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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

GINA PATTERMANN

Complainant,

v.

BOUGHTON TRUCKING AND MATERIALS,
INC.

Respondent.

PCB 99-187

(Citizen Enforcement,
Noise & Air)

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on the 29th day of December, 2003, the undersigned caused to be filed with the Office of the Clerk of the Pollution Control Board the COMPLAINANT'S MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, a copy of which is herewith served upon you.

THE JEFF DIVER GROUP, L.L.C.



By: _____

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**COMPLAINANT'S MEMORANDUM IN RESPONSE TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Now comes Complainant, Gina Pattermann ("Pattermann"), by her attorneys, and hereby submits her Memorandum in Response to the Motion of Respondent, Boughton Trucking and Materials, Inc. ("Boughton") for Summary Judgment.

**I. BOUGHTON MISSTATES THE APPLICABLE LEGAL STANDARD AND
IMPROPERLY SEEKS TO SHIFT THE BURDEN ON ITS MOTION FOR SUMMARY
JUDGMENT TO PATTERMANN**

"The party seeking summary judgment may meet its initial burden of persuasion by presenting facts which, if uncontradicted, would entitle it to a judgment as a matter of law." *Loschen v. Grist Mill Confections, Inc.*, PCB 97-174 (Sep. 18, 1997), citing *Estate of Stewart*, 236 Ill.App.3d 1, 7-8 (1st Dist. 1991). If the party seeking summary judgment produces such evidence, then the burden of production shifts to the party opposing the Motion. *Estate of Stewart*, 236 Ill.App.3d at 8. "In determining the existence of a genuine issue of material fact, the courts must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Id.* at 7.

Boughton alleges that Pattermann has failed to establish an "unreasonable interference with the enjoyment of life or property" in violation of Sections 9(a) or 24 of the Act and the Board's corresponding rules. Boughton states that "[t]he question before

the Board is not whether the Complainant and her witnesses have experienced noise and dust, or even whether that noise and dust interferes in their lives.” (Boughton Motion at 10-11).

Contrary to Boughton’s assertion, this Board must consider whether or not Pattermann has established the elements of her claims so that Boughton must produce “uncontradicted facts” entitling it to judgment as a matter of law. If Pattermann has provided *prima facie* evidence establishing the elements of her claims, which she has, then it is Boughton’s burden to present uncontradicted facts which would entitle Boughton to judgment as a matter of law. *Estate of Stewart*, 236 Ill. App. 3d at 7-8.

Pattermann has met her initial burden of proof. She, in addition to four other witnesses, testified to the presence of the noise and dust as well as the resulting negative impact upon their lives. Boughton, on the other hand, seems to believe that these claims can be disposed of by performing its own biased Section 33(c) analysis. A Section 33(c) analysis is inappropriate and premature in the context of summary judgment. Boughton’s own opinion is irrelevant to meeting its burden. Pattermann “is not obligated to introduce evidence on each of the Section 33(c) factors.” *Loschen v. Grist Mill Confections, Inc.*, PCB 97-174 (Sep. 18, 1997). She “may present facts at hearing” regarding the Section 33(c) factors. *Loschen v. Grist Mill Confections, Inc.*, PCB 97-174 (Sep. 18, 1997). Pattermann intends to present her testimony as well as that of her witnesses at hearing proving those facts related to Boughton’s noise and dust emissions.

Boughton also seeks to usurp this Board’s adjudicative function. In support of its Motion, Boughton parses deposition testimony and presents it in a slanted manner. Based on its own view of the facts, Boughton claims that it is entitled to summary

judgment because it "finds" the noise and dust emissions to be reasonable under its reading of Section 33(c). Boughton is not the fact-finder here nor is Boughton's weighing of the Section 33(c) factor's relevant evidence of a lack of a genuine material issue.¹

On September 23, 1999, this Board determined that Pattermann properly alleged air and noise violations of the Act and the Board's rules. This Board also found that Pattermann's pleadings were specific. Boughton must now meet its initial burden of persuasion by evidencing a lack of genuine issues of material fact or presenting "uncontradicted facts" establishing that it is entitled to judgment as a matter of law. Only after Boughton has met this burden does the burden of production shift to Pattermann to contradict those facts.

II. BOUGHTON HAS NOT MET ITS INITIAL BURDEN

Boughton relies on its interpretation of the deposition testimony in light of the Section 33(c) analysis. As discussed above, a Section 33(c) analysis is inappropriate and premature in the context of a motion for summary judgment. Nevertheless, Boughton has parsed the witnesses' deposition transcripts in its effort to establish that its noise and dust emissions are not unreasonably interfering with its neighbors' enjoyment of their life or property. This fails to meet Boughton's initial burden in three respects. First, Boughton does not deny that dust and noise emissions are in fact occurring. Rather, Boughton focuses only on the "reasonableness" of those emissions in the context of Section 33(c). Boughton appears to argue that the interference with Pattermann's life and the enjoyment of her home (and those of her neighbors) resulting

¹ Boughton's reliance on *Charter Hall v. Overland*, PCB 98-81 (Oct. 1, 1998) and *Kvatsak v. St. Michael's Lutheran Church*, PCB 89-182 (Aug. 30, 1990) is misplaced. In each of those cases, the Section 33(c) analysis took place after the hearing and not upon summary judgment.

from the dust and noise emissions is "reasonable". Whether or not the interference is in fact "unreasonable", however, is a question of fact appropriately decided after the hearing where Pattermann may present her case, especially those facts relating to the Section 33(c) factors. *Loschen*, PCB 97-174 (Sep. 18, 1997).

