BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on the 19th day of July, 2004, the undersigned caused to be filed with the Office of the Clerk of the Pollution Control Board the COMPLAINANT'S MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION, a copy of which is herewith served upon you.

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COMPLAINANT'S MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION

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

I. PROCEDURAL BACKGROUND

On May 6, 2004, this Board granted Summary Judgment to Boughton on Pattermann's claim of numerical noise violations. Finding a genuine issue of material fact still exists, however, this Board denied the balance of Boughton's Motion, directed at Pattermann's claims of violations of Sections 9(a) and 24 of the Act. Specifically, this Board found that there existed an interference from noise and air pollutants and that Boughton did not dispute the existence of that interference. May 6 Order at 9. In denying summary judgment, this Board found that "genuine issues of material fact exist regarding the extent and reasonableness of the interferences by noise and dust emissions." *Id.*

Boughton now seeks Reconsideration alleging that "any factual dispute over the level of interference or whether 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." Boughton Motion at ¶ 4. Boughton's argument is pure sophistry. Unwilling to acknowledge that it cannot controvert the existence and extent of the noise and air nuisances it created, Boughton simply waves away the facts and instead calls them "immaterial". As will be demonstrated below, there is no basis for Boughton's effort to have this Board ignore the undisputed facts.

II. BOUGHTON FAILS TO ESTABLISH ANY LEGAL OR FACTUAL BASIS FOR RECONSIDERATION

"Motions for reconsideration are designed to bring to the court's attention newly discovered evidence that was unavailable at the time of the original hearing, changes in existing law, or errors in the court's application of the law." *Continental Casualty Comp. v. Security Insurance Company of Hartford,* 279 Ill.App.3d 815, 820 (1st Dist. 1996). A motion to reconsider an order granting or denying summary judgment "raises the question of whether the judge erred in his previous application of existing law." *Koroguylan v. Chicago Title and Trust Comp.,* 213 Ill.App.3d 622, 628 (1st Dist. 1991).

Boughton asserts that this Board's denial of summary judgment was in error "because it was based on the faulty legal conclusion that there exists a 'genuine issue of material fact' which requires this matter to go to hearing." Boughton Motion at ¶2. Boughton does not assert that this Board made any actual error in applying existing law. Rather, Boughton merely seeks to resubmit the same argument that this Board already ruled on – albeit under the new guise of "immateriality". This effort at misdirection does not meet the established criteria for reconsideration.

III. THIS BOARD APPLIED THE CORRECT STANDARD OF REVIEW ON A MOTION FOR SUMMARY JUDGEMENT – THIS BOARD CORRECTLY FOUND THAT QUESTIONS OF FACT REMAIN AS TO THE UNREASONABLENESS OF THE INTERFERENCE CAUSED BY BOUGHTON

"The party seeking summary judgment may meet its initial burden of persuasion by presenting facts which, if uncontradicted, would entitle it to a judgment as a matter of law." *Loschen v. Grist Mill Confections, Inc.,* PCB 97-174 (Sep. 18, 1997), citing *Estate of Stewart*, 236 Ill.App.3d 1, 7-8 (1st Dist. 1991). If the party seeking summary judgment produces such evidence, then the burden of production shifts to the party opposing the Motion. *Estate of Stewart*, 236 Ill.App.3d at 8. "In determining the existence of a genuine issue of material fact, the courts must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Id.* at 7. While the nonmoving party does not have to prove its case, it must "present a factual basis which would arguably entitle her to a judgment." May 6 Order, citing *Gauthier v. Westfall*, 266 Ill.App.3d 213, 219 (2nd Dist. 1994). "Summary judgment may only be granted where the facts are capable of only one reasonable inference". *Estate of Stewart*, 236 Ill. App. 3d at 12. Finally, "Summary judgment 'is a drastic means of disposing of litigation', and therefore it should only be granted when the movant's right to the relief 'is clear and free from doubt.'" May 6 Order at 5, citing *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 463 (1998); *Purtill v. Hess*, 111 Ill.2d 229, 240 (1986).

