BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

GINA PATTERMANN,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 99-187
	)	(Citizens Enforcement - Noise, Air)
BOUGHTON TRUCKING AND MATERIALS, INC.,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: Michael S. Blazer
Matthew E. Cohn
The Jeff Diver Group, LLC
1749 S. Naperville Road, Suite #102
Wheaton, IL 60187

Please take notice that on November 10, 2003, I filed with the Illinois Pollution Control Board this Notice of Filing, Motion For Summary Judgment, and Request for Leave to File Reduced Number of Copies of Voluminous Attachments to Motion for Summary Judgment, copies of which are attached and hereby served upon you.

Dated: November 10, 2003

BOUGHTON TRUCKING AND MATERIALS, INC.

By: _____
One of its Attorneys

Mark R. Ter Molen, Esq.
Patricia F. Sharkey, Esq.
Kevin G. Desharnais, Esq.
MAYER, BROWN, ROWE & MAW
190 S. LaSalle Street
Chicago, Illinois 60603
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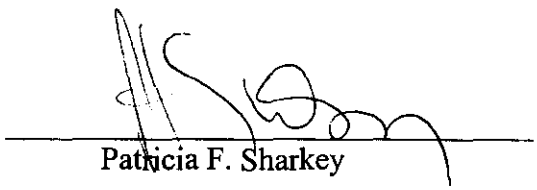
CERTIFICATE OF SERVICE

Patricia F. Sharkey, an attorney, hereby certifies that a copy of the attached Notice of Filing, Motion For Summary Judgment, and Request for Leave to File Reduced Number of Copies of Voluminous Attachments to Motion for Summary Judgment was served on the person listed below by U.S. First Class Mail, postage prepaid, on November 10, 2003.

Michael S. Blazer
Matthew E. Cohn
The Jeff Diver Group, LLC
1749 S. Naperville Road, Suite #102
Wheaton, IL 60187



Patricia F. Sharkey

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ILLINOIS POLLUTION CONTROL BOARD

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

REQUEST FOR LEAVE TO FILE REDUCED NUMBER OF COPIES OF VOLUMINOUS ATTACHMENTS TO MOTION FOR SUMMARY JUDGMENT

NOW COMES Respondent, Boughton Trucking and Material, Inc. ("Boughton"), by its attorneys, Mayer, Brown, Rowe & Maw, and requests leave to file a reduced number of certain full attachments to its Motion of Summary Judgment which is filed herewith.

In support thereof, Respondent states:

1. Two of the exhibits to affidavits which are attachments to the Motion for Summary Judgment, are reports that contain a large number of data pages.

2. The exhibits are Exhibit B to the Affidavit of Michael MCann, which is a report entitled "Property value Impact Study & Highest & Best Use Analysis," and Exhibit C to the Affidavit of Wayne Szepelak, which is a visible emissions compliance test report.

3. Respondent requests leave to file an original and 3 copies of the full reports and 5 copies of the narrative reports without the data. The conclusions from that data are stated elsewhere in the narrative sections of the reports which are provided in all copies. In the case of the McCann study, the aerial photos and subdivision plats contained in the full reports have been reproduced in Attachment 16 to the Motion which is provided with all copies.

4. Full copies of each of the reports which form these exhibits were previously provided to Complainant in the course of discovery.

WHEREFORE, Respondent requests leave to file an original and 3 full copies of these exhibits and 5 copies of these exhibits without the backup data.

Respectfully submitted,

November 10, 2003

BOUGHTON TRUCKING AND MATERIALS, INC.

By One of Its Attorneys

Patricia F. Sharkey
Mark R. Ter Molen
Kevin Desharnais
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190 South LaSalle Street
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ILLINOIS POLLUTION CONTROL BOARD

GINA PATTERMANN,	)	
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Complainant,	)	PCB 99-187
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BOUGHTON TRUCKING AND MATERIALS, INC.,	)	
	)	
	)	
Respondent.	)	

MOTION FOR SUMMARY JUDGMENT

NOW COMES Respondent, Boughton Trucking and Material, Inc. ("Boughton"), by its attorneys, Mayer, Brown, Rowe & Maw, and moves the Board to grant summary judgment in favor of Respondent and against Complainant as to each and every claim in this matter pursuant to 35 Ill. Admin. Code 101.516.

INTRODUCTION

Complainant's failure to establish the essential elements of the claims made in her complaint requires that summary judgment be entered in favor of Respondent as to each and every claim in this matter and dismissal of the Complaint in its entirety.

I. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment may be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Dowd & Dowd v. Gleason, 181 Ill.2d 460, 483, 693 N.E. 2d 358, 370 (1998). To withstand a motion for summary judgment, Complainant must present a factual basis which would arguably entitle her to a judgment. Gauthier v. Westfall, 266 Ill. App. 3d 213, 639 N.E. 2d 994 (2nd Dist. 1994).

When a Complainant has no evidence on which a court or in this case the Board can rule in her favor, summary judgment is encouraged as an aid in the expeditious disposition of a lawsuit. Allen v. Meyer, 14 Ill.2d 284, 292, 152 N.E. 2d 576 (1958). In fact, summary judgment is required upon such a showing. Section 101.516(b) of the Board's rules (35 Ill. Admin. Code 101.516 (b)) states: "If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board *will* enter summary judgment."). Section 5 of the Environmental Protection Act ("Act") (735 ILCS 5/2-1005(c)) also states: "The judgment sought *shall* be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

II. THE RECORD ON SUMMARY JUDGMENT

"If from the papers on file, a plaintiff fails to establish an element of his cause of action, summary judgment for the defendant is proper." Gauthier, Id. at 220. Discovery in this proceeding is now closed and, thus, the evidence contained in the papers on file, i.e. the pleadings, discovery responses, depositions, and admissions on file and the affidavits accompanying this motion, constitute all of the evidence which would be admissible at hearing. Based on this evidence, Complainant has failed to establish a violation of the Board's permit, noise or air regulations and has also failed to establish "unreasonable interference with the enjoyment of life or property" in violation of Section 9(a) or Section 24 of the Act. Therefore, summary judgment in favor of Respondent is required.

The evidentiary record in this case includes: Respondent's interrogatories (Attachment 1 hereto) and Complainant's Answers thereto (Attachment 2 hereto); Respondent's document

requests (Attachment 3 hereto) and Complainant's responses thereto (Attachment 4 hereto); Respondent's responses to Complainant's interrogatories (Attachment 5 hereto) and document requests (Attachment 6 hereto), with Complainant's interrogatories and documents are referenced therein; depositions of Complainant herself and four other witnesses identified by Complainant (Attachments 7, 8, 9, 10, and 11 hereto respectively), and the affidavits and reports of the witnesses whom Respondent properly disclosed during discovery and whom Respondent would call if this matter were to go to hearing (Attachments 12, 13 and 14 hereto).

As a matter of law, Complainant cannot supplement or expand the evidence at this point. "...[A] Complainant cannot wait until she sees a defendant's motion to then conduct unilateral discovery with the expectation that such testimony could be used to fend off summary judgment." Meredith v. Principi. 2001 WL 856283, (E.D. Ill. July 27, 2001)[1] In Meredith, the court struck affidavits of persons not disclosed during discovery and granted summary judgment based on Complainant's failure to introduce admissible evidence to withstand summary judgment.

Complainant bears the burden of both coming forward with evidence and the burden of proof. the burden of proof always rests with the party who asserts a fact or proposition as an element of his claim. Illinois Evidence Manual, 3rd Ed., Robert. J. Steigmann, Section 5.02. Furthermore, the burden of producing evidence is initially on the party who has the burden of proof. Id., Section 5.03, p. 287; Williams v. Koontz, 282 Ill. App. 3d 389, 668 NE2d 102 (1st Dist. 1996) In this case, the Complaint is over four years old and Complainant has had ample time to disclose any evidence on which she bases her claims during the discovery period. The Complainant chose not to depose Respondent's disclosed witnesses. Therefore, Respondent has

[1] Because this case is only available through its Westlaw citation, a copy is attached hereto as Attachment 18.)

provided the substance of its key witnesses testimony in the form of affidavits attached to this motion. (Attach. 12, 13, and 14 hereto.) She also chose not to retain her disclosed expert witness for his noticed deposition and was sanctioned by the Board for doing so by the exclusion of that witness and any testimony he may have offered.[2] See Board's Order in this case dated September 4, 2003, excluding Complainant's expert witness and making it clear that Complainant may not present any new witnesses. Thus, all of the witnesses and evidence that Complainant will be allowed to present at hearing are now before the Board. If the Board finds that the Complainant has not carried her burden of proof based on this evidence, it should rule on this case right now. Neither the Board's nor the parties' resources will be well spent in bringing this case to hearing.

III. COMPLAINANT HAS FAILED TO ESTABLISH A VIOLATION OF THE ACT OR BOARD REGULATIONS

The Complaint alleges violations of the following regulatory and statutory provisions[3]:

1. Section 9 of the Act (Air pollution)
2. Section 201.141 of the Regulations (Air pollution)
3. Section 901.102(a) (Daytime numeric noise limitations)
4. Section 901.102(b) (Nighttime numeric noise limitations)
5. Section 901.104 of the Regulations (Impulsive sound numeric limitations)
6. Section 900.102 of the Regulations (Noise pollution)
7. Section 24 of the Act (Unreasonable noise)

---

[2] The exclusion of experts has been upheld though the Complainant may thereby prevented from establishing a necessary element of his or her cause of action. Gauthier v. Westfall, 266 Ill. App. 3d. 213, 223, 639 N.E. 2d 994,1002 (1994) citing Barth v. Reagan, 139 Ill.2d 399, 564 N.E. 2d 1196 (1990) (Holding that the trial court did not err in barring testimony of Complainant's expert witness on the standard of care in a legal malpractice action and defendant was entitled to a directed verdict). In this case, there is no evidence that Complainant's excluded expert's opinion would have established a necessary element of her case in any event.

