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STATE OF ILLINOIS
Pollution Control Board

From: Mike McCambridge
To: Westefer.Gary@epamail.epa.gov
Subject: Re: Fw: Illinois adequacy

Thank you for forwarding the e-mail from Morton Dorothy. As I explained, this relates to a Board case PCB 050-49, which is presently pending before the Board. The case involves a six-count citizen enforcement complaint filed September 8, 2004 by Mr. Dorothy against Flex-N-Gate Corporation. On October 20, 2005, the Board granted summary judgment against Mr. Dorothy on Counts II through VI of the complaint and ordered the hearing officer to proceed to hearing on Count I. Thus, this matter is still pending before the Board. It is not yet ripe for appeal to the Illinois appellate court.

I will print a copy of your original e-mail together with this response and submit them to the Clerk's office for entry into the docket in PCB 05-49 as public comments. Even though our conversation concerned solely the procedural posture of the case, entry of this material into the record is necessary to avoid any implication of improper communications on a pending matter, consistent with the Illinois Ethics Act.

>>> <Westefer.Gary@epamail.epa.gov> 11/01/05 11:29 AM >>>

----- Forwarded by Gary Westefer/R5/USEPA/US on 11/01/2005 11:26 AM

MDor4248@aol.com

10/31/2005 11:20
AM

To
Gary Westefer/R5/USEPA/US@EPA
cc

PCB 05-49

PC#1

Subject
Illinois adequacy

Gary:

Haven't talked to you in a long time!

I have sent the following letter to Skinner. Thought I'd let you read it before he gets it.

Morton

Mr. Thomas V. Skinner
Regional Administrator
US EPA Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

Re: Illinois RCRA authorization

Dear Mr. Skinner:

This letter is intended to transmit substantive information that the Illinois RCRA program may no longer be adequate within the meaning of 40 CFR 239.13.

I am the complainant in Pollution Control Board case PCB 05-049. This case grew out of an accident in which a pipe carrying concentrated sulfuric acid separated, spilling the acid onto hazardous waste that had accumulated on the floor under tanks in an electroplating operation. The acid reacted with the waste, generating hydrogen sulfide gas. This was an unexpected result, in that the waste had not previously been known to contain sulfide.

The factory is a large quantity generator of hazardous waste that operates without a RCRA permit pursuant to the Illinois equivalent of 40 CFR 260.34. Among other things, it is required to have a contingency plan, to follow the contingency plan in an emergency, to notify the Illinois EPA, and to amend the plan in the event the plan fails. The facility had a contingency plan, but failed to follow the plan in any significant respect, and failed to notify. The facility has not amended the plan in response to the failure, specifically failing to modify the plan to address any future hydrogen sulfide release incident.

The Illinois EPA investigated this incident. Factory management essentially denied that the incident had occurred, and IEPA took no action. I then filed a citizen enforcement action with the Pollution Control Board. Management has admitted in discovery that the incident took place.

On October 20, 2005, the Board granted summary judgment in favor of the facility as to the counts alleging violation of the contingency plan requirements, reasoning that the released hydrogen sulfide was an "uncontained gas", and therefore not a "solid waste" within the meaning of RCRA. The Board cited *Helter v. AK Steel Corp.*, 1997 U.S. Dist LEXIS 9852(S.D. Oh. 1997).

Helter involved a release of a byproduct gas from a broken pipe, which gas was not a "solid waste" or a "hazardous waste" prior to release. The plaintiff in that case had argued that RCRA applied to the released gas. The Court held that the gas did not become a "solid waste" upon release, because of the "uncontained gas" exclusion. In the case before the Board, on the other hand, the gas originated from material that was already a hazardous waste and subject to the contingency planning requirements. The release of the gas was a trigger for implementation of the contingency plan with respect to the hazardous waste on the floor, regardless of whether the released gas was itself a "solid waste" or "hazardous waste".

The Board's extension of Helter undercuts all RCRA regulations aimed at protecting workers and the public from gaseous emissions from hazardous waste, including emissions from sulfide and cyanide bearing reactive waste, since such emissions would almost always be "uncontained gases".

Specifically, hazardous waste management facilities (including conditionally exempt generators) no longer have to comply with the following requirements:

- Facilities handling potentially reactive waste no longer have to prepare contingency plans for dealing with a toxic gas release. (Section 265.51)
- Because toxic emissions are excluded from contingency planning, facilities no longer have to: train workers concerning the dangers of toxic gases from mixing acids with reactive wastes; provide meters or respirators effective against foreseeable toxic gases; train workers in the use of such protective equipment; or, notify local emergency response teams of the possibility of toxic gas emissions.
- Facilities no longer have to notify IEPA or local emergency response teams about toxic gas releases from hazardous waste. (Section 265.56)

These important elements are now missing from the Illinois RCRA program. USEPA needs to initiate a withdrawal of determination of adequacy procedure until the State remedies this ruling. I intend to file a motion for reconsideration with the Board in the near future. Quick action on your part would allow the Board to reverse itself.

Sincerely,

Morton F. Dorothy