West facility?

ANSWER: First, the Guardian West facility which is the subject of this action ("Facility") has "claimed exemption from the RCRA permit requirement" for any



material contained in the Facility's wastewater treatment unit pursuant to the "wastewater treatment unit exemption" contained in 35 Ill. Admin. Code 703.123(e).

Second, the Facility has "claimed exemption from the RCRA permit requirement" for certain other wastestreams which it sends off-site for treatment, storage or disposal pursuant to 35 Ill. Admin. Code 703.123(a). Those wastestreams are.

Wastestream (Flex-N-Gate Description)	**RCRA Classification**
flush solvent	D001 for flammability.
wastewater treatment sludge	F006 is a listed waste
chromic acid	D007 for chromium, D002 for corrosive, D008 for lead
paint	D001 for flammability
chrom. solids like concrete with chromic acid	D007 for chromium
solvent rags	D001 for flammability
barium sludge	D002 for corrosive, D007 for chromium, D005 for barium, D008 for lead
aerosols	D001 for flammability
chrome rags	D007 for chromium
Tanks #1, #3, #4	D002 for corrosive, D007 for chromium
chrom. contaminated solids-PPE	D002 for corrosive, D007 for chromium

4. Has respondent had any laboratory analyses performed on the liquid, sludge or debris under the plating line? Provide the results of such analyses.

ANSWER: Flex-N-Gate has not had any laboratory analysis performed on any material located "under the plating line."

5. Has respondent had any laboratory analyses performed on the influent into what respondent refers to as the "wastewater treatment unit" receiving "wastewater" from the plating area? Provide the results of such analyses.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
vs.	)	No. PCB 05-049
	)	
FLEX-N-GATE CORPORATION, an Illinois Corporation,	)	
	)	
	)	
Respondent.	)	

INTERROGATORIES

Complainant Morton F. Dorothy requests that respondent Flex-N-Gate Corporation respond to the following interrogatories within 30 days after the date of this request:

1. List any witnesses respondent intends to call at hearing, including name, address, phone number, and whether the witness is to testify as an expert witness.

2. List any documentary or physical evidence respondent intends to introduce at hearing.

3. By which provisions has respondent, prior to August 5, 2004, claimed exemption from the RCRA permit requirement for the Guardian West facility?

4. Has respondent had any laboratory analyses performed on the liquid, sludge or debris under the plating line? Provide the results of such analyses.

5. Has respondent had any laboratory analyses performed on the influent into what respondent refers to as the "wastewater treatment unit" receiving "wastewater" from the plating area? Provide the results of such analyses.

6. By what name does respondent wish to refer to the area under the plating tanks?

7. By what name does respondent wish to call the accumulated liquid in the sump area under the plating tanks?

8. By what name does the respondent wish to call the series of events that occurred during third shift on August 4 - 5, 2004 on respondent's plating line, which events are the subject of this enforcement action?

EXHIBIT
C