[3] The Complaint, as amended, alleged violations of Section 3.02, 9, 23 and 24 of the Act and Section 201.102, 201.141, 900.102, 901.102(a), 901.102 (b), and 901.104 of the Board's regulations ("Regulations"). However, on September 23, 1999, the Board dismissed the allegations pertaining to Sections 3.02 and 23 of the Act and Section 201.102 of the regulations as frivolous.

Although the Complaint is lacking in specificity, all of the potential air and noise claims Complainant may have intended can be categorized as allegations that Boughton has 1) constructed or operated its facility without a permit or in violation of a permit condition 2) violated Board regulations, and/or 3) generally caused "air pollution" or "noise pollution" which unreasonably interferes with the enjoyment of life.

The Complainant has failed to produce objective evidence supporting any of these claims. The following is a discussion of each of the claims and the evidence provided by the Complainant and Respondent that is pertinent to each.

A. COMPLAINANT HAS NO EVIDENCE OF PERMIT VIOLATIONS

Complainant has entirely failed to carry her burden of proof as to any permit violations. Complainant has provided no evidence that Boughton hasn't obtained all proper permits or is operating in violation of its air pollution control permit. Boughton's June 22, 2001 First Set of Interrogatories to Complainant Gina Pattermann ("Boughton's Interrogatories") (Ex. 1 hereto) specifically asked Complainant to:

> "1. 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."

In her July 25, 2001 Answer to this interrogatory, Complainant made no reference to and provided no evidence of a violation of Section 9(b), i.e. an air pollution control permit violation. See Attachment 2 hereto. In addition, Complainant offered no witnesses with evidence of a permit violation. The scope of each of Complainant's witnesses testimony was stated to pertain solely to how Respondent's actions affects his or her life. See Attachment 2, Answer 13. Furthermore, on deposition, neither Complainant nor any of Complainant's witnesses offered any evidence pertaining to a permit violation. See Depositions of Gina Pattermann, William

Jene, Carlene Jenkins, Lisa Collins and Donald Boudreau, Attachments 7, 8, 9, 10 and 11 hereto respectively.

In fact, the only evidence in the record that is relevant to any Section 9(b) claim makes it clear that Boughton has a valid Illinois EPA air pollution control permit and is in compliance with the provisions of that permit. In response to Complainant's discovery request, Boughton provided Complainant with a copy of Boughton's valid air pollution control operating permit issued by the Illinois Environmental Protection Agency on January 13, 2000. Boughton also provided Complainant with a copy of a 1998 New Source Performance Standards compliance test report. Both the permit and the compliance test report are attached as Exhibit B and C to the Affidavit of Wayne Szepelak which is Attachment 12 hereto.

Thus, if the Complaint is read as stating a claim of a permit violation under Section 9(b), Complainant has offered no proof of such and summary judgment in favor of Respondent is proper as to any violation of the permit requirements of Section 9(b) of the Act.

B. COMPLAINANT ALSO HAS NO EVIDENCE OF REGULATORY VIOLATIONS

Section 9 (a) of the Act prohibits the violation of any Board standards or regulations. Section 201.141 of the Regulations, which the Complainant also cites, simply restates this prohibition.[4] The other regulatory violations alleged are of noise regulations.[5] They include a violation of Section 901.102(a) and (b) (the numerical daytime and nighttime noise limitations) and a violation of Section 901.104 (impulsive noise numerical limitations). As is discussed below, Complainant has provided no evidence that Boughton has emitted noise in excess of any numerical limitation. As such, she has failed to carry her burden of proof and summary

[4] Section 201.141, impertinent part, states: "No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment...so as to...cause or tend to cause air pollution in Illinois..."

judgment in favor of Respondent is proper as to the alleged violation of Section 901.102(a) or (b) and any violation of Section 901.104.

Section 901.102(a) and (b) prohibit the emission of sound during daytime and nighttime hours, respectively, from any property-line-noise source located on Class C land, such as the Boughton 111th Street quarry, to any receiving Class A land, such as a residential property in the River Run subdivision, in excess of certain numeric limitations at each of nine different frequencies. Similarly, Section 901.104, prohibits the emission of "impulsive sound" from any receiving Class C land, such as the Boughton quarry, which exceeds a specified numeric allowable A-weighted sound level when measured on any Class A receiving land, such as the River Run subdivision.

Section 900.103(b) of the Board's regulations establishes the measurement procedures that are required to determine whether emissions of sound comply with any limitation in 35 Ill. Admin. Code 901, including both Section 901.102 and Section 901.104. Section 900.103(b) requires that all measurements and all measurement procedures to determine whether emissions of sound comply with 35 Ill. Adm. Code 901 must be based on Leq averaging using a reference time of either at least 1 hour or, for "steady sound" as defined in Section 900.101, 10 minutes. All measurements of "steady sound" must be corrected for background noise in accordance with the procedures in Part 910 of the Regulations and must be in conformity with five specified American National Standard Institute specifications, i.e. ANSI S1.4-1983, ANSI S1.6-1984, ANSI S1.11-1986, ANSI S1.13-1995, and ANSI S12.9-1983. These procedures are designed to ensure the accuracy of the sound measurements used to determine compliance with the Board's numerical standards in Part 901.

Complainant's have provided no sound measurement documentation. Furthermore, to the extent that the Complainant claims to have made sound measurements, she admits that they were not obtained pursuant to any formal procedure. (Attachment 7, p. 75) Thus, these claims cannot be supported by evidence meeting the requirements of the Section 900.103 for the determination of compliance with the regulatory numerical limitations.

Respondent, in its Interrogatory #4 (Attachment 1, Par. 4), specifically asked Complainant to identify facts supporting her contention that Boughton has violated the daytime or nighttime numeric limits:

> "Identify with particularity each and every fact on which you rely and the bases for your contention that respondent has violated any part of 35 Ill. Admin. 901.102 of the Board's regulations. Identify each document related to this interrogatory."

Complainant responded stating only the following:

> "I have a sound meter that measures frequencies between 500 and 10,000 HZ. I have measured sounds above 58 dB on several occasions between 7:00 .am. and 10:00 p.m." (See Attachment 2, Answer #4.)

Complainant provided no other particulars, including no documentary evidence that these measurements were actually taken or that they were taken in conformity with the procedures required by Section 900.103. She provided no documents that respond to this interrogatory or Respondent's related document request.

In its Interrogatory # 5, Respondent also asked Complainant for any facts and documents supporting Complainant's claim that Boughton has violated Section 901.104, the impulsive noise limits. Complainant responded stating that she has a sound meter that measures frequencies between 500 and 10,000 Hz and that she has measured sounds above 47 dB on several occasions

between 10:00 pm and 7:00 am. See Attachment 2, Answer #5. Again, she provided no further detail and no documentation.

At her deposition, Ms. Pattermann stated that she had taken noise measurements in November of 2002 from her house with a handheld Radio Shack sound meter, but admitted that she had used no formal procedure. (Attachment 7, pp. 64, 75). When asked whether she followed any particular procedure when taking her measurements, she stated:

> "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 noise just because I can't remember if I was suppose 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." (Attachment 7, p. 75-76)

Absent compliance with Section 900.103 procedures, any measurements Complainant may have taken cannot be used to demonstrate a regulatory violation of Section 901.102 or Section 901.104.

Ms. Pattermann also stated that she had measured sounds within the past 6 months, "Novemberish," but could not provide any specific dates. When asked if she had a log of her noise observations, she said "I have that somewhere so I will share that with you because it probably is going to be a hearing exhibit." (Attach. 7, pp.71-72). Although the deposition notice and subpoena required that she bring to her deposition any documents that were relevant to her testimony, Ms. Pattermann brought no documents to her deposition. (Id. p.3) If Ms. Pattermann had any such log, she failed to provide it as an update to her discovery responses a required by Section 101.616(h) of the Board's procedural regulations (35 Ill. Admin. Code 101.616(h)). Moreover, she failed to provide such documentation at any time during the discovery period. As

a result of failing to provide this information during discovery, she is precluded from doing so at hearing.

Complainant's witness, William Jene, also stated in his deposition that he monitored noise on his property with a decibel meter that he purchased. But he stated he did not have any monitoring records. (Attachment 8, p.29 –30) Complainant's other three witnesses stated, in their depositions, that they had not taken sound measurements. (Collins, Attach. 10, p. 32; Jenkins, Attach. 9, p. 26; and Boudreau, Attach. 11, pp. 58-59)

Based on Complainant's lack of evidence of any noise measurements meeting the requirements of Section 900.103, her claims of a violation of the numerical limits in Section 901.102 or 901.104 must fail. Therefore, summary judgment in favor of the Respondent is required under the law as to the alleged violations of Section 901.102(a) and (b) and Section 901.104.

C. COMPLAINANT HAS NO EVIDENCE OF EMISSIONS OF NOISE OR DUST WHICH UNREASONABLY INTERFERE WITH THE ENJOYMENT OF LIFE

The remaining allegations in the Complaint are all allegations that emissions of noise or dust emanating from the Boughton facility "unreasonably interfere with the enjoyment of life."[6] The 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. Rather

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[6] Section 9(a) prohibits the emission of any "contaminant" so as to cause "air pollution." As these terms are defined under the Act, the emission of either noise or dust may constitute "air pollution" if it is "in sufficient quantities and of such characteristics and duration to be injurious to human, plant, or animal life, to health, or to property, or to *unreasonably interfere with the enjoyment of life or property.*" [emphasis added] See Section 3.02 and 3.06 of the Act (415 ILCS 5/ 3.02 and 3.06).

Similarly, Section 900.102 prohibits the emission of sound beyond the boundaries of one's property so as to cause noise pollution in Illinois. "Noise pollution" is defined in Section 900.101 of the Regulations as: the emission of sound that *unreasonably interferes with the enjoyment of life* or with any lawful business or activity."

