BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

GINA PATTERMANN,	)	
	)	
Complainant,	)	PCB 99-187
	)	
v.	)	(Citizen Enforcement –
	)	Noise, Air)
BOUGHTON TRUCKING AND MATERIALS, INC.,	)	
	)	
Respondent.	)	

BOUGHTON'S REPLY BRIEF TO COMPLAINANT'S MEMORANDUM IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT

NOW COMES Respondent, Boughton Trucking and Materials, Inc. ("Boughton"), by its attorneys, Mayer, Brown, Rowe & Maw LLP, and replies to Complainant's Memorandum In Response to Motion for Summary Judgment.

STANDARD OF REVIEW

Boughton agrees that in reviewing a motion for summary judgment the Board must take all of the "facts" in their best light for the Complainant. However, even taken in this *favorable* light, the facts in this case do not support a finding of violation on any of the claims made in the Complaint.

Complainant's brief states she has produced *prima facie* evidence establishing the elements of her claim. Complainant's Mem. in Resp. to Summary Judgment Mot. at p. 3 (hereinafter "Response"). Boughton disagrees. Whether Complainant has produced evidence establishing the elements of her claims is precisely what Boughton's Motion for Summary Judgment ("Motion") asks the Board to decide.

Complainant must do more than allege violations to withstand a motion for summary judgment. (See Response at 4). In response to Respondent's discovery requests, Complainant should have produced evidence supporting every element of her seven different claims.[1] After failing to produce evidence supporting her claims in discovery, she cannot simply sit back on allegations, claim the burden has shifted to the Respondent, and demand a trial. Allen v. Meyer, 14 Ill. 2d 284, 292, 152 N.E.2d 576 (1958) (holding that when a complainant has no evidence on which a court can rule in her favor, summary judgment is encouraged as an aid in the expeditious disposition of a lawsuit); Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994 (2d Dist. 1994) (holding that to withstand a motion for summary judgment, complainant must present a factual basis which would arguably entitle her to a judgment).

Complainant's reliance on the Board's September 23, 1999 ruling on Boughton's initial Motion to Dismiss Complaint As Frivolous illustrates Complainant's misconception of the

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[1] Boughton specifically asked Complainant to provide all of the information she had supporting each of her claims. For example, Boughton's Interrogatories Nos. 1 through 5 asked Complainant to "Identify with particularity each and every fact on which you rely and all bases for your contention that respondent has violated" Section 9 of the Act, Section 24 of the Act, 35 Ill. Adm. Code 900.102, 35 Ill. Adm. Code 901.102, 35 Ill. Adm. Code 901.104. Interrogatory No. 6 asked Complainant to "identify with particularity each and every fact on which you rely and the bases for your contention" that noise and/or dust emitted from Boughton's facility "unreasonably interferes with your enjoyment of life or activity at your property." (See Attachment 1 to Motion, p 3). Boughton's Document Request No. 1 also requested that Complainant "Produce all documents in your possession or control that were identified in your responses to Boughton Trucking, Inc.'s First Set of Interrogatories." Document Requests 2 through 5 requested that Complainant produce all documents in her possession or control that referred or related to: "Boughton Trucking, Inc.," "noise or dust levels, testing, or impacts at your property at 4439 Esquire Circle, Naperville IL," "noise or dust levels, testing, or impacts regardless of whether at your property or not, which levels or impacts you believe were created in whole or in part by Boughton," and "noise or dust levels, testing or impacts that you believe resulted in whole or in part from sources other than Boughton." (See Attachment 3 to Motion, p. 2).

standard of review at this point in the case. (See Response at 4). As the Board is well aware, Section 103.212 (formerly Section 103.124) of the Board regulations allows the Board to accept a complaint for hearing unless it is "duplicitous or frivolous," and specifically allows 30 days for motions by respondents on this point. In its September 23, 1999 order, the Board did nothing more than find that certain of the allegations were duplicitous or frivolous and certain allegations were not. Specifically, the Board held: "The Board finds that the remaining *alleged violations* of the Act and the Board's rules are neither duplicitous nor frivolous, so that the balance of the complaint is accepted for hearing." (Order at p. 4) (emphasis added). This was simply a finding that the complaint stated a claim under the Act and rules, not a finding that the allegations above were sufficient to establish a violation.

"Duplicitous and frivolous" is not the standard for Board review on a motion for summary judgment. Rather, the standard of review on summary judgment is stated in the Board's Rule 101.516(b):

> If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of a material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.

