

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**NOTICE OF FILING**

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

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board Respondent, Flex-N-Gate Corporation's **RESPONSE TO COMPLAINANT'S ORAL MOTION FOR ADDITIONAL TIME TO FILE MOTION FOR LEAVE TO AMEND COMPLAINT**, a copy of which is herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,  
Respondent,

Dated: June 22, 2006

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

**THIS FILING SUBMITTED ON RECYCLED PAPER**

**CERTIFICATE OF SERVICE**

I, Thomas G. Safley, the undersigned, certify that I have served the attached  
RESPONSE TO COMPLAINANT'S ORAL MOTION FOR ADDITIONAL TIME TO  
FILE MOTION FOR LEAVE TO AMEND COMPLAINT upon:

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

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

via electronic mail on June 22, 2006; and upon:

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

by depositing said documents in the United States Mail in Springfield, Illinois, postage  
prepaid, on June 22, 2006.

/s/ Thomas G. Safley  
Thomas G. Safley

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**RESPONSE TO COMPLAINANT'S  
ORAL MOTION FOR ADDITIONAL TIME  
TO FILE MOTION FOR LEAVE TO AMEND COMPLAINT**

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 Oral Motion for Additional Time to File Motion for Leave to Amend  
Complaint, states as follows:

**I. BACKGROUND**

1. On March 20, 2006, during a telephonic status conference, Complainant asked the Hearing Officer for time to file a Motion for Leave to Amend his Complaint. The Hearing Officer granted Complainant sixty days, or until May 19, 2006, to file such a Motion. See March 20, 2006, Hearing Officer Order.
2. Complainant did not file any Motion for Leave to Amend by the deadline set by the Hearing Officer.
3. As of one month after that deadline, June 19, 2006, Complainant still had failed to file any such Motion.

4. On June 19, 2006, the parties attended a telephonic status conference with the Hearing Officer, during which Complainant requested an additional fourteen days in which to file a Motion for Leave to Amend Complaint.

5. Granting this request would in actuality result in a 45-day extension of time, given that 31 days had passed between the Hearing Officer's May 19th deadline and the telephonic status conference on June 19th.

6. During the June 19, 2006 status conference, counsel for Flex-N-Gate orally objected to Complainant's request for additional time on the grounds that (1) the proceedings have been substantially delayed at this point and (2) Complainant has not proposed to amend his Complaint to cure any deficiency in his current claim, but rather has proposed to amend his Complaint to allege completely new counts for alleged "air violations" in addition to the Resource Conservation and Recovery Act count currently pled in Count I of the Complaint.

7. Per the Hearing Officer's direction, Flex-N-Gate files this written Response to further set forth its opposition to Complainant's Oral Motion.

## **II. ARGUMENT**

### **A. The Hearing Officer has the Authority to Set and to Enforce Deadlines to Manage Litigation before the Board.**

8. A Board Hearing Officer "has the duty to manage proceedings assigned, to set hearings, to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Admin. Code § 101.610. (Emphasis added.)

9. It is axiomatic that, in order to fulfill this duty, the Hearing Officer has the authority to, among other things, set and enforce pre-hearing deadlines. This is made clear by the enumeration of the powers of the Hearing Officer in Section 101.610 of the Board's rules, which states that "[t]he hearing officer has all powers necessary to these ends." 35 Ill. Admin. Code § 101.610.

10. Setting deadlines is the method by which the Hearing Officer "avoid[s] delay," "maintain[s] order," and moves the case toward a resolution.

**B. It Cannot Be the Case that the Hearing Officer Has No Authority to Deny a Motion for the Extension of a Deadline to File a Motion Leave to Amend a Complaint to Add New Counts.**

11. Further, it cannot be the case that the Hearing Officer has no authority to deny a motion for the extension of a deadline to file a motion for leave to amend a complaint to add new counts.

12. First, as noted above, the Hearing Officer has "all powers necessary" to manage Board litigation.

13. Second, if the Hearing Officer does not have this authority, then there would have been no reason to set a deadline for such a filing in this case. The deadlines that the Hearing Officer sets are not meaningless.

14. Third, if the Hearing Officer does not have this authority, a complainant or a respondent could delay a hearing in a case forever. A complainant could ask for time to file a Motion for Leave to Amend its Complaint with the Board; not file any Motion; ask for more time; not file any Motion; etc., in perpetuity. A respondent could do the same thing with regard to a Motion for Leave to File a Third-Party Complaint. It cannot be the case that the Hearing Officer is powerless to stop such actions.

15. Fourth, likewise, if the Hearing Officer does not have this authority, either party could, the day before hearing is set, ask the Hearing Officer for time to file a Motion for Leave to Amend, thus canceling the hearing and causing the other party to have incurred unnecessary time and expense in preparing for the hearing.

C. **As the Hearing Officer Has Authority to Deny Complainant's Motion, the Only Question is Whether the Hearing Officer Should Do So; the Answer is Yes.**

16. As the Hearing Officer has the authority to deny Complainant's Motion, the only question before the Hearing Officer now is whether the Hearing Officer should deny Complainant's Motion. The answer is yes.

17. First, Complainant has presented no reason why he did not file his Motion by the deadline that the Hearing Officer previously set. That deadline, 60 days, was more than enough time to file such a Motion. Section 101.522 of the Board's rules, 35 Ill. Admin. Code § 101.522, may not be directly on point, as it speaks to deadlines imposed by the Board's rules, but it is instructive. It states:

The Board or hearing officer, for good cause shown on a motion after notice to the opposite party, may extend the time for filing any document or doing any act which is required by these rules to be done within a limited period, either before or after the expiration of time.

35 Ill. Admin. Code § 101.522. (Emphasis added.)

Complainant has shown no "good cause" why he did not file his Motion by the deadline that the Hearing Officer previously set.

18. Second, Complainant did not move for an extension of the deadline or otherwise notify Flex-N-Gate and the Hearing Officer that he needed additional time. As set forth in Respondent's Motion for Sanctions or, in the Alternative for Summary

Judgment (“Motion for Sanctions”), this shows that Complainant has not acted in good faith. The Hearing Officer should not reward Complainant’s failure to act in good faith by granting him an extension of the deadline.

19. Third, any analogy to a situation in which a complainant moves for leave to amend his complaint to cure a deficiency in a current count is inapposite. Flex-N-Gate recognizes that such motions in order to cure defects are liberally granted. Here, however, Complainant wants to amend his Complaint to assert totally new counts, thus delaying resolution of Complainant’s current claim which has been pending for almost two years. There is no issue here of fairness to Complainant.

20. Fourth, Complainant has not argued that he will be prejudiced if he is not granted time to move for leave to amend, and Flex-N-Gate cannot identify any prejudice to Complainant.

**III. CONCLUSION**

WHEREFORE, Respondent FLEX-N-GATE CORPORATION respectfully prays that the Hearing Officer deny Complainant's oral motion for additional time to seek leave to amend his Complaint and grant FLEX-N-GATE CORPORATION such other relief as the Hearing Officer deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION,  
Respondent,

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

Dated: June 22, 2006

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GWST:003/Fil/Response to Complainant's Motion for Extension of Time to Seek Leave to Amend