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: See Attached Certificate of Service

Please take notice that on June 16, 2004, I filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing and the attached Motion for Reconsideration, copies of which are attached and hereby served upon you.

Dated: June 16, 2004

BOUGHTON TRUCKING AND MATERIALS, INC.

By: _____
One of its Attorneys

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CERTIFICATE OF SERVICE

Patricia F. Sharkey, an attorney, hereby certifies that a copy of the attached Notice of Filing and Motion for Reconsideration was served on the persons listed below by First Class U.S. Mail, proper postage prepaid, on June 16, 2004.

Bradley Halloran
Illinois Pollution Control Board
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(Courtesy Copy)

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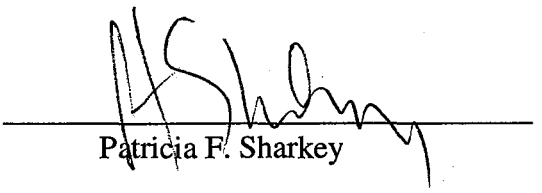

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	)	
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MOTION FOR RECONSIDERATION

NOW COMES Respondent, Boughton Trucking and Materials, Inc. ("Boughton"), by its attorneys, Mayer, Brown, Rowe & Maw LLP, and moves the Board for partial reconsideration of its May 6, 2004 Order granting partial summary judgment in this matter pursuant to 35 Ill. Adm. Code 101.520.

In support thereof, Respondent states:

1. Respondent received the May 6, 2004 Order in this matter via facsimile from the Hearing Officer on May 12, 2004. This motion is filed within 35 days thereafter and thus is timely under 35 Ill. Adm. Code 101.520.

2. The Board's Order granted partial summary judgment, dismissing the regulatory claims, but concluded that summary judgment was inappropriate for the nuisance claims. Boughton moves the Board to reconsider its May 6, 2004 Order because the denial of summary judgment on the nuisance claims was based on the faulty legal conclusion that there exists a "genuine issue of material fact" which requires this matter to go to hearing. This is untrue. For purposes of summary judgment, no issues of material fact remain in this case.

3. The Board's Order repeatedly states that Boughton does not dispute the Complainant's or her witnesses' observations for purposes of the summary judgment motion, but then incongruously concludes (page 10):

> "Therefore, the extent of noise and dust from the facility and the impact it has on the complainant continue to pose genuine issues of material fact. Accordingly, the Board denies summary judgment as to the allegations of nuisance noise and air pollution because genuine issues of material fact exist and Boughton has failed to demonstrate it is entitled to summary judgment as a matter of law."

4. Respondent respectfully disagrees with the Board's conclusion that the extent of noise and dust and its impact on Complainant "continue to pose genuine issues of material fact." The question is first whether there are facts in dispute and second whether they are material. For purposes of summary judgment, the Board is required to take Complainant's evidence in the best light for Complainant. Fraser v. Universities Research Ass'n, 188 Ill. 2d 444, 454 (1999). Thus, those facts may be deemed not to be at issue. Furthermore, any factual dispute over the level of interference or whether or not Boughton's operation caused the interference is *immaterial*, as a matter of law, *if* Complainant's evidence does not support a finding of "unreasonable interference" -- the legal standard which must be proved in order to win a nuisance case under the Environmental Protection Act. 415 ILCS 5/3.02; 415 ILCS 3.06; 415 ILCS 5/24; 35 Ill. Adm. Code 900.102; Boughton's Motion for Summary Judgment ("Motion") at 2-4; Boughton's Reply to Complainant's Memorandum in Response to Motion for Summary Judgment ("Reply") at 1-4.