Further, "Summary judgment may only be granted where the facts are capable of only one reasonable inference". *Estate of Stewart*, 236 Ill. App. 3d at 12. In its effort to meet this burden, Boughton presents a selective interpretation of testimony along with its bare conclusion of "reasonableness". In contrast to Boughton's interpretation, however, the witnesses' deposition testimony establishes that the noise and dust emissions interfere with their lives and the enjoyment of their homes. (See Section II.B., *infra*) On the whole, Boughton ignores its burden and focuses on the Section 33(c) "reasonability analysis". That analysis, biased as it is, does not assist Boughton in meeting its initial burden.

Finally, "In determining the existence of a genuine issue of material fact, the courts must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Estate of Stewart*, 236 Ill. App. 3d at 7. Boughton is not entitled to the presumption of a "reasonable" interference. The testimony of the witnesses must be construed liberally in Pattermann's favor.

In this regard, the witnesses testified to the noise and dust emissions and its interference with their lives. Whether or not Boughton disagrees with the witnesses' assessments of the extent of the impacts of Boughton's polluting activities is irrelevant. Pattermann is entitled to present her case, at hearing, showing that the noise and dust emissions substantially interfered with the enjoyment of life and property and, as such,

were violations of the Act. Again, it is improper to weigh the Section 33(c) factors before hearing. *Loschen v. Grist Mill Confections, Inc.*, PCB 97-174 (Sep. 18, 1997).

A. Boughton Has Not Met Its Burden Of Demonstrating That Pattermann Has Failed To Establish A Violation Of The Act Or Board Regulation

Boughton asserts that Pattermann did not produce any "objective" evidence supporting any of her claims. (Boughton Motion at 5). Boughton is wrong. Pattermann, as evidenced by Boughton's own Motion, produced five witnesses, photographs and evidence of the stress and discomfort caused by Boughton's air and noise pollution. (Boughton Motion at attachments 4, 7, 8, 9, 10, and 11). The testimony of the five witnesses (Pattermann, William Jene, Carlene Jenkins, Lisa Collins and Donald Boudreau) evidences the existence of noise and dust emissions as well as the substantial interference caused in their daily lives. It is well-settled that this type of evidence is sufficient to not only withstand a motion for summary judgment but to prevail at hearing. "The testimony of private citizens, as opposed to that of experts, is sufficient to sustain a finding that there was a violation of the Act." *Hillside Stone Corporation v. Illinois Pollution Control Board*, 43 Ill.App.3d 158, 162 (1st Dist. 1976), citing *Sangamo Construction Co. v. Pollution Control Board*, 27 Ill.App.3d 949, 955 (4th Dist. 1975).

In addition, Boughton itself has produced, in its Supplementary Discovery Response dated April 3, 2003, a document entitled "Boughton Trucking Noise Survey Notes" dated March 29, 2000 ("Survey Notes") (A copy of the Survey Notes is attached hereto as Exhibit A). The Survey Notes reflect a test of sounds emitted from Boughton's quarry from various River Run properties. In Section 4.0, titled "Conclusions and Recommendations", the author confirms that "[n]ighttime limits cannot be met by the existing plant configuration along Baybrook Lane or Sebastian Court." Also, "the

nighttime limit along Esquire Circle (and west to the swim club) is barley [sic] being met. However, the nighttime limit will almost certainly be exceeded when the leaves are off the trees." The Survey Notes further acknowledge that, "The most prominent audible sounds were backup alarms (although they did not appear to affect the meter readings) and truck dumps at the primary (which did affect the readings). The screening plant sound alone does not appear to exceed daytime limits, although it is quite noticeable."²

There is no doubt that Boughton was emitting noise audible to surrounding homeowners which may violate the Act. Whether or not Boughton can ultimately prove that it has complied with its permit or this Board's regulations does not mean that Boughton has not violated the Act. *Loschen v. Grist Mill Confections, Inc.*, PCB 97-174 (Sep. 18, 1997).

B. Boughton Is Not Entitled to Summary Judgment Since Material Issues of Fact Exist Relating to the Impact Of The Dust and Noise Emissions

Boughton's primary argument is that Pattermann has failed to produce "objective" evidence supporting her claims that Boughton's quarry emits noise and dust pollution which unreasonably interferes with her enjoyment of her life and property. (Boughton Motion at 5). As noted above, testimony of private citizens is sufficient to sustain a finding that there was a violation of the Act. *Hillside Stone Corporation*, 43 Ill. App. 3d at 162. The testimony of the witnesses establishes, at a minimum, that material issues of fact regarding the severity and "reasonableness" of Boughton's pollution preclude summary judgment.

² It is noteworthy that Boughton did not produce this document, created a full year prior, in its July 23, 2001 response to Pattermann's Interrogatories (See Boughton Motion at Attachment 5, page 13-14). Nor did Boughton alert Pattermann to the document's existence by specifically claiming privilege so that the matter could be contested. The document was not produced until April, 2003. Further, the report appears to be the notes for a survey prepared by the principal engineer of MACTEC Engineering and Consulting. The final survey, however, was not produced to Pattermann. (See Exhibit B hereto).

1. Dust Complaints

Section 9(a) of the Act prohibits the emission of any "contaminant" so as to cause "air pollution", "either alone or in combination from other sources". 415 ILCS 5/9(a) (2003). In order to establish a violation of Section 9(a), Pattermann must show that:

- 1) There was an emission of dust.
- 2) The emission was caused or contributed to by Boughton.
- 3) The dust resulted in either (a) injury to health or (b) interference with the enjoyment of life or property.
- 4) The injury or the interference was unreasonable according to the criteria at Section 33(c) of the Act. (415 ILCS 5/33(c) (2003).