Applying this standard, the question for the Board is whether the evidence it currently has before it, in the form of the pleadings, depositions and admissions, and affidavits, indicates that there is a dispute as to any fact that would make a difference as to a finding of violation on any of Complainant's claims. Hartmarx Corp. v. JBA Int'l, 2002 U.S. Dist. LEXIS 4249, *10 (March 14, 2002) ("A genuine issue of material fact exists only where the dispute over facts might affect the outcome of the lawsuit and there is sufficient evidence to support a jury verdict for the nonmoving party.").

For purposes of summary judgment, Boughton is not disputing Complainant's or her witnesses' observations. The only issue is whether the *facts* they have attested to – not their own subjective characterization of the facts – if taken as true, are sufficient evidence to support a finding of a violation of the Act or regulations under the "unreasonable interference" standard. Contrary to Complainant's contention, this is not a question of fact, it is a question of law. Thus, there is no issue of material fact. Rather, as is discussed in further detail below, the nuisance claims, as well as Complainant's other claims, all come down to questions of law which are ripe for summary judgment at this point.

BURDEN OF PROOF

In her Response, Complainant makes two legally incorrect and misleading arguments regarding burden of proof and the availability of summary judgment at this point in this case.

Complainant argues that it is premature to consider the Section 33(c) factors and that she should be allowed to bring in additional evidence on them at a hearing. (Response at 3). But this is precisely the evidence needed to establish her nuisance claims, i.e. the claimed violation of Sections 9(a) and 24 of the Act. The Supreme Court has directed the Board to consider the factors outlined by 33(c) of the Act in determining whether unreasonable interference has occurred under the Act and Board rules, and the Board routinely does so. Wells Mfg. Co. v. PCB, 73 Ill.2d 226, 232-233, 383 N.E.2d 148, 150-51 (1978); *see also* Ferndale Heights Util. v. PCB, 44 Ill.App.3d at 967-68, 358 N.E.2d 1224 (1st Dist. 1976).

In arguing that she should be allowed to bring in additional evidence on the 33(c) factors at hearing, Complainant is once again trying to re-invent her case. If Complainant had evidence pertaining to her nuisance claims which she failed to produce when specifically asked to do so in discovery, she cannot now contend she has "additional" evidence. The Board has already

addressed this issue – twice. First in its August 7, 2003 order, and again in its September 4, 2003 order confirming its prior order after the Complainant asked for "clarification." Specifically the Board said, it "will not reopen discovery" and "Ms. Pattermann may not designate any new witnesses at this *late date*." (Order at p. 2) (emphasis added).

Boot-strapping one incorrect argument to another, Complainant relies on the Board's opinion in Loschen v. Grist Mill Confections, Inc. for the proposition that she is allowed to produce additional evidence on the essential elements of her claims at hearing, and, therefore, she is shielded from summary judgment. PCB No. 97-174 (Sept. 18, 1997), 1997 Ill. ENV LEXIS 538. But this is not the holding of the Loschen case. The Board's opinion in Loschen says "it would be premature to weigh the factors of Section 33(c) of the Act at this time, since complainant is not required to present facts *in the complaint* concerning Section 33(c) of the Act in order to file a *sufficient pleading* but instead may present facts at hearing." 1997 Ill. ENV LEXIS 538 at *11 (emphasis added). The Board denied summary judgment for the Respondent in Loschen when the case had been pending for just over five months. Unlike the case at bar, little discovery had taken place. If Loschen stands for any proposition, it is that a motion for summary judgment brought prematurely by a Respondent, *i.e.* prior to the completion of discovery, will not be granted.

Contrary to Complainant's wishful argument, Loschen does *not* say that a complainant need not produce in the discovery process the evidence that she intends to present at hearing. Any such proposition is patently wrong. It is well-established that a party cannot introduce additional evidence after the close of discovery if that evidence was available during discovery. Illinois courts have held "that fractional discovery and fractional disclosure are not to be tolerated." Colls v. City of Chicago, 212 Ill. App. 3d 904, 954, 571 N.E.2d 951 (1st Dist. 1991).

The incomplete disclosure of evidence implies that no additional evidence or information exists and "'inevitably tends to mislead opposing counsel into the belief that further inquiry is not needed.'" Id. (citation omitted). The Illinois Supreme Court has found that "[s]uch conduct is especially to be condemned because discovery is supposed to enable counsel to decide in advance of trial not only what the evidence is likely to be but what legal issues can credibly be argued." Lubbers v. Norfolk & Western Ry. Co., 105 Ill. 2d 201, 213, 473 N.E.2d 955 (1984). Courts will not allow the introduction of evidence at trial that was available to the plaintiff throughout the time for discovery. See e.g., Colls, 212 Ill. App. 3d at 951-52 (the court, in upholding the exclusion of late-disclosed evidence, found "nothing in the record to indicate that these documents were not as readily accessible to defendant [] during the pre-trial period as the one report which was immediately disclosed").