Finally, Section 24 of the Act prohibits the emission of any noise beyond the boundaries of one's property that *unreasonably interferes with the enjoyment of life.*

the question is whether those emissions have "unreasonably interfered" with Complainant's enjoyment of life. Charter Hall v. Overland, PCB 98-81, Slip. Op. p.17 (Oct. 1, 1998); Kvatsak v. St. Michael's Lutheran Church (PCB 89-182, Slip. Op. at p. 9, (Aug. 30, 1990)

Whether the emission of noise or dust is "unreasonable" is determined by examining the factors in Section 33(c) of the Act (425 ILCS 5/33(c)) which states:

> "In making its orders and determinations the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> i. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> ii. the social and economic value of the pollution source;
>
> iii. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
>
> iv. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
>
> v. any subsequent compliance.

Complainants evidence on her claims of "unreasonable interference with the enjoyment of life" consists solely of witness testimony. Respondent deposed Complainant and each of her four witnesses during the discovery period. The full transcripts from these depositions are contained in Attachments 7, 8, 9, 10 and 11 hereto. If this matter were to go to hearing, Respondent's own witnesses would provide testimony as to the reasonableness of the emissions complained of. The substance of that testimony is provided in three affidavits provided with this motion in Attachments 12, 13 and 14 hereto. A review of this evidence, which is discussed in detail below, demonstrates that Complainant's allegations are not supported by evidence of

unreasonable emissions from the Boughton facility or "unreasonable interference with the enjoyment of life." Thus, summary judgment in favor of the Respondent as to the alleged violations of Sections 9(a) and 24 of the Act and Section 900.102 of the Regulations is required.

1. SECTION 33(c)(i): CHARACTER AND DEGREE OF INTERFERENCE

The Board has held that "Sounds from a source must *objectively* affect enjoyment of life to constitute an interference." Charter Hall v. Overland, PCB 98-91, Slip. at p. 17 (Oct. 1, 1998). [emphasis added]. In other words, the effect cannot be a purely subjective matter. In assessing the character and degree of interference experienced by a noise complainant, the standard applied by the Board is whether the noise "substantially and frequently interferes" with the enjoyment of life "beyond minor or trifling annoyance or discomfort." Charter Hall, at p. 18; Kvatsak v. St. Michael's Lutheran Church, PCB-89-182, Slip. Op. at p. 9 (Aug. 30, 1990).

Complainant and her witnesses allege that their lives have been affected by various noises and dust emitted from Boughton's 111th Street quarry. The emissions which the Complainant and her witnesses believe to be emanating from the Boughton quarry can be divided into three categories: blasting noise , process and vehicle noise, and dust.

a. BLASTING NOISE

With regard to blasting, one of Complainant's witnesses, Lisa Collins, stated in deposition that she found the blasting to be "annoying" (Attachment 10, p.28), however, the annoyance appears to have been associated more with the ground vibration from the blast than with noise. Ground vibration is not regulated under the Act or the Board's regulations and is not within the jurisdiction of the Board. Carla Jenkins stated in deposition that the noise from blasts woke her daughter, knocked valances off of windows, and cracked walls. (Attachment 9, p. 38). Again, these concerns appear to center around the ground vibration associated with the blast

rather than the noise. Ms. Jenkins also admitted that she could not distinguish between blasts at Vulcan and blasts at Boughton. (Attachment 9, p. 28). Donald Boudreau, when asked if he had heard any blasts himself stated: "Yes – I have felt them, I haven't heard them." (Attachment 11, p. 50). William Jene admitted that, although he has lived in River Run since 1999, he could not recall any specific instance in which he heard a blast that was troublesome to him. (Attachment 8, p. 34). He also admitted that he couldn't distinguish whether blast noise was emanating from the Boughton quarry or the Vulcan quarry. (Attachment 8, p. 27). Complainant herself stated in her deposition, "..., 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." (Attachment7, p. 93).

In summary: the witness testimony offered by Complainant on the issue of blasting noise does not rise to the level of "unreasonable interference" as that standard has been interpreted by the Board. Charter Hall v. Overland, PCB 98-91, Slip Op.at p. 18 (Oct. 1 ,1998). Neither Complainant nor any of her witnesses have stated facts that demonstrate that blasting noise from Boughton's operations "substantially and frequently interferes" with the enjoyment of life "beyond minor or trifling annoyance or discomfort." Moreover, blasting is a necessary component of quarry operations of which Complainant and each of her witnesses were aware or should have been aware at the time that they purchased their properties.

b. PROCESS AND VEHICLE NOISE

Complainant and her witnesses all state that they can hear process noises from quarry operations. This is not surprising. Complainant and all of her witnesses bought and/or built homes that directly abut the Boughton property and are a short distance across 111th Street from the Vulcan 111th Street quarry. The movement of residential development right up to the

boundary of the quarry properties is graphically depicted in the attached aerial photographs. (See Attachment 16 hereto). The question for the Board to decide is whether the process noise that Complainant and her neighbors hear is "unreasonable" in light of all of the Section 33(c) factors, including the pre-existence of the quarry and the measures taken by Boughton to reduce noise and dust to accommodate its new neighbors. (See discussion in Sections III.C.2, 3, and 4 below).

i. Deposition of Lisa Collins

Lisa Collins, who bought her home from Complainant Gina Pattermann's husband in 1997 and whose house backed directly up against Boughton's property, stated that she didn't like to be outside gardening because of the noises generated by the quarry. She stated "...one of the reasons that we wanted that lot is because it backed up to the river, and it was huge. It was one of the biggest lots in River Run, and 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 hear the conveyor belts and trucks beeping, and I just didn't like it." (Attachment 10, p. 17 -18). She could not hear the process noises in her house with the windows closed. (Attachment 10, p. 33). Thus, the interference she complains of is being "bothered" by quarry process noises in a backyard and through open windows in a home that was built in close proximity to two existing quarries.

Ms. Collins stated that she didn't know that the property behind her house, including the natural area between her house and the river and the 50 foot berm on the other side of the river, was owned by Boughton. (Attachment10, p. 21-22). She stated that she and her husband were "shocked" to find when they moved in that the Boughton quarry existed directly behind their

property. They "wished we had done a little more homework before we bought this property." (Attachment 10, p. 23)

It's hard to hide one quarry, let alone two. But assuming that Ms. Collins and her husband really didn't know they were buying property in close proximity to two quarries, her real complaint should be with Complainant and her husband, who sold her the house without telling her this. The Collins' bought their home from Complainant's husband, Steve Pattermann, who had been building and selling homes in River Run since the early 1990's and should have been well acquainted with the quarry noises that Ms. Collins states detracted from the "natural environment." (See Attachment 7, p. 11-16.). Ms. Collins stated at her deposition that Steve Pattermann never indicated to them that there was a quarry on the other side of the berm and also never told them there were any kind of noise or dust issues on the property. (Attachment 10, pp.12-13).

The fact that a person mistakenly and/or unreasonably assumes a property located next to two quarries is a completely natural environment and buys the property on that basis does not render the pre-existing regular process noises associated with those quarry operations "unreasonable."

ii. Deposition of Donald Boudreau

Donald Boudreau bought his lot in River Run in 1999 and built his house between 1999 and 2000. **His house is on the west side of Baybrook Lane and faces the Boughton property.** (Attach. 11, p. 20 - 21). On deposition, he admitted that he was aware that the two quarries were located on 111th Street. He also admits that he visited the lot daily, daytime and evening, while the house was under construction, and that he heard noises that he described as a "roaring noise" and which he attributed to "the shaker or some type of sorting device they have over there" while

visiting the lot before he bought it. He also stated that he didn't notice the noise "to be a big problem then." (Id. p. 18(Attachment 11, pp. 11-1). He believes that the noise has become louder recently and believes that might be attributed to changes in the terrain in the floodplain that he believes resulted in fewer trees between the subdivision and the quarry. (Attachment 11, pp. 23-24).

Mr. Boudreau described the noise he currently hears as "a steady roar, kind of a rattling consistent noise." He believes that the noise is there constantly, but is louder some days than others. (Id. p. 37). He can hear it outside in his yard and in his house on the east side facing the quarry. (Id., p. 45). He thinks it would interfere with watching television if he had a T.V. on that side of the house. He states that "It's loud enough that I'm concerned it wakes my children in the morning because their bedrooms are on that side of the house, and you can hear it clearly in the mornings with the trucks and...the shaking." (Id. p.45). He also states that he can't talk to his neighbor across a 30 feet street without yelling because of the noise. (Id. p. 60). Although he considers the noise to be "loud," he has taken no measures to try to soundproof his house. (Id. p.46).

Mr. Boudreau's testimony, given its greatest weight, is that process noise that he knew about before he bought his home and didn't think was a "big problem" has gotten louder in the last two years, possibly due to someone's removal of trees on property east of his house. He is worried that it may wake his kids in the morning at 7:00 a.m. He also thinks that it is "unwieldly" to have to yell across a 30 feet wide street to talk to a neighbor on the other side. When repeatedly asked for any thing else that would be a part of his testimony as to how the quarry noise impacts his life or property, Mr. Boudreau had nothing else to add. (Id. pp. 52-53, 57, 59, 60).

The level of interference with the enjoyment of life described by Boudreau cannot be characterized as unreasonable. Few people would expect to be able to speak to a neighbor across the street without yelling. Few people would buy a house next to two quarries and expect that their operations would begin later than 7:00 am. Mr. Boudreau himself appears to realize this. He stated, "...to be fair to these guys, I mean when we bought the house I was aware of the quarry." (Attachment 11, p. 50). While he believes the noise has gotten louder since he bought the house, he has no evidence that an increase in noise is attributable to Boughton.

In fact, apart from the reasonableness or unreasonableness of the level of noise, Mr. Boudreau's testimony makes it clear that the noise he describes cannot be coming from Boughton operations. Mr. Boudreau can see a structure on the Boughton property which he assumes to be the source of the noise he hears, although he admits he can't see whether the equipment in that structure is operating. (Id. p. 32). He claims to hear this noise everyday but Sunday, in winter and summer, from as early as 7:00 am and as late as 8:00 pm all the way through at least February 2003. (Id. pp. 32 -38).