See *Glasgow v. Granite City Steel*, PCB 00-221, 2002 WL 392181 (March 7, 2001), citing *Gott v. M'Orr Pork*, PCB 96-68, Slip. Op. at 12 (Feb. 20, 1997).

As noted above, Pattermann produced five witnesses, herself included, who resided near the Boughton quarry. Each witness, in depositions attached to Boughton's Motion (Boughton Motion at attachments 7,8,9,10, and 11), testified as to the presence of dust as well as its interference with the enjoyment of life or property. Boughton mischaracterizes, summarizes or removes the context of the testimony to support a biased presentation and diminish its impact.

Despite the evidence in the record, Boughton concludes that the level of dust is "minor", not unlike that experienced by people living in Metropolitan Chicago areas or located next to highways, etc., or that it is not unusual for people who live next to two quarries. (Boughton Motion at 25). Irrespective of Boughton's selective quotation, "summarization" and "interpretation" of the testimony, each of the witnesses in fact contradicts Boughton's characterization of the dust emissions.

Lisa Collins testified that the dust was an issue which led her to sell her house and move from the River Run property. (Boughton Motion at attachment 10, p. 17). Ms. Collins specifically testified to the following:

- 1) "I had black granite countertops, and I would wipe them down in the morning and by afternoon they would have a nice little coating of dust on them again." (Boughton Motion at attachment 10, p. 29).
- 2) "I never had that kind of dust in any other home." (Boughton Motion at attachment 10, p. 30).
- 3) "Where I'm living right now, I've got construction all around me, and I don't have that dust problem. So I would still believe that the dust came from the quarry. It was very heavy, and it wasn't like clay dirt." (Boughton Motion at attachment 10, p. 30).
- 4) "It was more of a light powdery type dust." (Boughton Motion at attachment 10, p. 30).
- 5) As to alleviation measures, "Just wiping it up , that's really all you could do or leave the windows closed." (Boughton Motion at attachment 10, p. 30-31).
- 6) "I would say the dust issue was simply more of a cosmetic issue, you know, my furniture, the floor, you know, if you walked around with your socks you would get dust." (Boughton Motion at attachment 10, p. 32).

As noted, Ms. Collins stated that the dust issue was a reason why she sold her house and moved away. No amount of "interpretation" can diminish the conclusion that

such a drastic result establishes a substantial interference with her enjoyment of her home.³

Donald Boudreau testified as to the presence of dust and its impact upon his life:

- 1) "My wife is very concerned about the dust, and I can speak secondhand, but I have seen a cloud of dust on occasion, but I hear complaints from my wife about the dust." (Boughton Motion at attachment 11, p. 40-41).
- 2) "I've seen a cloud of dust from this golf course. It drifted over the road, and it was a very heavy cloud of dust." (Boughton Motion at attachment 11, p. 41).
- 3) "...I see the dust. Just walking in the yard you get it on your shoes?" (Boughton Motion at attachment 11, p. 42).
- 4) As to whether the dust is unreasonable: "Yes, I think it is because just the other day a neighbor informed me that they were driving down our street on Baybrook Lane in the middle of the day, and they had to roll up their windows because the dust was so thick on our street. I think that's unreasonable." (Boughton Motion at attachment 11, p. 42-43).
- 5) Mr. Boudreau has dust when the windows are closed. (Boughton Motion at attachment 11, p. 43).
- 7) The dust comes into his home "through the normal traffic of our doors being open." (Boughton Motion at attachment 11, p. 43).

³ Boughton characterizes Ms. Collins' testimony as stating that "the dust did not require her to seal her windows or pressure wash her house." (Boughton Motion at 23). This is a mischaracterization. Ms. Collins actually stated, in response to the pressure washing question, that "it might have needed it, but we never did it." (Boughton Motion at attachment 10, p. 31).

- 8) "[I]f we don't dust our house for two to three days, we'll have a film of dust on our dining room table which is—we've lived in three different houses in different parts of the country and have not experienced such a high level of dust in the home. It's unusual." (Boughton Motion at attachment 11, p. 44).
- 9) "We don't open the windows because the dust is too great. My wife doesn't allow us to open the windows." (Boughton Motion at attachment 11, p. 44).
- 10) They keep the windows closed in the spring and summer in the front and back of the house. (Boughton Motion at attachment 11, p. 44-45).
- 11) "Well our windows remain dirty. I can't say that I can afford to have people wash my windows like other neighbors I have, however they remain dirty so I can't say that we have them washed regularly." (Boughton Motion at attachment 11, p. 60).

Boughton next mischaracterizes William Jene's testimony:

- 1) "Most of the major dust problems come of occurs in the drier times of the year that you can identify, and of course that's the time of year that we are outside. The summertime, you can't open your windows for fear that you will have dust throughout the entire house within minutes." (Boughton Motion at attachment 8, p. 37).
- 2) Boughton states that Mr. Jene "could not provide any particular dust problems he experienced which were associated with blasting". (Boughton Motion at 24). Contrary the this

characterization, the questions and answers to which Boughton refers relate to a specific date of the blasting, not the resulting dust problems. (Boughton Motion at attachment 8, p. 37).

- 3) Mr. Jene does not notice a difference in the amounts of dust in regards to any mitigation measures Boughton may have taken. (Boughton Motion at attachment 8, p. 39-41).
- 4) "...I would assume that because the Boughton Quarry is closer, that you're going to have more dust from Boughton than you are from Vulcan." (Boughton Motion at attachment 8, p. 26).