The case at bar has been pending for over 4 ½ years. Discovery was complete on May 2, 2003, and this was clarified at Complainant's request in the Board's order of September 4, 2003. We are not at the pleading stage in this proceeding anymore. As noted by the Board, it is now too late to bring in additional evidence.[2]

Moreover, the fallacy in Complainant's argument is evident. If Complainants are not required to produce evidence in the discovery process on essential elements of their claims, the entire discovery process in the Board's rules and the Illinois Civil Procedure Act is an exercise in futility. There would be no incentive for Complainant to disclose anything during discovery, and litigation by complete surprise would soon be the rule of the day in Board hearings. Furthermore, if Complainant is correct, there is no way the Board could ever grant summary

[2] While citizen comment would be allowed at a Board hearing, a complainant has the burden of proving the elements of her claims and cannot shield herself from summary judgment on the vague notion that a citizen comment might yield evidence on a claim that she and her witnesses have not been able to substantiate after 4 ½ years of litigation.

judgment. If that is the law, Section 101.516 should be eliminated from the Board's rules, as every case filed with the Board would have to go to hearing. This is simply not the law. Summary judgment is a legal mechanism for avoiding a hearing based on a complete disclosure of facts during the discovery process. Safeway Ins. Co. v. Hister, 304 Ill. App. 3d 687, 690, 710 N.E.2d 48 (1st Dist. 1999) (the use of summary judgment "is to be encouraged because it benefits insure not only to the litigants in savings of time and expenses, but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trials").

Complainant also twists the ruling in IEPA v. W. F. Hall Printing Company, PCB 73-30 (Sept. 15, 1997), 1977 Ill. ENV LEXIS 735 (citing Processing and Books, Inc, 64 Ill. 2d 68, 351 N.E.2d 865 (1976)) and argues that complainant has no burden to present evidence on the Section 33(c) factors. But it is quite clear that both of those cases limited the conclusion that the respondent has the burden of proof on the Section 33(c) factors by the phrase "*to the extent that a factor is not a necessary part of Complainants' burden as to unreasonableness.*" PCB No. 73-30, *4 (emphasis added). This makes perfect sense. The Board is obligated to consider "reasonableness" using the Section 33(c) factors in all of its orders and determinations. For example, in cases where the violation alleged is the exceedance of an emission standard or a deviation from a permit condition, the Section 33 (c) factors can be reviewed after a finding of violation to determine whether compliance was technically impractical or economically unreasonable. However, the air pollution alleged by the Complainant in this case results from "the presence of such contaminants in such amounts, characteristics and duration as to unreasonably interfere with the enjoyment of life or property." Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 295, 319 N.E.2d 794 (1974). This type of air pollution "is not proved unless there has been a showing of an unreasonable interference with the enjoyment of life or property." Id. at

296. The categories of factors set forth in Section 33(c) are considered in determining reasonableness. Id. While the Complainant does not bear the burden of proving all of the section 33(c) criteria, Processing and Books, 59 Ill. 2d at 75-77, the Complainant has the "burden of proving all *essential elements* of the type of air-pollution violation charged, and the Board must then assess the sufficiency of such proof by reference to the section 33(c) criteria." Incinerator, 59 Ill. 2d at 300 (emphasis added).

As stated, Complainant is not *obligated* to present evidence on each factor, but if, after discovery, she has failed to produce evidence on a factor and Boughton has, it is then up to the Board to consider the unrebutted evidence. This does not necessarily mean the Board must find for Respondent. For example, the Board could find the Respondent's evidence to be inconclusive or irrelevant. But, contrary to Complainant's wishful thinking, it also does not preclude the Board from acting on a Summary Judgment motion or mean that the complainant must be allowed to go to trial and at trial be allowed to produce previously undisclosed evidence.

Complainant's Response on the issue of burden and ripeness for summary judgment is "smoke and mirrors" designed to allow Complainant "another bite" to try to save her case by bringing in evidence not disclosed during discovery. The standards are clear. A party must produce all requested evidence in discovery. Colls, 212 Ill. App. 3d at 954; Lubbers, 105 Ill. 2d at 213. In this case, Respondent requested that Complainant produce all evidence supporting her claims. If in response to that request, Complainant failed to produce evidence supporting her claims, those claims should be dismissed on Summary Judgment. Gauthier, 266 Ill. App. 3d at 219.