Boughton had the opportunity to meet its initial burden of persuasion by evidencing a lack of genuine issues of material fact or presenting "uncontradicted facts" establishing that it is entitled to judgment as a matter of law. It failed to do so. Nevertheless, Pattermann went further and provided uncontroverted evidence establishing the elements of her claims – the testimony of five witnesses attesting to the

existence and extent of interference from both noise and air pollutants. This Board recognized that Boughton did not dispute the observations of Pattermann or her witnesses. May 6 Order at 7.

Pattermann produced a factual basis which would entitle her to a judgment. *Gauthier* at 219. Indeed, Boughton conceded the existence and extent of noise and air pollutants in its Motion for Summary Judgment. To avoid the impact of this concession, however, Boughton argued that the question submitted to this Board was "not whether the Complainant and her witnesses have experienced noise and dust, or even whether that noise and dust interferes in their lives. Rather, the question is whether those emissions have 'unreasonably interfered' with Complainant's enjoyment of life." Boughton Motion for Summary Judgment at 10-11.

Boughton now claims that this Board incorrectly determined that the level of interference suffered by Pattermann and her witnesses' from noise and air pollutants was material to its determination of Boughton's Summary Judgment Motion. Boughton Motion at ¶4. Boughton further asserts that this fact was "immaterial" because it was not in dispute and did not support a finding of "unreasonable interference". Boughton Motion at ¶4-5. Boughton asserts that, "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." *Id.* at 5, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

As noted, Pattermann previously provided this Board with *prima facie* evidence establishing the elements of her claims under Sections 9(a) and 24 of the Act. Pattermann produced the testimony of five witnesses attesting to the existence of interference from both noise and air pollutants and its interference with their enjoyment

of their lives. "The testimony of private citizens, as opposed to that of experts, is sufficient to sustain a finding that there was a violation of the Act." *Hillside Stone Corporation v. Illinois Pollution Control Board*, 43 Ill.App.3d 158, 162 (1st Dist. 1976), citing *Sangamo Construction Co. v. Pollution Control Board*, 27 Ill.App.3d 949, 955 (4th Dist. 1975).

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

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

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

The extent and impact of the dust generated by Boughton were discussed in detail in Pattermann's Memorandum in Response to Boughton's Motion for Summary Judgment. In summary, these include:

1) A cloud of dust that caused people to keep their doors and windows closed and to roll up their car windows.
2) A coating of dust on countertops, furniture, floors and windows.
3) Numerous household activities, such as gardening and enjoying back yards, were curtailed or precluded because of the dust.

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

Again, the extent and impact of the noise Boughton generates was dealt with in detail in Pattermann's prior Memorandum, and includes:

1) Sounds as if a train might be going or grinding or loud trucks.

2) Consistent beeping from truck back-up alarms.

3) Intense noise from blasting.

4) A daily, consistent roaring from equipment.

5) Noises so obtrusive that it is difficult to hold a conversation.

Boughton concedes that it has caused interference via noise and air pollution and further concedes the extent of that interference. These are the essential predicate facts necessary to establish a violation of Sections 9(a) and 24 of the Act. These facts are not rendered "immaterial" merely because Boughton cannot dispute them. We are thus left with a simple question – was the interference "unreasonable"? This is a question of fact that cannot be summarily determined. See *Gardner v. Township High School District 211*, PCB 01-86, Slip. Op. at 4 (December 6, 2001) (The issue of unreasonableness is not the proper subject of summary disposition and there must be a

fully developed hearing record before the Board can determine whether interference is unreasonable.)