Carlene Jenkins, who does not use her backyard because of the dust (Boughton Motion at attachment 9, p. 38), testified as follows:

- 1) "[T]he concern that I have about inhaling the dust which, no, I can't differentiate dust from one place or another, but I would say I'm 99 percent sure that the quarry is emanating dust that we are breathing in, and I worry about that. I worry about that not only for me but for my daughter especially. I fear that she may have allergies or asthma down the road." (Boughton Motion at attachment 9, p. 38).
- 2) "We don't use our backyard that we would like to because of the activity going on behind our lot and also because it's just filthy. It's filthy." (Boughton Motion at attachment 9, p. 38).
- 3) Responding to a question about specific occasions or significant amounts of dust, Ms. Jenkins stated, "I think it's just a consistent – it seems to be a consistent level. There aren't like big clouds of dust

that come over our property. It's just the consistent grinding and blasting, I'm sure – I'm not an expert, but I would tend to believe are what's causing the dust on our property and the structural things that are happening within our house.” (Boughton Motion at attachment 9, p. 39).

- 4) The dust, along with her other testimony, are pretty serious impacts. (Boughton Motion at attachment 9, p. 40).
- 5) Ms. Jenkins has expressed concerns over the dust and noise. (Boughton Motion at attachment 9, p. 35).
- 6) Ms. Jenkins has not noticed any decrease in dust emissions from the quarry as a result of the mitigation measures they have employed in the last two years. (Boughton Motion at attachment 9, p. 36).

Boughton next mischaracterizes and misstates the testimony and evidence supplied by Pattermann. Boughton states that, “Gina Pattermann stated that the dust from blasting was not a big problem for her. She was more concerned about process dust.” (Boughton Motion at 24). In contrast to Boughton's summary, Pattermann testified to coming home and viewing a cloud of dust that appeared to be generated by the quarry. (Boughton Motion at attachment 7, p. 69). Boughton's attorney then asked if Pattermann thinks the dust “is not only being generated in the blasting, but is also being generated in the operations”. Pattermann replied, “Absolutely.” (Boughton Motion at attachment 7, p. 70). Nowhere in the pages cited by Boughton does Pattermann ever state that the dust associated with the blasting is “not a big problem for her.” (Boughton Motion at 24).

On the same subject, in her response to Boughton's First Set of Interrogatories, Pattermann stated:

Respondent has polluted the air by releasing dust into the air on a regular basis in large quantities. This dust is visible to the eye. This dust is also visible inside my home most days when Boughton is operating and I open my windows or doors. The dust accumulates on the furniture, kitchen and bathroom counters, tables, etc. The dust also accumulates on the screens. I do not keep screens on my home any longer because the dust settles on the screens and it is not possible to see clearly outside. I rarely open my windows when respondent is operating because of that dust.

(Boughton Motion at attachment 2, p. 1). Pattermann further stated, "I cannot open my doors and windows. I rarely ever turned the air conditioner on in my previous houses. I love fresh air. Now I have no choice but to be closed in my house six days per week. I rarely get to enjoy my beautiful yard. For relaxation, I have always gardened in the past. I can no longer garden without listening to banging and crashing all day as well as getting covered in grit." (Boughton Motion at attachment 2, p. 2). Finally, in her responses to Boughton's First Set of Document Requests, Pattermann produced ten photographs, dated August 3, 1998, illustrating the clouds of dust as well as photographs of the same locations without the clouds of dust. (Boughton Motion at attachment 4).

Each of the witnesses complains of the dust emissions. Several witnesses do not use their backyards because of the dust. Several witnesses had their activities, such as gardening or children playing, curtailed because of the dust. Ms. Collins moved, in part, because of the dust. At least one resident has expressed concerns over the possible health implications to children of such a large quantity of dust. Several witnesses stated that the dust has caused them additional household work and expense. The evidence in

the record amply supports a finding that the dust emissions interfere with the witnesses' enjoyment of their life or property. At a minimum, Boughton has not met its burden and there remains an issue of material fact regarding a violation of Section 9(a) of the Act and whether that violation substantially interferes with Pattermann's enjoyment of her life and property.

2. Noise Complaints

Section 24 of the Act prohibits emitting noise beyond one's property which unreasonably interferes with the enjoyment of life in violation of the Board's rules or standards. *Kvatsak v. St. Michael's Lutheran Church*, PCB 89-182, 1990 WL 158048 (Aug. 30, 1990). Appropriate evidence would include testimony describing the noise; explaining the type and severity of the interference caused by the noise; and indicating the frequency and duration of the interference. *Kvatsak v. St. Michael's Lutheran Church*, PCB 89-182, 1990 WL 158048 (Aug. 30, 1990), citing *Ferndale Heights Utilities Company v. Illinois Pollution Control Board*, 41 Ill.App.3d 962 (1st Dist. 1976).

Boughton attempts to distinguish the noises emitted from its quarry as blasting noise and process and vehicle noise. This effort is irrelevant. There is no basis for distinguishing the noises to determine if there exists a genuine issue of material fact that the noises complained of violate the Act. For the purposes of this response, therefor, Pattermann will not distinguish between the two types.

It is appropriate at the outset to point out a misstatement in Boughton's Motion. First, Boughton states that "Carla Jenkins [sic] stated in deposition that the noise from the blasts woke her daughter..." (Boughton Motion at 12). Boughton then summarizes that statement so as to "center around the ground vibration associated with the blast rather than the noise." (Boughton Motion at 12-13). While the witness may have testified

as to ground vibration, this does not detract from her specific testimony regarding the noise of blasting.