THE EVIDENCE PRODUCED DOES NOT SUPPORT ESSENTIAL ELEMENTS OF EACH OF COMPLAINANTS CLAIMS

Now that all of the facts have been discovered, this case is ripe for a decision as to whether *taken in the light most favorable to the Complainant* the evidence Complainant has produced support the claims made. The evidence before the Board is as follows:

In response to Boughton's discovery requests, Complainant produced only the responses and documents contained in Attachments 2 and 4 to the Motion. Complainant produced this information in July 1999 and never updated her discovery responses. Thus, the information contained in Attachment 2 and 4 to the Motion and the deposition testimony of her four fact witnesses, in Attachments 7 – 11, constitute the only evidence Complainant has produced to support the seven claims she has made. This information does not include any noise measurement data, any information on noise reduction measures, any evidence on the social and economic benefit of the quarry, or any evidence on the quarry's suitability to the area or priority of location.

For its part, Boughton produced the answers and documents listed in Attachments 5 and 6, including its original and supplementing discovery responses, information on measures taken to reduce noise and dust and its expert witness' property evaluation study, and, since Complainant chose not to depose Boughton's witnesses, Boughton also produced the affidavits of the quarry Operations Manager, the quarry Superintendent and its property valuation expert witness, with the Motion.

Boughton's Motion walks through each of Complainant's seven claims and demonstrates that "there is no genuine issue of a material fact" as to each claim – even when the above evidence is taken in the light most favorable to the Complainant. Either Complainant has produced no evidence on a claim (permit or regulatory claims), or the evidence she did produce

is insufficient as a matter of law (numeric noise limitation claims), or the evidence produced does not demonstrate a violation (nuisance claims).

PERMIT CLAIMS

Complainant broadly alleged a violation of Section 9 without specifying what she was actually alleging. Although requested to identify with particularity each and every fact on which she relied and based her contention that Respondent had violated Section 9, she has presented no evidence during discovery whatsoever of a violation of Section 9(b), *i.e.*, failure to have a permit or violation of a conditions of a permit.[3] Furthermore, Complainant doesn't attempt to defend a Section 9(b) claim in her Response. Given that, there is no evidence on which the Board could rule in her favor and there is no issue of material fact as to a Section 9(b) violation; summary judgment in favor of the Respondent on any claim arising under Section 9(b) is both proper and required.

REGULATORY CLAIMS

Complainant also alleged violations of Section 901.102(a) and (b) (daytime and nighttime numeric noise limitations) and of Section 901.104 (impulsive sound numeric limitations). As stated in the Motion, Complainant did state in her deposition that she had made some numeric measurements, but the measurement procedures that she testified that she used cannot *as a matter of law* be used to demonstrate a violation of the Board's numeric standards. Section 901.103(b)(1) of the Board's rules states:

> All measurements and all measurement procedures to determine whether emissions of sound comply with 35 Ill. Adm. Code 901 *shall*, with the exception of measurements to determine whether emissions of sound comply with 35 Ill. Adm. Code 901.109, be

[3] Although not required to do so, since Complainant provided nothing on this claim, Boughton has, in fact, provided a copy of its current and valid Illinois Environmental Protection Agency air pollution control permit with its Motion.

based on Leq averaging as defined in 35 Ill. Adm. Code 900.101, using a reference time as follows:

A) Except as specified in subsection (b)(1)(B) for steady sound, a reference time of at least 1 hour shall be used for all sound measurements and measurement procedures.

B) For measurement of steady sound as defined in Section 101 of this Part, the reference time shall be at least 10 minutes.

2) All measurements and measurement procedures under subsection (b)(1)(B) of this Section must correct or provide for the correction of such emissions for the presence of ambient or background noise in accordance with the procedures in 35 Ill. Adm. Code 910. All measurements must be in conformity with the following ANSI standards, incorporated by reference at Section 900.106:

A) ANSI S1.4-1983 (R2001) "American National Standard Specification for Sound Level Meters."

B) ANSI S1.6-1984 (R2001) "American National Standard Preferred Frequencies, Frequency Levels, and Band Numbers for Acoustical Measurements."

C) ANSI S1.11-1986 (R1998) "American National Standard Specification for Octave-Band and Fractional-Octave-Band Analog and Digital Filters."

D) ANSI S1.13-1995 (R1999) "American National Standard Measurement of Sound Pressure Level in Air."

E) ANSI S12.9-1993 (R1998) "American National Standard Quantities and Procedures for Description and Measurement of Environmental Sound – Part 3: Short-Term Measurements With an Observer Present."

In cases alleging violations of the Board's numeric sound limits, the Board requires strict adherence to applicable measurement procedures. Charter Hall Homeowner's Ass'n v. Overland Transp. Sys., Inc., PCB 98-81 (October 1, 1998), 1998 Ill. ENV LEXIS 513, *44, *citing* Discovery S. Group, Ltd. v. PCB, 275 Ill. App. 3d 547, 559, 656 N.E.2d 51, 59 (1st Dist. 1995).