Although Mr. Boudreau professed to be certain that the process noises he hears were coming from that plant, he also admitted several times that he associated seeing the plant with determining that it was the source of the noise, stating: "7:00 p.m. I would say later, however, I cannot be precise, I can't see where the noise is coming from when it gets dark." (Id. p. 35) and "Again,... to be fair to Boughton, I would say that the only time that I have a complaint is when I can actually physically see this unit operation and locate between my eyes and ears and walking around that the noise is coming from there. So if I hear a noise at night and it's dark, without walking directly over there, you know, if I had to prove in a court of law where it was coming from I couldn't without walking directly over there." (Id. p. 48). He also stated that the best

place he has found to "focus on where the noise is coming from and why it is so loud" is south of his house on Sebastian Street at a location where he can see the structure on the Boughton property, but which is actually closer to the Vulcan quarry. (Id. p.34).

Notably, in her deposition, Ms. Pattermann stated that she can distinguish the Vulcan noise from the Boughton noise because "Vulcan sometimes runs all through the night..." (Attach. 7, p. 77). She describes that noise as the noise of a "conveyor belt." (Id. p. 77). While she describes the noise as "real quiet noise in the background," her home is located further away from and further north of the Vulcan quarry than is Mr. Boudreau's. (Id. p.78). She also stated that the Vulcan noise increases when the wind is coming out of the south. (Id. p. 79)
Ms. Pattermann's testimony on this point confirms that the noise Mr. Boudreau is hearing may be noise generated by Vulcan. This is further supported by the testimony of Mr. Jene who in his deposition on April 10, 2003 stated "I actually wanted to compliment Boughton over the last few months because they haven't been operating when I've come home from work." (Attach. 8, p. 35).

Other evidence also demonstrates that Mr. Boudreau has incorrectly assumed that the noise he hears is generated by the piece of equipment he can see from his property. This piece of equipment is the Boughton wash plant.[7] As discussed in Mr. Kessen's affidavit, the wash plant is a plant that operates only a limited number of days each year, and only in the summer months. (Attach. 13, p. 15). The wash plant physically cannot operate when temperatures are below freezing because it uses large quantities of water to wash gravel. (Id., p. 15). Thus, it could not be the source of the noise which Mr. Boudreau described as the same noise he hears all year round including in the month of February in 2003.

[7] As stated in Dale Kessen's affidavit, the berm cannot be extended behind the wash plant because of the proximity of existing ponds and the river.(Attachment 13, p. 36.)

Furthermore, Mr. Kessen also states that Boughton's hours of operation for *all process equipment* are from 7:00 am all year round to 4:00 pm in the winter and 5:00 pm in the summer. (Id. , pp. 13 and 20). Thus, neither the wash plant nor any other process operation on the Boughton property could be the source of the noise that Mr. Boudreau hears from early in the morning until late at night.

iii. Deposition of William Jene

William Jene, like Donald Boudreau, lives on Baybrook Lane in the last section of River Run to be built and the only section that is not shielded from the Boughton quarry by the 50 foot berm. His property is on the east side of the street and directly adjacent to the Boughton property. (Attachment 8, p.14-15). He was aware of the location of the Boughton and Vulcan quarries at the time he bought his property. (Id. p. 19). Prior to buying his home, he visited his lot several times and heard noises that he assumed to be from both the Boughton and Vulcan quarries. (Id, pp. 12-13). He "knew about the noise factor" and had actually talked to the Complainant about her complaint in this case before he purchased his property. (Id. pp. 22- 23).

He stated that the noises he heard before he bought his property were the same ones he is hearing today -- a conveyor, dumping and beeping. (Id. p. 22). He stated that he used to hear these noises as early as 6:00 am, but that recently it had been 7:00 am. (Id. p. 34). He did not hear these noises in the evening when he returned from work. (Id. p. 34). He finds the conveyor and trucks backing up to be "the biggest annoyances." (Id. p. 35).

Mr. Jene offered no further comment on the impact of these noises on his life. He was asked if there were any other matters that he would testify to if called at hearing, and he stated that there were not. (Id., p. 45). His deposition indicates that he finds the process and beeper noise to be an "annoyance." But he admits that he knew full well that he was building his house

directly adjacent to one quarry and across the street from another. Since the noises he hears now are the same noises he heard before he bought the property and this did not deter him from buying the property, he cannot now claim these noises to be "unreasonable."

iv. Deposition of Carlene Jenkins

Carlene Jenkins bought Lisa Collins' house in 1999. (Attachment 9, p. 8). It is next to the Complainant's house and backs up to the Boughton property. She states that she and her husband became aware that the River Run subdivision was next to the Boughton quarry when she heard a blast while they were visiting the property before purchasing it. (Id., p. 10). They also heard "what sounded like maybe a train or grinding, trucks" and asked the realtor what it was and were told that it was the adjacent quarry. (Id. p. 10). She stated that she knew of the location of both the Boughton and Vulcan quarries before she moved into her home. (Id. p.17).

Ms. Jenkins is aware that Boughton has constructed and is still enlarging the berm between the quarry operations and the subdivision. She admits that the berm shields her property from view of any Boughton operations (Id. p. 23), but complains that the activity of constructing and maintaining the berm requires trucks to go back and forth on the berm. She also states that although the berm has gotten much higher since she moved in, it has not resulted in a reduction in noise. She claims that the noise has actually "more intense" and "worse." (Id. pp. 20-21). She also indicates that she cannot differentiate what noise or dust is caused by Vulcan's operations. (Id. pp. 21, 26).

She stated that she hears trucks and beepers before 7:00 am (e.g. 5:30- 6:00 am), but no other operational sounds at that hour. (Id., p. 30). She said she heard "grinding," but she did not indicate any specific impacts on her life associated with that noise. (Id. p. 29). She has done no monitoring, has no records and can point to no specific instances of noise problems. (Id. p. 26)

Her major concerns appeared to be with blast vibration, as discussed above, and with dust. She fears her daughter may contract asthma and allergies in the future, but did not indicate any current medical conditions. (Id., p. 38). She stated that they don't use their backyard because it is "filthy," but she could point to no specific occasions when significant amounts of dust have come on to her property from the Boughton property. (Id., p. 39)

Ms. Jenkins major noise complaint appears to be the sound of trucks that are constructing and maintaining the berm that is designed to shield the River Run subdivision from the Boughton operations. This hardly rises to the level of "unreasonable interference with the enjoyment of life" for one who knowingly moved next door to a quarry.

v. Deposition of Gina Pattermann

Gina Pattermann, the Complainant in this case, also built her home on property directly abutting the Boughton property. She and her husband, Steve Pattermann, purchased their lot in 1995 or 1996. (Attach. 7, p. 5, 9). Although Ms. Pattermann claimed she was unaware that either the Boughton or Vulcan quarries existed at the time that she bought her property, (Attach. 7, pp.24-25), she admitted that her husband who is a professional home builder who had been building and selling homes in River Run since the early 1990's must have known of Boughton's quarry because his excavation contractor dumped fill at Boughton's facility. (Attach. 7, pp. 11-24). She also admits that the operations at the Boughton plant have not changed or expanded since she purchased her property and that the blasting and excavation activities at the Boughton quarry have moved progressively further east, away from the River Run subdivision since then. (Id. p.53).

Ms. Pattermann stated in her deposition that she hears process noises from the Boughton facility at approximately the same level all year round, varying only with the wind. (Id. p. 56 -

57). When the winds come straight out of the east, which she admitted they rarely do, she stated it's really loud. (Id. p. 57). She can tell when a truck is dumping something (p. 56-59), she can hear back-up beepers (Id. p. 74), a repetitive process sound all day long (Id. p. 56), and a "woosh" sound which she associated with loading once in a while. (Id. p. 103). She admits that she only hears trucks in the morning before 7:00 am, not operational noises. (Id. p. 74). When asked whether she could point to any specific instances in which she recalls being particularly bothered by noise from the Boughton property, but stated "Not really. It's pretty consistent." (Id. p. 58). Her one comment was that Boughton's choke feeding of the plant to reduce noise doesn't prevent the noise from the first load in morning from being loud, but she also admitted that she doesn't pay attention later in the day due to having five kids in the house making it incredibly noisy in her house later on in the day. (Id. p. 104).

As discussed above, she did use a Radio Shack hand-held sound meter to monitor sound for approximately a week sometime in November of 2002, but admits she used no particular procedure and that she did not correct for the "background noise" emitted by Vulcan. (Attach.7, p. 77). She stated that she was "ambitious" for a week and made a log of these measurements sometime in approximately November of 2002, but she never provided that log as an up-date to her discovery responses. (Id. p. 71-72)

She 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 that they have no impact on reducing sound levels on her property. (Id. p. 31, 59).

Ms. Pattermann's testimony does not support a finding that Boughton operations have "unreasonably interfered with her enjoyment of life." As she herself stated, she is generally unaware of the noise during the day and notices it "once in a while" in the morning. She states

that on a rare occasion the process noise from Boughton's facility is really loud due to the wind. But she admits the noise from the facility has not changed since she purchased her house. Whether or not Ms. Pattermann herself knew of the existence of the Boughton and Vulcan quarries, she admitted that her husband, who is in the building trade and continues to make his living selling homes in River Run, was well aware that the Boughton quarry was located in close proximity to their property. In fact, one of his contractors used the quarry.