Pattermann and her witnesses described the noise; the type and severity of the interference caused by the noise; and the frequency and duration of the interference. Examples of that testimony include:

a. Carlene Jenkins:

- 1) "[I]t sounded as if a train might be going or grinding, loud trucks." (Boughton Motion at attachment 9, p. 17).
- 2) "[T]here's definitely more noise with trucks going back and forth every day, and I guess that's it, just the trucks going back and forth." (Boughton Motion at attachment 9, p. 20).
- 3) The noise has gotten significantly more intense. (Boughton Motion at attachment 9, p. 20).
- 4) The blasts are more intense despite mitigation measures. (Boughton Motion at attachment 9, p. 27).
- 5) A repetitive beeping like that of trucks or equipment in reverse and grinding. (Boughton Motion at attachment 9, p. 29).
- 6) The blast noise which wakes her daughter. (Boughton Motion at attachment 9, p. 38).
- 7) The consistent grinding and blasting. (Boughton Motion at attachment 9, p. 39).

b. William B. Jene:

- 1) "I had never heard a blast from the quarry until after I was in construction of the property." (Boughton Motion at attachment 8, p. 21).
- 2) "I knew about the noise factor just from me being there." (Boughton Motion at attachment 8, p. 22).
- 3) Noises from "[t]he conveyor and the excessive beeping." (Boughton Motion at attachment 8, p. 22).
- 4) Mr. Jene has contacted the IEPA three or four times over the last three years and most of the conversations were on Boughton regarding the noise and dust. (Boughton Motion at attachment 8, p. 25-26).
- 5) Mr. Jene has heard blast noise on his property. (Boughton Motion at attachment 8, p. 33)⁴
- 6) Mr. Jene has heard and been able to identify noises from the conveyor belt, the dumping, and blasting. (Boughton Motion at attachment 8, p. 34).

c. Donald Boudreau:

- 1) Mr. Boudreau testified as to "[t]he roar of the – I don't know what it is, the shaker or some type of sorting device they have over there." (Boughton Motion at attachment 11, p. 14).

⁴ Boughton appears to use this portion of Mr. Jene's testimony to leap to the conclusion that he could not recall any specific instance in which he heard a blast that was troublesome to him. (Boughton Motion at 13). On the contrary, Mr. Jene stated, "That I can say I was sitting there and that I can pinpoint the exact day? No." (Boughton Motion at attachment 8, p. 33-34).

- 2) "...I didn't consider the noise an issue during the first couple of years we were here. However, recently the noise has gotten – it is apparently louder..." (Boughton Motion at attachment 11, p. 23-24).
- 3) "A steady roar, kind of a rattling consistent noise" heard every day but Sunday. (Boughton Motion at attachment 11, p. 32).
- 4) Mr. Boudreau hears the noise "especially at lunchtime when I come home for lunch it's extremely loud. I would say that I've heard it much earlier before 7:00 o'clock in the morning as well. "(Boughton Motion at attachment 11, p. 33).
- 5) As to whether or not the noise is emitted from Boughton, "I've investigated through my neighborhood walking down the street to identify where this noise was coming from, whether it was this quarry or this quarry, because they are quite a ways apart from where I am because I'm directly across from Boughton." (Boughton Motion at attachment 11, p. 33-34).
- 6) "...I hear the noise at 7:00 a.m. because it wakes my kids up sometimes." (Boughton Motion at attachment 11, p. 36).
- 7) Mr. Boudreau testified that the noise is consistently there but is really loud two days a week and that the wind can make a difference depending upon its direction. (Boughton Motion at attachment 11, p. 36-37).
- 8) Mr. Boudreau investigated filing a complaint with the IEPA regarding the noise at Boughton but found this suit had already been initiated. (Boughton Motion at attachment 11, p. 39).

- 9) Mr. Boudreau testified as to hearing what he presumes are the back-up beeper noises from the trucks. (Boughton Motion at attachment 11, p. 40).
- 10) Mr. Boudreau testified he can hear the noise (the beeping and the shaking) from the inside of a portion of his home; it wakes his children because their bedrooms are on that side of the house, and you can hear it clearly in the mornings with the windows closed despite having double-pane windows. (Boughton Motion at attachment 11, p. 45-46).⁵
- 11) "I think it's of note that we have difficulty communicating from one side of the street to the other side of the street when this shaker noise is occurring. In other words, I can't talk to my neighbor across the street without yelling, and I think that infers a significant level of noise that I think is unwieldy." (Boughton Motion at attachment 11, p. 60).

d. Lisa Collins:

- 1) Ms. Collins sold her house and moved, in part, because of the noise. (Boughton Motion at attachment 10, p. 17).
- 2) One of her reasons for moving was "I just like to be outside gardening, and the noise bothered me. I felt like I wasn't in a natural environment. It felt like being in a big city because I could

⁵ Boughton again mischaracterizes the testimony of the witnesses. First, Boughton claims that Mr. Boudreau "thinks it would interfere with watching television if he had a T.V. on that side of the house." (Boughton Motion at 16). Mr. Boudreau said no such thing in his deposition. (Boughton Motion at attachment 11, p. 45). Second, Boughton states Mr. Boudreau has taken no measures to soundproof his house, completely ignoring the fact that he in fact stated he has double-paned windows as soundproofing. (Boughton Motion at 16).

hear the conveyer belts and trucks beeping, and I just didn't like it. It took away the enjoyment for me." (Boughton Motion at attachment 10, p. 18).⁶

- 3) Ms. Collins testified as to crashing rocks and back-up beepers that bothered her. (Boughton Motion at attachment 11, p. 18-19).
- 4) Ms. Collins testified that she complained to neighbors "that we can't stand the noise". (Boughton Motion at attachment 11, p. 26).
- 5) Ms. Collins, prior to moving, had been a plaintiff in this suit. (Boughton Motion at attachment 11, p. 27-28).
- 6) Ms. Collins testified that she heard the blasting noises and they were annoying. (Boughton Motion at attachment 11, p. 28).