5. Disputes over immaterial facts are insufficient to preclude summary judgment: "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or

unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Also see, e.g. Klitzka v. Hellios, No. 2-03-0334, 2004 WL 1109781, at *6 (2d Dist. May 17, 2004) (affirming summary judgment for defendant despite immaterial factual disputes); First Ill. Bank & Trust v. Galuska, 255 Ill. App. 3d 86, 90-91 (1st Dist. 1993) (holding that summary judgment for defendant was appropriate where only factual issues raised by Complainant were immaterial to cause of action); An issue of fact is not material, even if disputed, unless it has legal probative force as to the controlling issue." First of Am. Bank, N.A. v. Netsch, 166 Ill. 2d 165 (1995).

In ruling on motions for summary judgment, facts are material if they constitute a legal defense, or if their existence or nonexistence might affect the result of the action, or if the resolution of the issue they raise is so essential that the party against whom it is decided cannot prevail. On the other hand, a factual issue that is not necessary to the decision is not material within the meaning of the rules governing summary judgment and a motion for summary judgment may be granted without regard to whether it is in dispute." See 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure § 2725 (3d ed. 1998).

6. As stated above, for purposes of this Motion for Summary Judgment, the Board can and should assume that the noise and dust impacts on complainant are just what Complainant's objective factual evidence indicates – no more, no less.[1] Thus, the extent of dust and noise and its impact on Complainant does not pose an issue of material fact for purposes of this motion. Furthermore, on the reasonableness of Boughton's emissions, Complainant has presented no evidence contradicting Boughton's witnesses' affidavits and the other evidence

[1] While Complainant will need to prove every element of her claim if this matter goes to hearing, for purposes of summary judgment, the Board may assume that the evidence Complainant presented in the course of discovery – not the unsupported claims and allegations – is fact.

presented with the Motion for Summary Judgment. Thus, the Board's conclusion that issues of material fact remain is incorrect.

7. No new material facts regarding these impacts will be generated at hearing. As the Board recognized in its May 6, 2004 order as well as in its prior orders of August 7, 2003 and September 4, 2003, discovery is now closed and all of the evidence of these impacts that will be admissible at hearing is already before the Board. Moreover, to deny summary judgment to allow a complainant against whom summary judgment is sought to bring in more evidence after the close of discovery is legally improper and defeats the purpose of both discovery and Summary Judgment. Motion at 3; Reply at 4-8. See also Meredith v. Principi, No. 00 C 2476, 2001 WL 856283, at *1 (E.D. Ill. July 27, 2001) (stating that 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"); Colls v. City of Chicago, 212 Ill. App. 3d 904, 954 (1st Dist. 1991) (holding "that fractional discovery and fractional disclosure are not to be tolerated").

8. Given this fact, there is nothing more to be learned about the extent of noise and dust impacts on Complainant by going to hearing. What remains is not more fact-finding on those impacts, but rather the determination of whether those impacts, taken in the best light for the Complainant for purposes of this motion, are "unreasonable." This is a legal issue to be decided based on all of the facts before the Board under the standard in Section 33(c).

9. The Complainant has not carried, and cannot carry, her burden of proof because the level of impact she has demonstrated in the evidence provided during discovery (regardless of whether it can be proved at hearing) does not rise to the level of "unreasonable interference" when the Board considers the uncontradicted evidence on all of the factors stated in Section

33(c)(i) through (v). Thus, taken in the best light for Complainant, the impacts testified to by Complainant's witnesses in deposition are not facts which, if proven at hearing, will make a difference in the outcome of this case. If Complainant has no likelihood of success of the merits, summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (holding that summary judgment is appropriate if no issue of material fact exists warranting a trial on the merits); Safeway Ins. Co. v. Hister, 304 Ill. App. 3d 687, 697 (1st Dist. 1999) (upholding summary judgment in favor of the defendant when Complainant failed to rebut motion with any evidence).