Complainant described her procedure as follows:

> No. I just stand there and hold it right in the doorway. ... Usually for about five to ten minutes. ... I'm assuming that I am monitoring noises just because I can't remember if I was supposed to put it on the A or the C band, but Greg told me what band I should have it on. I think it was the A band, to monitor the correct noise level.

Pattermann Dep., Attachment 7 to Motion, p. 93.

In her Response, Complainant does not point to any other evidence or argument regarding the use of her own ad hoc measurement procedure to demonstrate a violation of the numeric limitations. She does point to a set of notes made by a consultant to Boughton and implies that they demonstrate a numeric violation. (Response pp. 6-7). But, in fact, they don't. The notes refer to measurements made during the day and conclude that the daytime limits were *not* being violated. The author opines that nighttime limits *could be* violated if Boughton were to operate during those hours, but no measurements were made during nighttime hours. Furthermore, the affidavits of Wayne Szepelek and Dale Kessen establish that Boughton's hours of operation are entirely during the hours that are designated as "daytime" under the Board's rules. Finally, the consultant's notes indicate on their face that they were made as a " rough compliance check," and not in accordance with the procedures required under Rule 901.103(b)(1). Thus, the measurements referenced in these notes cannot be used to determine whether noise emissions comply with Section 901.103 *as a matter of law*.[4]

Since the only evidence that Complainant has produced or pointed to in the record is evidence which the Board's regulations state *cannot be used* to demonstrate a violation of the Section 901 numeric noise limitations, Complainant has no evidence to support a verdict in her

[4] Complainant insinuates that these notes were withheld. In fact, they were the privileged notes of a consultant working under the direction of Boughton's prior attorney and were not required to be disclosed until such time as that witness was named as a testifying witness. Boughton did name Kip Smith as a testifying witness in April 2003 on the assumption that Complainant would have an expert witness on the issue of numeric limits, and the notes were produced at that time. When Complainant did not produce an expert witness, Boughton made the decision that it would not need to use Mr. Smith or his notes, thus they were not included in the Motion for Summary Judgment.

favor on these claims and Summary Judgment is appropriate as to all claims of violation of Section 901.102(a) and (b) and 901.104.

NUISANCE CLAIMS

The remainder of Complainant's claims are essentially nuisance claims, alleging that noise and dust emissions from the quarry unreasonably interfere with Complainant's enjoyment of life and property. On these claims, Complainant argues that she has met her initial burden of proof by testifying in deposition as to "the presence of noise and dust as well as the resulting negative impact on their lives." (Response p. 3). However, the presence of noise and dust and even a negative impact on one's life is not the legal standard for finding a violation of Section 9(a) or Section 24 of the Act, or Section 201.141 or Section 900.102 of the regulations. The standard in each of these sections is whether emissions from a facility "unreasonably interfere with the enjoyment of life."

As discussed above, the standard the Board applies to determine whether "noise" or "air pollution" "unreasonably interferes" is the Section 33(c) factors in the Act. "The Board considers Section 33(c) of the Act to determine if noise rises to the level of a nuisance, *i.e.* the unreasonable interference with the enjoyment of life." Charter Hall, PCB 98-81, 1998 Ill. ENV LEXIS 513 at *46 (citation omitted); *see also* W. F. Hall, 1977 Ill. ENV LEXIS 735 at *4, 8.

The Section 33(c) factors include the "character and degree" of any interference and four other factors bearing on the reasonableness of the emissions, including the very relevant factor of whether the complainant "moved to" the alleged nuisance. Boughton has provided evidence on each of the five Section 33(c) factors and that evidence is either uncontroverted or overwhelmingly favors Boughton even taken in a light most favorable to Complainant. In fact,

for at least two of the factors, Complainant and/or her witnesses have either concurred with Boughton's evidence or stated that they simply have no information on this factor.

Section 33 (c)(i): Nature and Character of the Emissions:

Regarding the nature and character of the alleged emissions, Complainant's Response walks through the witness testimony and picks out different statements to highlight for the Board than Boughton highlighted.[5] Where the testimony is of observed facts, such as dust on furniture or floors, Boughton is not disputing the witnesses' testimony for purposes of summary judgment. Boughton also fully agrees with Complainant that it is the Board's job to review the facts. With its Motion, Boughton provided both the Board and Complainant with the complete transcripts, as well as the photocopies of photos Complainant produced during discovery,[6] the McCann property value study and the affidavits of Boughton's witnesses – all to ensure that the Board had access to the complete, unvarnished evidence. Based on all of this evidence, the Board has ample information to determine whether there has been an objective interference with the enjoyment of life and property.