Pattermann has herself provided ample evidence regarding the noise emitted from Boughton's quarry. Aside from her testimony at deposition, Pattermann also responded to Boughton's interrogatories. Boughton's summary of Pattermann's evidence is especially noteworthy in two respects. First, Boughton's asserts that Pattermann is "casual" in pursuing her claims, although Boughton does not provide any legal, statutory or administrative basis for the relevance of this assertion. Boughton then leaps to the conclusion that Pattermann's "casual" actions "are not the actions of someone who is experiencing an 'unreasonable interference with the enjoyment of life'." (Boughton Motion at 23). Boughton's irrelevant speculation does not establish the

⁶ Again, Boughton attempts to diminish the testimony that the Boughton noise and dust issues forced Ms. Collins to move by blaming Pattermann, since Pattermann's husband sold the Collins a lot. This is completely outside of the requirements for Boughton's burden of proof and is inserted solely to place Pattermann in a defamatory light. More to the point, Boughton's effort is not supported by the record. Pattermann testified that the Collins moved in before the Pattermanns. (Boughton Motion at attachment 7, p. 16). Further, upon discovering the noise and dust issues, the Pattermanns declined to develop any more lots at River Run and even returned a lot. (Boughton Motion at attachment 7, p. 17-18).

absence of a genuine issue of material fact nor does it assist Boughton in meeting its initial burden. In any event, Pattermann has been pursuing this claim formally since June 1999 and informally since 1997. (Boughton Motion at attachment 7, p. 37).

Boughton next asserts that Pattermann admits that the operations at the Boughton plant have not changed since she has moved there and that the blasting and excavating have moved to the east. (Boughton Motion at 21). The deposition transcript is at best unclear on this point as it appears that both Boughton's attorney and Pattermann were having difficulty reading the map. (Boughton Motion at attachment 7, p. 51-53). Again, these arguments do not assist Boughton in meeting its burden.

Pattermann stated in her response to Boughton's First Set of Interrogatories that Boughton:

[C]ontinuously creates noise that unreasonably interferes with the enjoyment of life on my property on a regular and ongoing basis. Every morning between 5:30 a.m. and 6:30 a.m., Monday through Saturday, the respondents begin operating their very noisy equipment waking me and my family. Respondent operates the equipment until late afternoon. The equipment is loud enough that it prevents me from using my backyard for normal purposes such as children playing and hosting parties. If the children are playing while the respondent is operating, on most days, they cannot hear me speaking to them from the deck attached to the rear of the home. I cannot open my windows or doors or hold normal conversations inside my home while respondent is operating their equipment. I cannot hold a conversation with her neighbors while standing in the driveway unless we shout. The respondent also uses blasting devices several times a week. This blasting wakes the children from their naps on a regular basis. In the autumn, the respondent allows a local group of hunters to use their property to hunt. Sunday is the only day that respondent does not operate their quarrying equipment but I am awoken by the sound of rifle shots at the edge of my property line.

(Boughton Motion at attachment 2, p. 1).

Pattermann further testified in her deposition as follows:

- 1) Boughton's sound-proofing berm is not placed between the rear of her home and the Boughton quarry. (Boughton Motion at attachment 7, p. 28-29).⁷
- 2) The noises she originally complained of in 1997 were the blasting noises and the general operations noises. (Boughton Motion at attachment 7, p. 37).
- 3) Pattermann's home is the closest to the Boughton plant. (Boughton Motion at attachment 7, p. 55).
- 4) Pattermann can distinguish between the noise of a truck dumping and back-up beepers as well as several noises she cannot describe but attempted to demonstrate. (Boughton Motion at attachment 7, p. 56).
- 5) The noise goes on all day long, it is "pretty much the same all year long" and it varies most with wind direction. (Boughton Motion at attachment 7, p. 56).
- 6) "If it's a real windy day it's louder. If it's less windy, it's softer, unless the winds are coming straight out of the east, which they rarely do,

⁷ Boughton attempts to evade this fact by claiming that Pattermann "admits to the presence of the berm and the 25 acres of undeveloped property between the east side of her property and Boughton's operations, but claims they have no impact on reducing sound levels on her property." (Boughton Motion at 22). The berm does not extend between some of Boughton's operational facilities and Pattermann's home despite the fact that the two properties are directly opposite each other. (Boughton Motion at attachment 7, p. 31-32).

then its really loud. If it's cloudy it's usually louder." (Boughton Motion at attachment 7, p. 57).⁸

- 7) If the wind is traveling in a direction from the plant to her home, "it is ridiculously loud". (Boughton Motion at attachment 7, p. 57).
- 8) When asked about "specific dates" when she was particularly bothered, Ms. Pattermann replied, "Not really. It's pretty consistent." (Boughton Motion at attachment 7, p. 58).
- 9) Blast noise is not affected by the wind. (Boughton Motion at attachment 7, p. 68).
- 10) Pattermann can distinguish the source of noises from the Vulcan quarry and the Boughton quarry. (Boughton Motion at attachment 7, p. 76-77).
- 11) Pattermann believes she hears trucks, engines, back-up beepers, and possibly equipment as early as 5:30 a.m. to 6:00 a.m. (Boughton Motion at attachment 7, p. 73-74).
- 12) Pattermann stated "...when I wake up in the morning, if it's the first one that they are dumping in there, that's when I hear what's going on there more than any other time because I have five kids and it gets incredibly noisy in my house later in the day." (Boughton Motion at attachment 7, p. 104).⁹

⁸ Pattermann acknowledges that she is guessing about the various wind directions and what the prevailing winds are at her home, since she is not a meteorologist. (Boughton Motion at attachment 7, p. 57).