Most telling, is the fact that Ms. Pattermann, the Complainant in this case, has been extremely casual in documenting any noise incidents or measurements and in pursuing her claims in this case. Although a lawyer and representing herself in this case until June 2003, she didn't bother to retain her purported expert witness, she didn't attend her own witnesses' depositions and she didn't bother to review records offered by Boughton. These are not the actions of someone who is experiencing an "unreasonable interference with the enjoyment of life."

c. DUST

On the issue of dust, Lisa Collins stated, "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." (Attach. 10, pp. 30-31). She never had that type of fine powdery dust in her previous homes, and assumes it was from the quarry. But she admits that she never saw plumes of dust moving from the quarry toward her property. (Id. 29-30). She also said the dust did not require her to seal her windows or pressure wash her house. (Id. p. 31). She also stated there was no noticeable dust problem on the deck. (Id. p. 32).

Donald Boudreau stated that they have to dust inside the house every two to three days or they have a film of dust on the dining room table, that they have more dust in the house than he

has experienced in his previous homes, and that his wife doesn't allow windows to be left open because of dust. He said he gets dust on his shoes when walking in the yard. But he admitted that he has never seen a plume of dust from the Boughton facility moving toward his property and that he cannot distinguish this dust from any other type of dust. However, he admitted he did not wash his windows or siding particularly often and has not taken any other measures to keep dust out of his house other than closing the windows. (Attach.11, p. 43-44).

William Jene said that dust is a problem in drier times, and that in the summertime you couldn't open windows for fear that you would have dust throughout the house. He indicated that the blasting creates a big dust storm, but could not provide any particular dust problems he experienced which were associated with blasting. He also admitted that he couldn't distinguish the source of the dust. (Attach. 8, p. 37 -41).

Carlene Jenkins stated that she worries that her daughter may contract asthma or allergies down the road as a result of inhaling dust. However, she did not indicate that any member of her family has any respiratory problems that she attributes to the dust. She also stated that they don't use their backyard because it is "filthy." However, she could not point to any specific occasions when significant amounts of dust had come on to her property from the Boughton quarry. She said there are no "big clouds of dust that come over our property," but that she believes that consistent grinding and blasting, presumably from Boughton's facility, is causing the dust on her property. (Attach. 9, pp.38-39).

Gina Pattermann stated that the dust from blasting was not a big problem for her. She was more concerned about process dust. She stated that a week before her deposition she saw a cloud of dust dissipating out of the trees around the wash plant, although she assumed it was from the

dry plant rather than the wet wash plant. She believes that dust is generated both by the plant operations and by trucks driving around when the ground is dry. (Attach. 7, pp. 69-71).

The question for the Board is whether the amount of dust complained of by these witnesses rises to the level of "unreasonable interference with the enjoyment of life." While dust may be present frequently, the level of dust complained of is, in fact, minor. The dust described by these witnesses is not unlike the dust experienced by people throughout the Metropolitan Chicago area, particularly in the City or in areas located in proximity to highways, construction sites, and other industrial and agricultural activities. Furthermore, there is no indication that the level of dust experienced in River Run is unusual for property located in close proximity to two quarries. As is discussed later, there is also no indication that Boughton generates excessive amounts of dust in its operations. In fact, visible emissions testing of Boughton's operations have shown particulate levels at the plant itself to be well below federal New Source Performance Standards. (See Attach. 12, Ex. C). As also is discussed later, Boughton has undertaken a number of measures to reduce dust at its facility.

The major step taken by these witnesses to address the dust problem appears to be keeping their windows closed in the summer. They have not had to seal their windows or take other extraordinary measures to reduce the dust within their homes. While keeping windows shut all of the time may be less than desirable, all of these homes are valued in excess of $400,000 and surely have air conditioning. It is not an unreasonable interference with the enjoyment of life to have to keep windows closed against dust in light of the fact that each of these people built homes in close proximity to two existing limestone quarries.

d. NO ADVERSE IMPACT ON PROPERTY VALUES

An increase or decrease in property values or the rate of appreciation in property values is an objective indicator of whether the emissions complained of in this case have had an adverse impact on property in the River Run area or the perceived quality of life in the River Run area. None of the witnesses offered by the Complainant had an information as to the increase or decrease in their property's value or rate of appreciation. Moreover, the Complainant herself admitted in her deposition that the quarry has not had an adverse effect on property values in River Run. (Attach. 7, p. 113).

Complainant's opinion is confirmed by a report entitled "Property Value Impact Study & Highest & Best Use Analysis," prepared by William A. McCann & Associates, Inc., which is included herein as Exhibit B to the Affidavit of Michael S. McCann, Respondent's expert witness. (Attach. 14, Ex. B hereto). Mr. McCann, the author of the study and an experienced and certified real estate appraiser, would testify if called as a witness that it is his professional opinion the Boughton 111th Street quarry has not had, and cannot reasonably be forecast to have, any measurable adverse effect on property values in the River Run subdivision. (Attach. 14, p. 2). Mr. McCann's opinion is based upon a comparative market analysis of property values, rates of appreciation and marketing times in the River Run and White Eagle subdivisions, both of which are located in the Will County portion of Naperville. Homes in the White Eagle subdivision, which is over three miles from the Boughton 111th Street quarry, were chosen as a "control group" of properties for comparison with properties located in River Run. The bases for Mr. McCann's selection of the White Eagle properties as comparable are stated in his affidavit. While different in some respects, one having larger lots and the other having a private golf course, the two subdivisions have houses of approximately the same size. Moreover,

Complainant stated in her deposition that in her opinion River Run and White Eagle were the two "really upscale" subdivisions in Naperville. (Attach. 7, p. 112).

Mr. McCann's study found that the rate of appreciation of properties in River Run has not only not been adversely impacted by the presence of the Boughton quarry, it has actually outpaced the rate of appreciation in White Eagle. He reviewed sales in the two subdivisions between 2001 and 2003. The average annual rate of appreciation for homes in River Run was 8.25% for residences held in excess of 12 months. The average annual rate of appreciation for homes in White Eagle was only 6.14% for properties held in excess of 12 months. Furthermore, for the preceding year River Run homes sold on average for 98% of the list price, compared to 96% for White Eagle homes, and homes in the two subdivisions sold within almost exactly the same marketing period. (See Attach. 14).

Mr. McCann was disclosed to Complainant as Respondent's expert witness and the complete McCann Study was provided to Complaint within the discovery period. Mr. McCann's expert testimony and the evidence in this report, coupled with Complainant's own admission, clearly demonstrate that property values in River Run have not been adversely affected by the Boughton quarry. In addition, this information is objective evidence that the quality of life in the River Run subdivision has not been adversely affected by the presence of the Boughton quarry.

2. SECTION 33(c)(ii): THE SOCIAL AND ECONOMIC BENEFIT OF BOUGHTON QUARRY

Wayne Szepelak has been Boughton's Office manager for almost 25 years. He is intimately familiar with Boughton's business and is prepared to testify as to the social and economic benefit of that business to the surrounding community and the State of Illinois. Mr. Szepelak was identified as a witness on behalf of Respondent within the discovery period and an

affidavit reflecting the testimony that he would give if this matter goes to hearing is attached. (Attach. 12).

As is stated in Mr. Szepelak's affidavit, Boughton is a family owned and run company which operates two limestone quarries in Will County, the Boughton 111th Street quarry and the Boughton 119th Street quarry. As can be seen from the aerial photographs provided in Attachment 16 hereto, the Boughton 111th Street quarry is located north of 111th Street, directly across the 111th Street from another quarry owned and operated by Vulcan Materials. The Boughton family has lived and worked in the Naperville-Plainfield area for over four generations. Boughton Road, a major roadway in Naperville and Plainfield, is named after a Boughton family member. (Id. Par. 5).

If called to testify, Mr. Szepelak would explain that Boughton produces construction crushed limestone, sand and gravel used in highway and building projects in the western suburbs of Chicago. Boughton's products are used as driveway and garage fill; pipe and wall backfill; pipe bedding; base material for foundations, parking lots and roadways; septic systems; landscaping materials; pools; sandboxes; and masonry applications, among other uses. In 2002, Boughton served over 600 Illinois governmental, business and residential customers located within an approximate 30 mile radius of its 111th Street quarry. (Id., Par. 7).

Mr. Szepelak would also testify that Boughton's products have been used in Illinois First and other local construction projects, including: municipal building construction for the Village of Plainfield, the City of Lockport, the City of Downers Grove, the City of West Chicago and the City of Warrenville; park construction in the Plainfield and Lockport Park Districts; school construction in the Plainfield, Naperville, Aurora and Lisle school districts; church construction in Naperville, Aurora and Wheatland Township; road projects on 127th Street (Plainfield) and

135th Street (Plainfield); industrial projects for Reliant Energy (Aurora) and Commonwealth Edison (Naperville); commercial projects for Farm & Fleet (Montgomery), Home Depot (Naperville), Walgreens (Oswego) and CostCo (Naperville); and residential subdivisions such as Tall Grass (Naperville), White Eagle (Aurora), Hickory Oaks (Bolingbrook) and Southpointe (Plainfield). (Id., Par.8).

Mr. Szepelak affidavit points out that the supply of aggregate in the immediate area of Boughton's 111th Street quarry has decreased over the years and a greater decrease is expected in the future. Of the four quarries in the surrounding area, one (Prairie Materials quarry) has all but closed, and another (the adjacent Vulcan Materials quarry) is likely to run out of surface material in the near future. Therefore, the continuing operation of the Boughton quarry is very important to serve the construction industry in the area. (Id., Par. 9).

Boughton is also a significant local employer. Mr. Szepelak states that Boughton employs 33 individuals on a full-time basis and 2 individuals on a part-time contract basis. The Company also utilizes the services of approximately 20 contract drivers who drive exclusively for Boughton and 15 contract drivers who drive primarily (but not exclusively) for Boughton. All of Boughton's employees live in Illinois within close proximity to Boughton's business. In 2002, Boughton paid $5,451,000 in payroll expenses. Although sales decrease in winter, we do not have a slowdown in production, nor do we lay off any employees. (Id., Par. 10).