In the depositions, Complainant's witnesses were given every opportunity to describe the instances and nature of any dust and noise that they believe emanates from Boughton and interferes with their lives. Complainant's Response notes that her witnesses characterized noises they believe are coming from the quarry as "blasting," "whooshing," "Crushing rocks,"

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[5] For example, Complainant treats the statement that blasting is "not a big problem for her [Gina Pattermann]" as a direct quote which cannot be found in Ms. Pattermann's transcript. Complainant is correct – the phrase cannot be found in the deposition transcript, because Ms. Pattermann's exact words were "blasting is not a huge issue for me. I know for some of my neighbors it is, but it's not for me. Blasting happens once or twice a week. It's just not a huge issue for me." Pattermann dep., Attachment 7 to Motion, p. 93.

[6] Boughton was never provided with originals of the 10 photos, despite a request in the deposition subpoena issued to Gina Pattermann and each of her witnesses that any photos in their possession be brought to the deposition. While for purposes of this Motion for Summary Judgment, the Board must view the evidence in the best light for the Complainant, the only admissible evidence are the blurry photocopies provided to Boughton during discovery, assuming Complainant could provide authentication and foundation for these photocopies if this matter were to go to hearing.

"beepers," "shaking," and "grinding" – these are all normal quarry noises. There is nothing unusual about these noises – they are the normal noises associated with a quarry and, as is clear from the aerial photos and the affidavits of the people who run the quarry, nothing has changed in its operations that would have increased that noise.

Complainant's own testimony indicates that the impact of the quarry on the residents of River Run is an occasional annoyance, but one that can be ignored most of the time, and not more than to be expected for homes built next to a quarry. However, if the Board finds the witness testimony contains objective facts demonstrating an interference with the enjoyment of life and/or property, it's next step must be to evaluate the "character and degree" of that interference under Section 33(c)(i).[7] If the Board finds that the interference is minor or trifling,[8] it should weigh this factor in favor of Respondent. If the Board finds that this interference is substantial, however, it should weigh this factor in favor of Complainant. But either way, the violation of "unreasonable interference" is not proven until evidence on the other Section 33(c) factors is produced and considered. Incinerator, 59 Ill. 2d at 295-96 (holding that the Board must consider the criteria in section 33(c) of the Act to determine whether the "presence of [] contaminants in such amounts, characteristics and duration [exist] as to unreasonably interfere with the enjoyment of life or property"); Scarpino v. Henry Pratt Co., PCB No. 96-110 (April 3, 1997), 1997 Ill. ENV LEXIS, *36, 52 (finding that although the plant noise had interfered with Complainant's enjoyment of life the interference was not unreasonable as "determined by

[7] Contrary to Complainant's contention at p. 5 of the Response, the issue as to whether an interference is "unreasonable" is a question of law, not a question of fact. It is the Board's job to weigh the facts and apply the legal standards to determine whether the interference in this case is "unreasonable."

[8] "[T]he word 'unreasonably' as used in section 3(b) was intended to introduce into the statute something of the objective quality of the common law, and thereby exclude the trifling inconvenience, petty annoyance or minor discomfort." Processing and Books, 64 Ill. 2d at 77.

reference to the criteria set forth in Section 33(c) of the Act" and Respondent had therefore not violated the Act).

Specifically, under Section 33(c), the Board must also weigh: the social and economic value of the quarry; the suitability of the quarry to the area in which it is located, including the question of priority of location in the area; the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from the quarry; and the measures undertaken by Boughton to address Complainant's concerns. As stated above, in the case of alleged Section 9(a) and 24(a) and Section 201.141 and 900.102 violations, these factors are not applied after there is a finding of violation. They must be considered *before* there can be a finding of violation. Scarpino, 1997 Ill. ENV LEXIS 167 at *36, 52.

Section 33(c)(ii): Social and Economic Value of the Boughton Quarry.

Complainant has provided no evidence on this factor. However, Boughton has provided substantial uncontested evidence demonstrating the social and economic value of the Boughton facility. Boughton provides a vital product to the highway and construction industries, serving over 600 governmental, business and residential customers, employing 70 persons on a full or partial basis, paying over $1,000,000 per year in federal, state, and property taxes, pumping millions of dollars into the local Illinois economy, and making substantial charitable contributions. This information is unrebutted and demonstrates that the Boughton quarry is of significant social and economic value to the Naperville-Plainfield community, Will and DuPage County, and the State as a whole.