⁹ This is yet another example of how Boughton has taken a witness' testimony out of context. Pattermann, as quoted above, said she hears the noise more in the morning and gave an explanation for why she hears it less later in the day (her five children). The fact that Pattermann's home is noisy due to

Finally, Boughton's own Survey Notes state that on July 7, 1999, starting at 6:35 a.m., the engineer could hear the plant running, including back-up alarms, and the occasional truck dump. (Exhibit A, p. 1-2). At another point, the engineer reported that the sound of the screening plant was noticeable. At a third location, the plant was "noticeably louder" and sounds could be distinguished as back-up alarms, truck dumps, vibrating screens, and trucks/loader engines at full power. Finally, the engineer reported hearing "the occasional loader dumping muck into a haul truck". (Exhibit A, p. 2).

In summary, each of the witnesses testified to the type of noise, the severity of the noise and the interference it causes. The noises have been described as: "blasting", "a whoosh"; "rifle shots"; "crushing rocks"; "beepers"; "conveyor belts"; "shaking"; "loud trucks"; "grinding"; a "steady roar"; and "a rattling". Some witnesses complain the noise is "loud", "really loud" or "ridiculously loud". Several witnesses testified that the noise has gotten "more intense". The noises are audible in their homes. It prevents conversations in places where they could normally be carried. It wakes people and their children. It is continuous. The noise, likely depending upon the wind and the location, is consistently loud.

Five witnesses gave testimony that is more than adequate to establish the elements of Pattermann's noise claim. Not one witness testifies that there is no noise or that it does not cause some level of discomfort or interference. Boughton, despite its "interpretations", has not established the absence of a genuine issue of material fact.

her children does not assist Boughton in meeting its initial burden of proving that there is no genuine issue of material fact regarding the fact and impacts of the pollution it creates.

III. CONCLUSION

The Section 33(c) analysis should be conducted by this Board after a hearing, not by Boughton in its interpretive effort to obtain summary disposition. For all of the foregoing reasons, Boughton's Motion for Summary Judgment should be denied.

Respectfully submitted,

The Jeff Diver Group, L.L.C.



By: _____
One of the attorneys for
Complainant

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ATTORNEY CLIENT WORK PRODUCT**

Boughton Trucking Noise Survey Notes

1.0 Protocol

IEPA noise pollution regulations are written with reference to allowable octave band sound pressure levels, and measured based on Leq averaging and a reference time of one hour. While an acoustic consultant and elaborate test equipment is generally required to take these detailed readings, IEPA recommends an alternative, less expensive method as a rough compliance check. Greg Zak, IEPA Noise Pollution Control (217-785-7726), suggested the following protocol for compliance testing:

1. Purchase a Radio Shack Sound Level Meter (either digital or analog). His experience when testing the Chinese manufactured Radio Shack units is that they are accurate to within 1 dB.
2. When preparing to take readings for compliance verification, set the unit to "A" weighting and "slow" response.
3. Because there is no wind screen on the unit, limit testing to low wind conditions.
4. Monitor for about 10 minutes, recording meter readings every 10 seconds. The average of the readings will give a close approximation to the 1-hr Leq. (While the sound level meter also has the ability to integrate readings over a period of time up to 199 seconds, Greg did not recommend using it. He stated that the integration protocol used by the Chinese was questionable, and could not be correlated with any known international standard.) He further stated that the "slow", "A" weighted results were recognized by both US and international agencies.
5. According to Greg, the "pseudo" limits are 51 dBA (nighttime - 10pm to 7am) and 61 dBA (daytime - 7am to 10 pm).

2.0 Test Results - July 7, 1999

Weather at the time of readings was 78 degrees, 90% humidity, no wind, and scattered clouds.

I arrived at the River Run subdivision at 6:15 am in anticipation of the plant starting up at about 6:30. I parked at a vacant lot between 4423 and 4419 Esquire Circle on Esquire Circle (parcel number 352-014). After walking to the back of the lot (at the Boughton Trucking property line), I prepared the Radio Shack digital display sound level meter (digital model 33-2055) as described in the protocol.

The plant started up at 6:35 am. The sound level meter can only display sound levels to a minimum of 50 Db. Although I could hear the plant running, including back-up alarms, the only events that registered readings above 50 dB was the occasional truck dump at the primary. At this location, I believe the nighttime limits were not being exceeded prior to 7:00 am.

The second sampling location was at the back of the Patterman (the complainant) Lot. Again, the meter only occasionally registered above 50 dBA. The nighttime limit was not exceeded at this location.

I then attempted a reading at the end of Sebastian Court, but there was too much background construction noise (homebuilding) to get any meaningful readings. The sound of the screening plant was noticeable, however, and similar to later readings at Baybrook Lane.

The third sampling location was at the back lot of 1719 Baybrook Lane. The plant was noticeably louder at this location, with average readings from 57 and 58 dBA. Some of the plant equipment, namely the elevated wash plant screen was visible from this location. There is limited vegetation between the plant site and the homes along Baybrook Lane. Distinct sounds could be identified, including back-up alarms, truck dumps into the primary, vibrating screens, and trucks/loader engines at full power.

The fourth location was at the back lot of 1743 Baybrook Lane. Sound levels dropped to an average of 54 DbA, due to additional tree screening.