Boughton also contributes significantly to the tax base. Mr. Szepelak states that on average, Boughton pays $1 million in federal income taxes and $200,000 in state income taxes. In 2003, Boughton will also pay $514,476 in state and local sales taxes and over $70,000 in property tax. (Id., Par. 11).

Beyond employment and taxes, Boughton's business also contributes substantially to the local economy by using local businesses and vendors to conduct its quarrying operation. Mr. Szepelak states that in 2002, Boughton paid $3,073,000 in cartage expenses to several locally owned and operated trucking companies. Boughton also conducted $1,488,000 of business in 2002 with Callahan & Schue (drilling) of Lockport, Illinois, and Evenson Explosives of Morris, Illinois. Several local companies provide plant, truck and equipment maintenance, as well as operating supplies, including Patten/Caterpillar of Elmhurst, Illinois; KAR Products of Palatine, Illinois; Crescent Electric of Joliet, Illinois; Motion Industries of Chicago; and Mack of Joliet, Illinois. Boughton's business with these local companies totaled $804,000 in 2002. (Id., Par. 12).

Finally, Boughton is also a benefactor of a number of charities and local institutions. As stated in Mr. Szepelak's affidavit, Boughton's donations have increased annually from $22,000 in 2001 to $34,000 for the first 9 months of 2003. This includes major donations to the Don Zarndt Fund, the Les Turner ALS Foundation, the Naperville and Plainfield Schools and Little Friends. In addition, Boughton formed the Walter Boughton ALS Fund in 1993. The charity contributes $40,000 to $70,000 each year for ALS (Lou Gehrig's Disease) research and family care for individuals afflicted with the disease. In ten years, the fund has raised over $540,000 for this cause. (Id., Par. 13).

Based on all of the above and the absence of any evidence from Complainant that goes to this point, the Board should enter Summary Judgment in favor of Respondent as to the Section 33(c) factor for social and economic benefit of the emission source.

3. SECTION 33(c)(iii): THE SUITABILITY OF THE BOUGHTON QUARRY TO ITS AREA AND ITS PRIORITY OF LOCATION

Mr. Szepelak's affidavit also attests to facts which demonstrate the suitability of the Boughton quarry to its area and its priority of location. (See Attach. 12, Pars. 14 –17).

The location of a limestone quarry is dictated by geology. Unlike many areas of the country, northern Illinois and Will County, in particular, are rich in accessible natural limestone deposits. As a result, there are four limestone quarries within Wheatland Township. (Id., Par. 14).

Like Boughton's 111th Street quarry, all four of these quarries were developed on mineral rich land in an area of Will County that was zoned and used primarily for agriculture and mining until the 1990's. Mr. Szepelak can attest to having lived and worked in this area since 1978, and can personally attest to the fact that in 1985, when Boughton began quarrying operations at its 111th Street location, its quarry was surrounded by open farmland to the north, west and south and another quarry and more farmland to the south. He can further attest to having reviewed the series of aerial photographs from 1980 to 2001 obtained by McCann & Associates for their April 3, 2003 Report (and also attached hereto as Attachment 16) and his belief that those photographs accurately depict the movement of residential development into this quarrying and agricultural area as he himself saw and experienced it. (Id., Par. 15).

Mr. Szepelak can also attest to his personal observation that Wheatland Township still contains several thousand acres in agricultural and mining use. The 111th Street quarry is bounded by quarrying operations to the south. A golf course borders the quarry on the east with agricultural land further to the east. To the west and north, the River Run subdivision was constructed right up to the boundary of the existing Boughton's property from approximately 1990 to 2001. However, the quarry is still separated from the subdivision by the DuPage River

and approximately 25 acres of land owned by Boughton and used solely as a buffer, including woods and a 50 feet tall earthen berm constructed by Boughton. (Id., Par. 16).

Unlike many other businesses, quarries cannot simply pick up their equipment and move somewhere else. Mr. Szepelak's affidavit explains that a quarry's location is dictated by geology and that a quarry also takes many years to develop. Limestone is not typically found near the surface, and considerable cost and intensive labor is required to remove overburden, which can range from a few feet to over thirty feet in depth. As a result, a quarry operation may not realize a profit for several years. In addition, given labor, heavy equipment and land acquisition costs, the start up expenses of a quarry operation are very high. (Id., Par. 17).

Based on all of the above, it is clear that the Boughton quarry is a business that is well-suited to its location. In fact, when Boughton's special use zoning application was initially rejected by Will County Zoning Board, the Illinois Circuit Court over-turned that decision, finding:

> "Because of the deposits of sand, gravel and limestone on the subject land and the shallow overburden covering the deposits, the highest and best use of the subject land is mining and quarrying with blasting and the operation thereon of the usual quarry equipment, crushers, conveyors, office and scale." Boughton Trucking and Materials, Inc. v. The County of Will, No. 80 CH 253 (Judgment Order, Mar. 8, 1982) (Attachment 15 hereto).

The Illinois Appellate Court agreed with Illinois Circuit Court and the evidence demonstrating that Boughton's quarrying operations represent the "highest and best use" of the land given the socially valuable limestone deposits located on that property. Boughton Trucking and Materials, Inc. v. County of Will, 112 Ill. App. 3d 26, 444 N.E.2d 1128 (3rd Dist. 1983).

Section 33(c) also calls for a consideration of the priority of location in determining the suitability of an emission source to its location. In this case, it is clear that the Boughton 111th

Street quarry preceded the River Run subdivision by at least 9 years. The quarry was developed in 1985. The subdivision came into existence in phases between 1994 and 2001. The character of the land uses in the area and the movement of the residential development right up to the edge of the Boughton property is graphically depicted in the aerial photographs which were obtained by Mr. McCann in the course of his study and which were used as exhibits in the depositions of Complainants witnesses. The fact that the quarry operations have not changed can also be discerned from these photographs which show the same quarry plant equipment in the same locations. (A copy of those aerial photographs are attached hereto as Attachment 16.) The only thing about the quarry that has changed is that the blast face has moved further to the east, away from the subdivision. Thus, unlike in Charter Hall, the character and intensity of the Boughton's operations have not increased.

The aerial photographs are dramatic evidence of the classic "moving to the nuisance" syndrome which is the true basis of the Complaint in this case. The home owners in this case all knew or should have known that they were buying property in close proximity to not one but two existing limestone quarries and in an area dominated by four limestone quarries. The complaints they raise do not indicate that Boughton has changed its operations, exceeded regulatory emission levels or operated its quarry in any way that is not common in the industry. In fact, Mr. Szepelak's affidavit and exhibits thereto demonstrate that the quarry's operations have not changed since 1987, that it is properly permitted by the Illinois Environmental Protection Agency, and that it is in compliance with that permit, emitting far less than the allowable particulate emission limits allowed for non-metallic quarries. (See Attach. 12, Exs. B and C). Rather, their complaint is with levels of noise and dust that are inherent in the nature of a quarrying operation.

Given all of the above, Boughton is entitled to summary judgment in its favor as to the Section 33(c) (iii) factor pertaining to the suitability and priority of location of its 111th Street quarry.

4. SECTION 33(c)(iv) and (v): NOISE AND DUST REDUCTION MEASURES UNDERTAKEN AND THE TECHNICAL IMPRACTICABILITY AND ECONOMIC UNREASONABLENESS OF FURTHER REDUCING NOISE AND DUST FROM THE BOUGHTON QUARRY

Complainant has presented no evidence that additional reductions in noise and dust can be made at the 111th Street quarry. On the other hand, Boughton has provided evidence of an on-going program investigating and implementing noise reduction measures in every aspect of its operations, including blasting, drilling, crushing, conveying, and hauling. Some measures that have been investigated have been found to be unworkable, but a wide-range of other procedural, operational and equipment changes have been made to Boughton's operations specifically to reduce noise and dust emissions.

Dale Kessen is the Superintendent of the Boughton 111th Street quarry. His job responsibilities include essentially running every aspect of the plant and quarry operations, including oversight of all blasting performed by the blast and drilling contractors, oversight of all process operations in the main plant and the wash plant, oversight of all truck and vehicle movement and loading within the plant and quarry, and the evaluation, installation, implementation and operation of all pollution control equipment and measures. He has personally been responsible for investigating, implementing and evaluating noise and dust reduction measures at the 111th Street quarry for many years. Mr. Kessen was identified to Complainant as one of Respondent's witnesses within the discovery period and is prepared to

testify if this matter goes to hearing. The substance of his testimony is contained in an affidavit attached hereto. (Attach. 13).

a. Blast Noise and Dust Mitigation

Mr. Kessen's affidavit attests to the fact that Boughton has been actively involved with its blast contractors in investigating blasting techniques designed to reduce dust and noise, including cutting back the size of the shot, cutting back the number of shot holes used, removing drilling debris from the shot area, wetting the rock to be blasted and wetting the shot hole, and limiting blasting based on wind direction. He states that Boughton has also changed blasting contractors a number of times when we have found they were not flexible in trying new methods to reduce noise and dust impacts. (Attach. 13, Par. 4).

He states that as a result of this investigation, Boughton has discovered and implemented several blasting methods that reduce noise and ground vibration. He states that Boughton now uses less shot and drills fewer holes than in the past for "high wall" blasts. For certain areas, Boughton has used a "benching" technique for blasting. Under this "benching" approach, they use smaller shots and blast 50 feet of the quarry wall at a time instead of 100 feet. (Id., par. 5)

Mr. Kessen oversees Boughton's blast contractor and reviews the blast reports created following each blasting event. He states that those blast records indicate that the average ground vibration and air blast pressure (in decibels) generated by Boughton's blasting has been considerably reduced since 1999 as a result of the new blast techniques that have been implemented. His affidavit includes an exhibit summarizing the results of over 4 years of blast records which demonstrate a reduction in air blast levels by over 6 decibels. (Id., Pars. 6 and 7). As noise is measured in decibels on a logarithmic scale a decrease of a single decibel actually represents a logarithmic reduction in sound. To calculate when noise is reduced in half or

doubled, various agencies use different "exchange rates," from 3 to 5. Using the Mine Safety and Health Administration's conservative exchange rate of 5, Boughton's 6 dB reduction in air blast translates into reduction in audible noise by more than half. (See 30 CFR 62.101, a copy of which is attached. Attach. 17 hereto.). This is a substantial achievement in noise reduction.