Section 33 (c)(iii): Suitability to the Area and Priority of Location:

Suitability to Area: The record demonstrates that the Boughton facility is entirely suitable to its existing location, being located in an area dominated by four quarries, and directly across the street from the Vulcan Quarry. Further, in this case we are in the remarkable position of having an Appellate Court opinion in which the court expressly found that the Boughton quarry was not only well-suited to its location, but is the highest and best use of the property. Boughton Trucking and Materials, Inc. v. County of Will, 112 Ill. App. 3d 26, 35, 444 N.E.2d 1128 (3d Dist. 1983). The location of the quarry is dictated by geology and is completely dependent on the location of the valuable mineral deposits, and for obvious reasons, the quarry cannot be moved elsewhere. If a quarry is not suitable at this location, it is not suitable at any location. The McCann study also concludes that a quarry is the highest and best use of the property, and further demonstrates that the quarry has had no negative impact on surrounding residential property values.

While Complainant and her witnesses have provided their personal opinions on the suitability factor, they have provided no evidence, despite a specific request for related information by Boughton. In its discovery requests, Respondent specifically requested that Complainant provide information on purchase and sale prices for the properties her husband had purchased, developed and sold in the River Run subdivision. (See Motion for Summary Judgment, Attachment 1, Interrogatory 17). Complainant first refused to provide such information saying it was confidential and later, in a Status Conference with the Hearing Officer, said she couldn't provide it because it was in her husband's possession and they were going through a divorce. She subsequently testified that she had no information of property values. Pattermann dep., Attachment 7 to Motion, p. 111. Furthermore, when in her deposition,

Complainant was asked directly whether she thought the quarry had had an adverse effect of property values in River Run and her response was "No, not really." Id. at 113. Taken in the light most favorable to the Complainant, the evidence on this factor is clearly in favor of Boughton.

Priority of location: There is "no genuine issue of material fact" regarding priority of location. When the quarry was developed in 1985, it was surrounded by other quarries and farmland. The River Run subdivision was not developed until 1994 – 2001. Complainant's witnesses each testified to the subsequent dates on which they bought their properties, several admitting they knew the quarry was there when they purchased their homes. (*See* Jene dep., Attachment 8 to Motion, pp. 12-13, 19; Jenkins dep., Attachment 9 to Motion, pp. 10, 17; Boudreau dep., Attachment 11 to Motion, pp. 15-16). Boughton provided aerial photographs graphically depicting the movement of the residential subdivision development into an area of pre-existing quarries, including the Boughton quarry. Vill. of Wilsonville v. SCA Serv., Inc., 86 Ill. 2d 1, 24, 426 N.E.2d 824 (1981) ("It is the opinion of the Court that if a business is located in a certain area before complainants moved into the area and if the complainants come to the nuisance this may constitute a defense or operate as an estoppel. A person cannot place himself in a position where you suffer and then complain."); Wells Mfg., 73 Ill. 2d at 236 (stating that when complainants move to the nuisance, they are "on notice of the possibility that some annoyances present in heavy-manufacturing areas could affect them, and this fact considerably diminishes the potency of their complaints.").

The aerial photos, on which Boughton's equipment is visible, together with the affidavits of Boughton's witnesses, also document that the Boughton operations have remained unchanged since the early 1990s. (See Attachment 16 to Motion.) Although one of Complainant's witness

said he thought noise from the quarry had increased lately, he admitted he had never been on the quarry and that his perception could be due to the removal of trees by a third party. Boudreau dep., Attachment 11 to Motion, p. 46.

Section 33(c) (iv) and (v): Technical Practicability and Economic Reasonableness of Reducing or Eliminating Emissions/Measures That Have Been Implemented to Reduce Emissions:

Complainant presented no evidence on the technical feasibility or economic reasonableness of undertaking additional noise reduction measures at the Boughton quarry. When asked in her deposition whether she was aware of the measures Boughton has undertaken to reduce noise and dust, she stated she was aware of some of the measures, but unaware of many others. Pattermann dep., Attachment 7 to Motion, pp. 100-108. While discounting the effect of these measures, she provided no evidence of any other measures that can be taken.