The fifth location was between 4247 and 4235 Cotton Circle, an area closest to the active highwall. The only sound that moved the meter above 50 dbA was the occasional loader dumping muck into a haul truck.

3.0 Test Results - July 26, 1999

I revisited the quarry on the afternoon of July 26, 1999. Temperature 90 degrees, winds from the west at 12 mph. The plant was operating normally.

I checked readings at the vacant lot on Esquire at 3:30 pm. Noise levels were higher than recorded during the morning of the 7th, at an average of 52 DbA. This is likely due to the wind direction.

Noise at the back lot of 1710 Baybrook was actually lower than recorded on the 7th, at an average of 54 DbA. Differences in the weather, humidity, and wind direction likely account for the difference.

Other spot check readings around the River Run neighborhood showed no areas above the daytime limits.

4.0 Conclusions and Recommendations

Nighttime limits cannot be met by the existing plant configuration along Baybrook Lane or Sebastian Court. At the moment, the nighttime limit along Esquire Circle (and west to the swim club) is barely being met. However, the nighttime limit will almost certainly be exceeded when the leaves are off the trees.

All daytime readings are currently being met meeting the daytime limit, but with little room to spare along Baybrook Lane and Sebastian Court.

The most prominent audible sounds were backup alarms (although they did not appear to affect the meter readings) and truck dumps at the primary (which did affect the readings). The screening plant sound alone does not appear to exceed daytime limits, although it is quite noticeable.

In order to insure that nighttime limits are not exceeded, I recommend waiting until 7:00 am to start operating the processing plant. I don't believe that shipping (loading customers trucks) earlier than 7:00 am will be a problem.

Enclosing the primary crushing dump hopper will help reduce the intermittent, loud noise resulting from truck dumps.

Consideration should be given to using alternative screen cloth media at the wash plant to reduce the noise from the screen. Alternatively, the screen tower can be enclosed to contain the noise.

MAYER, BROWN, ROWE & MAW

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April 3, 2003

VIA Facsimile and Attachments
VIA UPS Overnight Delivery

Gina Pattermann
4439 Esquire Circle
Naperville, Illinois 60564

Re: Supplementary Discovery Responses

Dear Ms. Patterman:

Per the extended deadline for submission of written discovery responses ordered by the Hearing Officer in the Status Conference held on March 27, 2003, we are herewith providing you with the following supplementary responses:

Interrogatory responses:

In response to neighbor concerns, Boughton changed its hours of plant operation to 7:00 am to 4:30 pm all year round approximately two years ago. Although employees and customers arrive between 6 am and 7 am, no rock crushing equipment is in use until 7:00 am.

Equipment: 2 new screens:

New Allis Chalmers Ripple Flow 6 X 20

Pioneer 5 X 16 3 deck screen

Rubber screens added to Diester BHM 3820 3-deck vibrating screen

1 new CAT 773 Quarry Truck

2 new MACK Semi-Trailer Trucks

Sold 2 Peterbilt Semi-Trailer Trucks

1 Euclid R-50 Quarry truck (not in use for last two years)

Installed infrared back-up alarms on two trucks (pilot program)

Brussels Charlotte Chicago Cologne Frankfurt Houston London Los Angeles Manchester New York Palo Alto Paris Washington, D.C.
Independent Mexico City Correspondent: Jauregui, Navarrete, Nader y Rojas, S.C.

Mayer, Brown, Rowe & Maw is a U.S. General Partnership. We operate in combination with our associated English partnership in the offices listed above.

PATTERMANN EXHIBIT B

MAYER, BROWN, ROWE & MAW

Gina Pattermann

April 3, 2003

Page 2

Employees update:

Jim McCary – retired

Doug Boughton -- deceased

Ann Boecker – retired

Carol Merkel – Office – hired

Steve Schlitz – CAT 9220 – hired

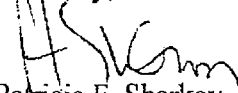
Tom Brcync- Semi-Driver - hired

Noise reduction consideration: See attached Boughton memoranda re noise and dust mitigation measures and cost estimates

Documents

1. Resumes of Kip Smith and Michael McCann
2. A document entitled "Boughton Trucking Noise Survey Notes" prepared by Kip Smith, MACTEC, dated 3/29/00
3. Correspondence by Boughton re zoning of the River Run property
4. A sample copy of blasting records that are maintained on site and for which Boughton previously offered Complainant the opportunity to inspect
5. A photo copy of an IDOT 1997 aerial photo graph depicting the River run subdivision, Boughton property and a portion of the Vulcan property
6. Boughton memo re cost estimates for moving plant into the pit as proposed by Greg Zak
7. Boughton memo re noise and dust mitigation measured taken in last two years
8. Real estate value study prepared by McCann & Associates.
9. Judgment Order in Boughton v. County of Will, et al., Circuit Court Case No. 80 CH 253 (Mar. 6, 1982)
10. IEPA Air Permit (Issued 1/13/00)
11. Report on Visible Emissions Evaluations May 4, 5, and 11, 1988 Compliance Test

Sincerely,


Patricia F. Sharkey

cc: Bradley Halloran (w/o attachments)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the above and foregoing Notice of Filing and COMPLAINANT'S MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, all on behalf of the Complainant, to be served via facsimile transmission upon the following:

Mark R. Ter Molen
Patricia F. Sharkey
Kevin G. Deshamais
Mayer, Brown, Rowe & Maw
190 S. LaSalle Street
Chicago, IL 60603
Fax No. (312) 706-9113

on this 29th day of December, 2003.

THE JEFF DIVER GROUP, L.L.C.



By: _____

Michael S. Blazer