Mr. Kessen also states that Boughton's investigation indicated that neither removing the drilling debris from the blast area nor wetting the rock or the shot hole prior to blasting noticeably reduced the dust generated during the blast. However, dust movement above the quarry wall is reduced by "benching." (Id., Par. 8).

As another effort to reduce the possibility of dust impacts in the neighboring residential areas, Mr. Kessen states that Boughton has instituted a policy limiting blasting to days when the wind is not blowing toward the west or northwest. The only exception to this is when the wind changes after the shot has been set. He explains that once the explosives have been set in the shot holes, it cannot be removed and must be blasted in order to prevent a hazard. (Id., par. 9).

b. Drilling: Dust and Noise Mitigation

Mr. Kessen explains that the blast shot is set in holes which must be drilled into the quarry wall. Boughton hires a drilling contractor to drill these holes. Boughton has instituted a policy of not allowing drilling to commence before 7:00 a.m. To Mr. Kessen's knowledge, there has only been one instance in which drilling has commenced before 7:00 a.m. since 1999, and that was due to a misunderstanding with the drilling contractor. (Id., par. 10).

He has also instructed the driller as a general matter not to drill when the wind is from the east or southeast to reduce noise traveling towards the subdivision and has also confirmed that the driller is using a drill equipped with a downhole hammer which substantially deadens the drilling noise. (Id., par. 11).

He has also confirmed that Boughton's drilling contractor is using dust covers and collectors while drilling. Having observed the operation of the drill, Mr. Kessen can attest that the dust collector, which utilizes a vacuum and bag collection system, collects almost all of the ambient dust created by the drilling process. (Id., par. 12).

c. Noise Mitigation Measures: Processes and Vehicles

i. Reduced Hours of Operation

Mr. Kessen attests to the following facts regarding Boughton's operating times: that to reduce noise in the early hours, Boughton has instituted a 7:00 a.m. start time for all plant operations, including the operation of all Boughton quarry trucks; that all trucks and machinery that strip and excavate overburden do not begin operating until 7 a.m. or later; that the wash plant, which is the piece of equipment closest to the River Run subdivision, is never operated before 7:00 a.m. and rarely operated before 8:00 a.m. and that because the wash plant requires the use of water it is only operated between April and November, weather permitting; that blasting and drilling does not begin until at least 7 a.m. and blasts rarely occur before 10:00 a.m. or after 4:00 p.m.; that since December 2000, in the winter months (generally December through March), customer loading does not begin until 7:00 a.m.; that in the summer months (generally April through November), the 111th Street quarry opens at 6:30 a.m. only for customer truck loading; and that no other plant operations begin at this earlier time. (Attach. 13, pars. 13-18).

He further states that the 7:00 a.m. start time is a later start time than that of other competing quarries in the area, including the Vulcan quarry located directly across 111th Street and that he has personally seen customers leaving the Vulcan 111th Street quarry with fully loaded trucks as early as 6:00 a.m. and has also heard Vulcan's crushers operating as early as 6:00 a.m. (Id., par.19).

Mr. Kessen also states that the Boughton 111th Street quarry ceases operations at 4:00 p.m. in the winter and 5:00 p.m. in the summer and closes its gates to customers at 3:30 p.m. in both the winter and summer. Boughton operates on Saturdays only between 7:00 a.m. and 12:00 p.m. The quarry is closed on Sundays. (Id., Pars. 20-21).

ii. Berm and Buffer

Boughton has constructed an earthen berm to the north and northwest to screen quarry and plant operations from most of the River Run subdivision. Mr. Kessen states that he has been personally responsible for constructing the berm for many years. In his estimation the berm is currently over fifty feet in height. It also sits on a 15 to 20 foot hillside. Thus it actually stands 65 to 70 feet above the DuPage River. Mr. Kessen attests to standing on the top of the berm many times and he judges that it is at least as high as the roof tops of the houses in the River Run subdivision. (Attach. 13, par. 22).

He states that the only operation not shielded by the berm is the wash plant. The berm cannot be extended west of the wash plant because the wash plant ponds are located immediately to the west all around the plant. The DuPage River is located immediately west of the wash plant ponds. (Id., par. 23).

He also states that the wash plant is separated from the River Run subdivision by property owned by Boughton and the DuPage River. He estimates the closest house in the River Run subdivision is approximately 1000 feet from the wash plant. (Id., par. 24).

iii. Pollution Controls on Process Equipment – Main Plant

Boughton has both changed its operations and retrofitted its equipment with noise controls to reduce process noise from its main plant. Mr. Kessen's affidavit describes a number of these measures.

He describes the implementation of a choke feeding procedure designed to reduce noise by having rock continuously present in the bins so that loaded rock falls on rock rather than metal. (Attach. 13, par. 25).

He also describes the installation of "sound blankets" and "sound barriers" at the top and feed and discharge openings at the two main process screens. These dampen the sound and deflect it away from the River run subdivision. He can attest to the fact that these measures have greatly reduced the level of noise from the primary and secondary screens in the main plant and also reduce dust by intercepting and knocking down airborne particulate. (Id., pars. 26-28).

He describes Boughton's investigation of various liners for the discharge chute. A rubber liner installed in 2001 did not wear well and also created a safety hazard because it caused rocks to bounce out of the chute. The rubber liner was subsequently replaced by four ceramic liners in July of 2003. These liners, though more expensive, have not caused rock to bounce out of the chute and appear to be more effective in reducing noise. Mr. Kessen believes that the liners have greatly reduced the level of noise from this chute, estimating that the noise from the main discharge chute has been reduced approximately 75 to 80%. Based on this success, he states that Boughton purchased more ceramic liners which are anticipated to be installed under the jaw crusher by the end of 2003. (Id., pars. 29-31).

Mr. Kessen's affidavit describes the July, 2002 installation of rubber screens on the top deck of the primary screen. He believes these new screens have greatly reduced the noise from the primary screen. (Id., par. 32).

Mr. Kessen's affidavit also states that Boughton has considered several options to reduce noise from the primary hopper, but has not found a safe method for doing so. Because the quarry truck drivers require a clear line of site visibility to the surge bin as one indication of when to

dump their load into the hopper, Boughton determined that it cannot construct a barrier or otherwise enclose the hopper. He states that enclosing the hopper would also lead to overfeeding of the hopper, which would cause an overflow in the surge bin and result in flying rock. (Id., par. 33).

iv. Pollution Controls on Process Equipment -- Wash Plant

Mr. Kessen states that Boughton minimizes the operation of the wash plant. It is never operated in the winter because it cannot operate at temperatures below freezing. It is also only operated on an "as needed" basis in the warmer months. In 2002, the plant operated for only 67 days between April and November. In 2003, it operated for only 56 days between April and October 13th. When the plant is in use, it is rarely started before 8 a.m., and never before 7 a.m. (Id., par. 34).

Mr. Kessen describes constructing a wall around the west side of the wash plant screens to deflect any noise away from the River Run subdivision. He states that Boughton found that the wall was a safety hazard. The structure limited safe access for employees and continuously needed repairs and maintenance, requiring employees to enter unsafe areas. He removed the wall within a year after its installation based upon the comments of a MSHA Inspector who indicated that it was not safe. (Id., par. 35).

He further stated that it is not possible to build a free standing sound barrier structure on the west side of the wash plant because of the proximity of the wash ponds and then the DuPage River immediately to the west of the ponds. (Id., par. 36).

He explains that because Boughton cannot build a berm or other free standing sound wall on the west side of the wash plant, it has instead investigated the sources of noise generated at the wash plant and focused on reducing noise at the equipment level. (Id., par.37). Steps that

that have been taken at the wash plant include replacement of the wash plant's four metal screens with four polyurethane screens. These screens have been designed specifically for wet applications, e.g. wash plants. The movement of gravel on polyurethane creates less noise than does the movement of gravel on metal. He estimates that these polyurethane screens reduced the noise from these screens by approximately 40%. (Id., pars. 37-38).

He has also wrapped the discharge chute from the wash plant screen in a rubber blanket to reduce noise and installed rubber sound barriers in front of the feed and discharge openings on the Pioneer screen. Bolt-in covers already serve as sound barriers on the Deister screens. (Id., pars. 39-40).

v. Vehicle Back Up Beepers/Alarms

Mr. Kessen describes a pilot program to test the safety and effectiveness of radar proximity sensing back up alarms on Boughton's trucks. These alarms greatly reduce the number of times the back-up beeper sounds because rather than going off every time the vehicle backs up, the beeper only sounds when the radar detects an obstacle behind the vehicle. Boughton has now determined that the radar equipment is safe and effective and has installed radar back up alarms on all four of its quarry trucks. (Id., par. 41).

According to Mr. Kessen, Boughton has also investigated installing radar activated alarms on its loaders. Boughton mechanics originally told the Company that there were electrical grounding problems that would prevent the use of the radar alarms on the loaders. However, they have recently resolved that problem through discussions with the manufacturers and plan to install radar activated alarms on Boughton's two loaders in early 2004. (Id., 42).

Mr. Kessen notes that any changes to existing audible alarms must comply with the Mine Safety and Health Administration (MSHA) regulations and provide the same level of safety,

protection and warning for the miners. Although the Mine Safety & Health Control Manual regulations provide the option to use signal persons instead of alarms, Boughton does not consider the use of signal persons to be a viable option in the loading areas at the Boughton plant. At times Boughton has as many as 24 separate loading points. It would have to have a separate signal person assigned to each one of these loading points because it cannot allow workers to walk around in close proximity to heavy trucks and mobile equipment hauling, loading and dumping loose rock and in proximity to rock screens, bins and crushers. Mr. Kessen states his personal belief that having people on foot in the loading areas creates an unacceptable safety hazard. He also points out that MSHA recommends against any kind of foot traffic in haulage areas due to the high risk of an accident and even a fatality. He points to a "MSHA Hazard Alert" which states that mine operators should "Prohibit foot traffic in haulage areas" and to MSHA Fatality Information bulletins which report on fatal accidents resulting from having workers on-foot inside mining plants. (Id., par.43).