10. The concept of a "nuisance" and "unreasonable interference" is premised on the fact that what is reasonable in one case, may not be so in another. Great Atlantic & Pac. Tea Co., Inc. v. LaSalle Nat'l Bank, 77 Ill. App. 3d 478, 485 (1st Dist. 1979) (stating that "[w]hat is an unreasonable use of one's property . . . to constitute a private nuisance under the circumstances is determined by weighing" several factors, and the "weight that each factor is accorded is relative to [the] circumstances of the case"). Certainly cases may arise in which the level of impacts from a facility are so great that nothing else matters, e.g. where the nuisance rises to the level of being a *nuisance per se*. But a review of the Complainant's witnesses' transcripts and other evidence in the record "taken in the best light for the Complainant" make it clear that this is not a case involving a *nuisance per se*. Rather, this is a standard nuisance case which requires a balancing of the rights of the parties and of society as a whole.

11. Nuisance cases focus not only on the level of impact, but also on whether the impacts were foreseeable by the complainant, whether the source has made all reasonable efforts to mitigate the impacts, whether the land use is appropriate and whether the source is of social value. These considerations are incorporated in the Section 33(c). On the one side of the scale

are the impacts that Complainant and her witnesses allege to be emanating from the Boughton quarry. On the other side are the factors as to reasonableness.

12. In the testimony highlighted by the Board Order (p. 9-10), Complainant's witnesses described dust on lawns and furniture if windows are not kept closed and blasting noise events that wake children sleeping during daytime hours; the latter, of course, being events that it is undisputed occur for only a few seconds once or twice a week during daytime hours. Additional elaboration on these alleged impacts by witnesses isn't going to change the nature of the impacts and by any objective measure they are not extreme. Charter Hall v. Overland, PCB 98-91, Slip Op. (Oct.1, 1998) (To be deemed "unreasonable interference" sounds from a source must objectively affect enjoyment of life, must substantially and frequently cause such interference, and must be beyond minor or trifling annoyance or discomfort.)

13. On the other side of the scale, there are facts that point to the reasonableness of the alleged impacts. The facts before the Board right now demonstrate that this is a case in which the Complainant "moved to the nuisance" and even made a living selling homes to others on property adjacent to the alleged nuisance. The Complainant herself admits this. *See Pattermann Deposition, Attach 7, pp.5, 9. Also see Motion for Summary Judgment, p. 21- 22, and 31-34; Szepelak Affidavit (Attach. 2); McCann & Associates Study, Attach. 16 (including aerial photographs depicting construction of River Run subdivision adjacent to pre-existing quarry operations.).*

In addition, the evidence is clear that the quarry is an appropriate land use for the area. *See Motion for Summary Judgment, pp. 31- 34, Szepelak Affidavit (Attach. 2); McCann & Associates Study, Attach. 16 (including aerial photographs depicting multiple pre-existing quarry operations in the area.)* In fact, the Illinois Appellate Court ruled that *this very quarry* is

the "highest and best use" of the property it sits on. *See Boughton Trucking and Material, Inc. v. County of Will, 112 Ill. App. 3d 26, 32-33 (3d Dist. 1983) and Motion for Summary Judgment p. 32.* The Property Value Impact Study prepared by Boughton's expert witness, Michael McCann, demonstrates that the values of the homes in Complainant's subdivision haven't gone down; rather, they have increased at a greater rate than those of the other premier subdivision in Naperville. *See Motion for Summary Judgment . 26-27 and the McCann & Associates Study, Attach. 16..* Moreover, Complainant does not dispute the study and admits that the quarry has had no adverse effect on her property value. *See Pattermann Deposition, p.113, Attach. 7.*

No activities at the quarry have changed which would cause an increase in emissions since Complainant and her witnesses bought their homes. *See Motion for Summary Judgment, pp. 34-44 , Aerial photos in Attach. 16 (depicting same equipment in same location except quarry face has moved further away from the subdivision), and Szepelak Affidavit, Attach. 12.* In fact, Boughton's witnesses recite numerous steps that have been taken that have reduced emissions. *See Motion for Summary Judgment, pp. 34-44*, Szepelak *Affidavit, Attach. 12 and Kessen Affidavit, Attach. 13.* Complainant's witnesses have provided no evidence of any increase or change in activity at the quarry, nor do they deny that Boughton has taken the steps it has listed.