Boughton's "immateriality" argument is a pretext for its effort to re-argue its flawed Section 33(c) analysis. According to Boughton, because the existence and the extent of the noise and air pollutants are conceded and, consequently, "immaterial", then all that is left for this Board to do is to balance the Section 33(c) factors to determine if the conceded interference is unreasonable. To reiterate the point, the analysis of Section 33(c) factors is premature until the close of all the evidence. Boughton has not asserted any basis of law for its conclusion it is entitled to the Section 33(c) analysis at this stage of the proceeding.[1] A Section 33(c) analysis is inappropriate and premature in the context of summary judgment. Thus, as this Board held in *Loschen v. Grist Mill Confections, Inc.,* PCB 97-174, Slip. Op. at 4 (Sep. 18, 1997):

> [A] complainant is not obligated to introduce evidence on each of the Section 33(c) factors. (*See Incinerator, Inc. v. Pollution Control Board*, 59 Ill. 2d 290, 296, 319 N.E.2d 794, 797 (1974); *Processing and Books, Inc. v. Pollution Control Board*, 64 Ill. 2d 68, 75-77, 351 N.E.2d 865, 869.) Furthermore, the respondent has the burden of proof as to the Section 33(c) factors "to the extent that a factor is not a necessary part of Complainants' burden as to unreasonableness." (*IEPA v. W.F. Hall Printing Company* (September 15, 1997) PCB 73-30, 27 PCB 371, 372, n.3 (citing *Processing and Brooks, Inc.*, 64 Ill. 2d 68, 351 N.E.2d 865 (1996)).) The Board finds that it would be premature to weigh the factors of Section 33(c) of the Act at this time, since complainant is not required to present facts in the complaint concerning Section 33(c) of the Act in order to file a sufficient pleading but instead may present facts at hearing. Therefore the Board denies respondent's motion to dismiss prior to hearing because facts could be present at hearing that demonstrate, after weighing the factors of Section 33(c) of the Act, that respondent has

[1] Boughton's reliance on *Charter Hall v. Overland*, PCB 98-81 (Oct. 1, 1998) is particularly misplaced here. In that case, the complainant presented the testimony of neighbors to successfully prosecute a noise violation under the Act. The neighbors testified to noises and interference startlingly similar to that testified to by Pattermann and her witnesses – neighbors awakened by the noise, the inability to use their patios, the need to shut their windows. That evidence was sufficient for the Board to find that the noise interfered with their enjoyment of life. After, and only after, that determination and the presentation of all of the evidence, did the Board perform its Section 33(c) analysis.

violated Section 9(a) of the Act.

In its order denying Boughton's original Motion, this Board set forth the applicable order of findings to be made in a nuisance noise and air proceeding. "The threshold issue is whether the sounds have caused an interference with the complainant's enjoyment of life or lawful business activity." May 6 Order at 9. This Board found that it is undisputed that "there exists interferences from both noise and air pollutants." May 6 Order at 9. For purposes of summary judgment, this Board found that there does still exist a genuine issue of material fact regarding the extent and reasonableness of those interferences. *Id.* "If the Board finds that a respondent's air contaminants or sound emissions have interfered with the enjoyment of life, the Board then considers the factors set forth in Section 33(c) of the Act." *Id.* (*emphasis added*). Quite simply, Pattermann has produced sufficient evidence to defeat Boughton's Motion for Summary Judgment. Unreasonableness cannot be decided until this Board, not Boughton, weighs the Section 33(c) factors at the close of this case.

V. CONCLUSION

Boughton does not assert that this Board failed to apply any legal standard correctly – the appropriate standard of review on a Motion for Reconsideration. Pattermann's evidence of the existence and extent of, and interference by, the noise and air pollutants created by Boughton is undisputed. Pattermann is not obligated to contest, in the narrow confines of Boughton's Motion for Summary Judgment. As this Board correctly found, the Section 33(c) analysis should be conducted by this Board after a hearing, not by Boughton in its interpretive effort to obtain summary disposition nor under the pretext of a motion for reconsideration. For all of the foregoing reasons, Boughton's Motion for Reconsideration should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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on this 19th day of July, 2004.

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By: _____
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