In contrast, information in the record provided by Boughton shows that Boughton has undertaken a continuous program of investigating and implementing noise and dust reduction measures. Boughton provided Complainant with an initial list of those measures back in 1999 and an updated list in 2003. (See Attachment 5 to Motion). Complainant chose not to depose Boughton's personnel to learn more about the measures that Boughton has investigated and those that have been implemented. But in an affidavit accompanying the Motion, Dale Kessen, the Superintendent for the quarry, provided a detailed discussion of numerous noise and dust reduction measures that Boughton has implemented. Those measures include: the construction of a 50 foot berm across the western side of the quarry operating face, shielding most of the River Run subdivision from view as well as noise and dust; reducing the quarry's hours of operation well below those of its competitors; the modification of blast procedures to reduce dust and sound blast; the retrofitting of vehicles and operating equipment with noise reduction equipment; and the implementation of blast restrictions and on-site traffic control measures. (See Kessen

Aff., Attachment 13 to Motion). Among other things, Mr. Kessen provided noise blast records documenting that audible noise from blasting has been reduced by over half. (See Exhibits A and B to Attachment 13.) In addition, the changes have resulted in a reduction in dust emissions over the quarry wall. Mr. Kessen also provided details on various noise and dust control measures that were investigated and/or initially implemented that turned out to be ineffective or unworkable, including the rubber lining of certain equipment and the construction of a noise barrier wall west of the wash plant which had to be removed due to safety concerns. Mr. Kessen's Affidavit makes it clear that safety concerns are the primary limitation on further noise reduction measures. (See Kessen Aff., Attachment 13 to Motion, pars. 9, 29, 33-35, 41, 43-44).

The evidence on these two factors overwhelmingly favors Boughton, and Complainant demonstrated little interest in providing the Board with any additional evidence on existing or additional noise and reduction measures throughout the discovery period.

Summation of Section 33(c) Factors

It is the Board's job to determine whether the evidence in the record at the close of discovery, taken in the best light for the Complainant, can sustain a finding of "unreasonable interference" under the five factors in Section 33(c). If the Board agrees with Boughton that the evidence cannot sustain such a finding and, in fact, overwhelmingly favors Boughton on at least four of the five factors, then there is no need to go to hearing on the nuisance claims and the Board should grant summary judgment in favor of Boughton on all claims under Sections 9(a) and 24 of the Act and Sections 201.141 and 900.12 of the regulations.

Conclusion

In summary, taking the evidence in the light most favorable to Petitioner, Petitioner has failed to come forward with sufficient facts to demonstrate a violation of the Act. Petitioner has

provided no evidence supporting a permit violation claim, and the evidence presented is insufficient as a matter of law to demonstrate a violation of the Board's numeric standards for daytime noise, nighttime noise, or impulsive noise.

Regarding the alleged nuisance-type violations, while Complainant has presented some evidence indicating the presence of some dust and some noise, Complainant has failed to present evidence supporting the necessary elements of its claim that the noise or dust constitute an *unreasonable interference*. The required analysis of the 33(c) factors overwhelmingly supports the conclusion that no unreasonable interference has occurred.

Regarding the "character and degree of injury to or interference with the protection of the health, general welfare, and physical property of the people," accepting all of the complainants' witnesses statements in full, the record demonstrates that the interference is minor. The extent of noise and dust complained of have not impacted property values or home sales in the River Run subdivision, are limited to daytime hours, are in compliance with applicable noise and dust regulations, and are what is to be expected at properties adjacent to a quarry. The extent of impacts has also been measurably reduced over time as a result of Boughton's mitigation measures.

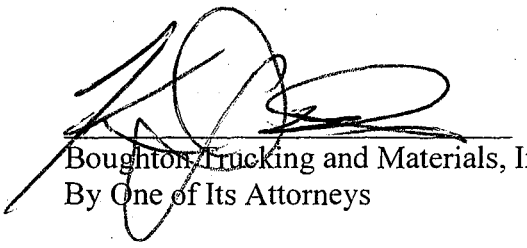
Boughton has provided substantial uncontested evidence demonstrating the social and economic value of the Boughton facility. The record also demonstrates that the Boughton facility is entirely suitable to its existing location, and it is uncontroverted that the facility has priority of location. Because of Boughton's priority of location, Complainant were on notice of any potential impacts, and "this fact considerably diminishes the potency of their complaints." Wells Mfg., 73 Ill. 2d at 236.

The evidence in the record further demonstrates that Boughton has been extremely proactive in pursuing noise and dust mitigation options, and has taken substantial measures to mitigate noise and dust emissions from its property, including changes in blasting procedures, changes in drilling procedures, changes in process operations, installation of numerous types of noise mitigation equipment, and construction of a 50 foot berm. There are no other technically practicable or economically reasonable measures which can be implemented to reduce noise or dust emissions.

Taking the evidence in the light most favorable to Petitioner, the record overwhelmingly supports the conclusion that there is no violation of the Act. Under these circumstances, no purpose would be served by proceeding to hearing, and summary judgment is appropriate.

WHEREFORE, Boughton requests that the Board enter summary judgment in its favor on all counts in the complaint.

Respectfully submitted,



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