The Board's May 6, 2004 order finds there is no evidence of regulatory noncompliance. There is also no evidence of poor quarry practices or shoddy operations. Rather, the record shows an extensive program of noise and dust measures in excess of regulatory requirements that have been taken by Boughton to ensure against dust and noise emissions that might trouble its neighbors – including building a 50 foot berm which shields the subdivision, changing operating hours, changing blasting practices, retrofitting equipment and trucks and instituting procedural

measures. *See Motion for Summary Judgment, pp. 34-44 and Kessen Affidavit, Attach. 13.* While Complainant might want all dust and noise in the area eliminated, she has presented no evidence that there are any feasible additional steps that Boughton can take which would benefit her property.

14. The equation here yields a clear result. There are no material facts in dispute. Based on the evidence produced in discovery and without going to hearing, the Board can and should determine right now that this case does not involve impacts that can be characterized as a nuisance *per se* which would outweigh any other consideration. Once the Board reaches that conclusion, all that remains for the Board to do in this case is to balance the evidence on the level of the impacts alleged against the evidence on the other factors under Section 33(c) that go to the reasonableness or unreasonableness of those impacts. All of the evidence on those points is also before the Board – and is uncontradicted.

15. As the Complainant has no evidence contradicting the evidence presented by Boughton on measures taken to reduce noise and dust, priority of location, highest and best use, effect on property values, and social and economic benefit, the Respondent believes Board can and should right now weigh the uncontradicted evidence provided by Boughton on each of these Section 33(c) factors against the *presumptive* level of impacts described by Complainant. Any facts in dispute are immaterial to the outcome of this case and no purpose will be served by going to hearing. See 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure § 2725 (3d ed. 1998).(A factual issue that is not necessary to the decision is not material within the meaning of the rules governing summary judgment and a motion for summary judgment may be granted without regard to whether it is in dispute.)

CONCLUSION

The outcome in this case does not turn on any facts that are in dispute. It turns on the evidence of the impacts which Complainant and her witnesses have put into evidence in light of the evidence presented on the other factors. Thus, even if some facts regarding the alleged impacts are in dispute or not completely clear, e.g.. whether Boughton's facility is the source of the impacts, these are not facts which are *material* to the outcome of this case. Rather, this is an easy case on the facts. *For purposes of this Motion*, Complainant's impact evidence should be taken by the Board in its best light, i.e. assume Complainant's witnesses' factual and objective evidence is true. On the other side of the equation, the movant's evidence regarding the reasonableness of the alleged impacts is uncontradicted by Complainant. The Board can verify this today, without a hearing, because Complainant produced no evidence during discovery contesting Boughton's ample evidence of reasonableness under the factors in Section 33(c)(ii)-(v).

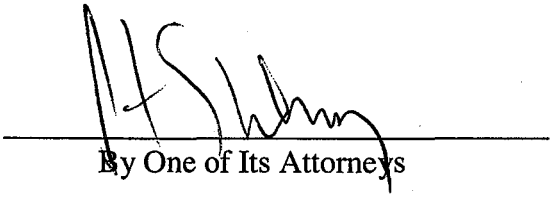
As there are no *material* facts in dispute for purposes of this motion, this is precisely the type of case in which Summary Judgment at the close of discovery is appropriate. Helms v. Chicago Park Dist., 258 Ill. App. 3d 675, 679 (1st Dist. 1994).

WHEREFORE, Boughton requests that upon reconsideration the Board enter summary judgment in favor of Respondent on the remaining nuisance allegations in the complaint.

In the alternative, if the Board, upon reconsideration continues to believe that there are material facts in dispute, Respondent requests that the Board issue an order specifying those facts which it believes are both material and in dispute such that the scope of the hearing can be limited to those specific matters.

Respectfully submitted,

Boughton Trucking and Material, Inc.



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