Mr. Kessen states that Boughton cannot control the type of back-up alarms used on its customer's trucks. However, it has created routing to allow its customers to load without backing up. Customer trucks are routed to drive forward in a loop up to and out of the stockpiles rather than backing up to the piles. This greatly reduces the triggering of the backup alarms and also increases safety. (Id., par. 44).

vi. Dust Mitigation Measures: Processes and Vehicles

Mr. Kessen points out that the earthen berm to the north and northwest which completely screens plant operations from most, if not all, of the River Run subdivision also prevents process dust from migrating to the subdivision. It is currently over fifty feet in height, which is as least as high as the roof tops of houses in the River Run subdivision. He states that he can personally

attest that he has never observed dust generated at the ground level on the east side of the berm rise to a level high enough to cross over the top of the berm. (Attach. 13, par. 45).

He notes that the 25 acres of Boughton's undeveloped land west of the berm, on both sides of the DuPage River, also creates a buffer area between Boughton's plant and quarry operations and the River Run subdivision of a distance of greater than 1000 feet at the closest point. (Id., par. 46).

He attests that the wash plant, which is not entirely screened by the berm, does not generate any significant amount of dust because it is an extremely wet operation. (Id., par. 47).

He also states that Boughton utilizes water sprays at specific points in the main plant to minimize dust. Boughton's permit and Board regulations require that material processed have a 1.5% moisture content. Although the rock Boughton mines has a naturally high moisture content, plant personnel check the moisture content of the aggregate on a regular basis and also use water sprays as an additional measure to minimize dust. (Id., par. 48).

Mr. Kessen notes that trucks entering and exiting mining sites can carry dust onto the roadways. For this reason, Boughton has installed a wheel wash which washes the tires of all trucks exiting the 111th Street quarry. Boughton also maintains its own water truck and wets quarry roadways and haul areas up to 4 to 5 times each day, as necessary. (Id., par. 49).

He states that Boughton dispatchers check vehicles before they leave the quarry to ensure that tailgates are clean and tarps are used to prevent spillage on roadways. (Id., par. 50).

He adds that Boughton has instructed employees and contractors to minimize speed, sharp turns and rapid accelerations while on Boughton property to reduce dust. In addition, Boughton has posted 10 mph speed limit signs on roadways throughout the quarry. (Id., par. 51).

Mr. Kessen's affidavit demonstrates that if this matter were to go to hearing he would testify as to an extensive program of noise and dust reduction investigation and implementation which has substantially reduced noise and dust from Boughton's facility well beyond regulatory requirements. The measures which have not been implemented are technically impractical based on the nature of the materials being handled, the mining environment, and the safety issues posed. The many measures which have been implemented have reduced noise and dust substantially.

In contrast, Complainant has presented no evidence whatsoever as to any other noise or dust reduction measures. Thus, there are no facts in dispute on this point and summary judgment should be granted in favor of Respondent as to the factors in Section 33(c)(iv) and (v).

CONCLUSION

This is a case that is entirely appropriate and ripe for dismissal on the basis of summary judgment at this time. Complainant simply has no evidence warranting a finding of violation of the Act or regulations and no legitimate purpose will be served by requiring a hearing in this matter.

As is discussed above, Complainant has presented no evidence whatsoever of a permit violation under Section 9(b) of the Act or a regulatory violation of any numeric emission limitation under Section 901.102 or 901.104 of the Regulations.

On the remaining "nuisance" type allegations (Section 9(a) and Section 24 of the Act and Section 900.102 of the Regulations), Complainant has failed to present evidence that Boughton's emissions are unreasonable or that its facility has caused an "unreasonable interference with the enjoyment of life" in the River Run subdivision. The Board's well-established case law on noise nuisance claims makes it clear that the analysis of whether emissions are unreasonable involves a

weighing of all of the Section 33(c) factors. In this case, the evidence demonstrates that the Respondent is entitled to judgment on every factor.

On Section 33(c)(i), the character and degree of the interference, the evidence of noise and dust impacts that Complainant has been able to muster over the four years in which this case has been pending is weak. The noise and dust is characterized variously by her own witnesses as "annoying," as a "cosmetic issue," as unnoticed except when focused on, as "not a huge problem," and as something that her own witnesses realize they should have anticipated when moving next door to two existing quarries. The witness testimony is inconsistent and subjective. What some witnesses thought to be a problem, others did not. Furthermore, several witnesses admitted to being unable to even determine whether the Boughton facility was the source of the noise and dust complained of. Based on this testimony, the minor noise and dust impacts that Complainant's witnesses have attested do not "substantially and frequently interfere[] with the enjoyment of life, beyond minor or trifling annoyance or discomfort." Charter Hall v. Overland, PCB 98-91, slip Op. at 18, (Oct. 1, 1998), Kvatsak v. St. Michael's Lutheran Church, PCB 89-182,Slip Op. at 9 (Aug. 30, 1990).

In fact, the objective evidence confirms that the quality of life in River Run has not been diminished by any emissions from quarrying operations. Property values in River Run are among the highest in the area and are appreciating at a rate that is higher than other premier Naperville properties that are not located adjacent to quarries.

Complainant offered no witnesses or other evidence on the remaining Section 33(c) factors that go to the reasonableness of the emissions complained of. Respondent, on the other hand, provided substantial evidence.

On Section 33(c)(ii), the social and economic value of the Boughton quarrying business, Boughton's witnesses' affidavits demonstrate that the Boughton quarrying operations provide an essential service to the local community and contribute significantly to the local economy, employing 70 regular and contract employees and doing millions of dollars of business with local suppliers every year.

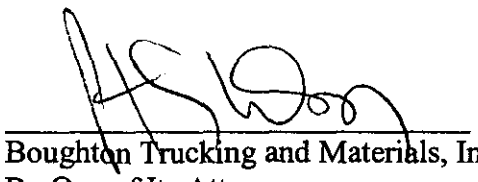
On Section 33(c)(iii), the suitability of location, this is an extremely clear case. The Illinois Appellate Court has ruled that Boughton's quarrying activity is the "highest and best use" of its property based on the rich and accessible limestone deposits found there and the social value of these natural resources to the community. Moreover, Boughton's operations were pre-existing when the River Run subdivision was developed. When constructed, the quarry was located in an entirely agricultural and mining area. In the 1990's residential development moved progressively into the agricultural and mining area, but Wheatland Township continues to have four quarries and several thousand acres in mining and agricultural use. The residents of River Run chose to build their homes right up to the property boundary of one an existing quarry and right across the street from another.

On Section 333(c)(iv) and(v), the technical practicability and economic reasonableness of taking additional noise and dust reduction measures and the measures taken to reduce emissions, again Complainant offered no evidence. Boughton, on the other hand, provided evidence of both an extensive program of effective noise and dust reduction measures and evidence that additional measures have been investigated and found to be unworkable, primarily for safety reasons.

Based on all of the above, Respondent is entitled to ruling on summary judgment in its favor on the alleged violations of Sections 9(a) and 24 of the Act and Section 900.102 of the Regulations (the "nuisance" claims) as well as the alleged permit and regulatory violations.

WHEREFORE, Respondent moves the Board to enter Summary Judgment in its favor and against Complainant on each and every violation alleged in the Complaint and to dismiss this matter in its entirety.

Respectfully submitted,



Boughton Trucking and Materials, Inc.
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STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF ATTORNEY

The undersigned, Patricia F. Sharkey, being first duly sworn upon oath states that she is one of the attorneys for the Respondents in this action, Gina Pattermann v. Boughton Trucking and Materials, Inc., PCB 99-187, and that based upon her personal knowledge and investigation of the facts stated in the attached Motion for Summary Judgment, certifies to her knowledge and belief that the allegations contained in this Motion for Summary Judgment are true in substance and in fact.

PATRICIA F. SHARKEY

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

Signed and sworn to by Patricia F. Sharkey, who is personally known to me and appeared before me, a Notary Public, in and for the County of Cook, State of Illinois, on this 10th day of November, 2003, in order to affix her signature as her free and voluntary act.

Notary Public

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"OFFICIAL SEAL"
Donna M. Draper
Notary Public, State of Illinois
My Commission Exp. 03/25/2006

ATTACHMENTS TO MOTION FOR SUMMARY JUDGMENT

Attachment No.	Title
1	Boughton Trucking & Materials, Inc. First Set of Interrogatories to Complainant Gina Pattermann
2	Complainant's Answer to Boughton First Set of Interrogatories
3	Boughton Trucking & Materials, Inc. First Set of Document Requests to Complainant Gina Pattermann
4	Complainant's Responses to Respondent's Document Requests
5	Boughton Trucking & Materials, Inc. Answers to Complainant Gina Pattermann's First Set of Interrogatories
6	Boughton Trucking & Materials, Inc. Response to Complainant Gina Pattermann's First Request for Production of Documents
7	Gina Pattermann Deposition Transcript
8	William Jene Deposition Transcript
9	Carlene Jenkins Deposition Transcript
10	Lisa Collins Deposition Transcript
11	Donald Boudreau Deposition Transcript
12	Affidavit of Wayne Szepelak
13	Affidavit of Dale Kessen
14	Affidavit of Michael McCann
15	*Boughton Trucking v. County of Will*, No. 80 CH 253, Judgment Order
16	Aerial photographs
17	Title 30, Code of Federal Regulations, 30 CFR 62.101
18	*Meredith v. Principi*, 2001 WL 856283 (N.D. Ill.)

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