BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on August 19, 2004, I filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing and the attached BOUGHTON'S REPLY TO COMPLAINANT'S MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION, copies of which are attached hereto and hereby served upon you.

Dated: August 19, 2004

BOUGHTON TRUCKING AND MATERIALS, INC.

By: _____
One of its Attorneys

Patricia F. Sharkey
Mark R. Ter Molen
Kevin Desharnais
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, Illinois 60603-3441
(312) 782-0600

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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

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

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

I. The Board failed to undertake the analysis of the evidence required on a motion for summary judgment based on an improper basis.

The Board's May 6, 2004 order denying summary judgment on the statutory nuisance claims was predicated on a finding that there are material issues of fact pertaining to the extent of interference. *See* Order at 10. This was an error. No material facts are in dispute for the purposes of the summary judgment motion, and the Board should have undertaken the legal analysis to determine whether, as a matter of law, the evidence is sufficient to support a claim of unreasonable interference.

Once Boughton informed the Board of the basis for its motion, and identified the evidence which it believes shows the absence of a genuine issue of material fact, Complainant, in order to avoid summary judgment and support its nuisance claim, was required, at that time, to come forward with evidence demonstrating the existence of a material issue of fact in dispute as

to whether Boughton has caused an unreasonable interference. *See* Celotex v. Catrett, 477 U.S. 317, 324. The non-moving party cannot rest on the pleadings alone, but must designate specific facts that establish that there is a genuine triable issue. Id. at p. 324. Complainant has failed to carry this burden.

Complainant has come forward with some evidence regarding interference, and on a motion for summary judgment, the Board is required to take Complainant's allegations in the best light for the Complainant. Fraser v. Universities Research Ass'n, 188 Ill. 2d 444, 454 (1999). Thus, the Board is entitled to assume, for purposes of summary judgment, that the types of interference testified to in Complainant's witnesses depositions can be proven to have occurred, and that the source of that interference is Boughton's quarry operations.[1] *What the Board is not entitled to do is deny Boughton's Motion for Summary Judgment on the basis that Complainant might be able to prove something more at hearing.* A motion for summary judgment must be decided on the basis of the record as it exists at the time it is heard. Logan v. Old Enterprise Farms, Ltd, 139 Ill.2d 229, 237, 564 N.E.2d 778, 782 (1990). Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 744 U.S. at 323. The evidence of the extent of impact is what has been testified to by Complainant's witnesses or

[1] Complainant continues to muddy the issues in this case with its self-serving argument that Boughton has admitted its facility has interfered or unreasonably interfered with Complainant's enjoyment of life, yet fails to cite any portion of Boughton's motion as support. See Response at 7. As Boughton has repeatedly stated, it does not admit any such facts and Complainant would bear the burden of proving such at any hearing should this case go that far. Boughton has simply stated that on summary judgment the Board must take the facts in the light most favorable for the party moved against, and, in doing so, it remains the case that the facts alleged do not rise to the level of an unreasonable interference. Thus Complainant has not carried her burden of proof and any dispute regarding the alleged interference is not a material fact standing in the way of summary judgment.

otherwise disclosed during discovery and submitted with Complainant's Response to the Motion for Summary Judgment -- no more, no less.

As the Supreme Court held in Celotex, "there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323. The Board's order has not identified any genuine issue of a material fact that would preclude it from undertaking the analysis of the evidence required on a motion for summary judgment. A review of the evidence shows that the extent of interference testified to by Complainant's witnesses is insufficient, as a matter of law, to support its nuisance claim. Further, the Board is also required to consider the uncontested evidence on the remaining 33(c) factors presented by Boughton in support of its motion. Uncontradicted facts in a summary judgment movant's affidavit are admitted and must be taken as true for purposes of the motion. 735 ILCS 5/2-1005(c); *see also* Heidelberger v. Jewel Cos., 57 Ill. 2d 87, 312 N.E.2d 601 (1974). Complainant has failed to come forward with *any* evidence controverting the facts presented by Boughton, and the Board is required, as a matter of law, to take those facts as true for purposes of summary judgment. Taking this undisputed evidence and the evidence regarding interference (which is also undisputed for the purposes of the summary judgment motion) and construing it in the light most favorable to Complainant, the Board must undertake the balancing specified by Section 33(c) of the Act to determine whether the evidence presented is sufficient to sustain a claim of unreasonable interference. The Board's failure to undertake this analysis is the error of law which is the basis for Boughton's motion for reconsideration.

The Board is therefore required to assess the sufficiency of the evidence provided on each of the applicable Section 33(c) factors, as required by the controlling Supreme Court case law,

Wells Manufacturing, Inc. v. IPCB, 73 Ill. 2d 226, 383 N.E.2d 148 (1978), and make a finding as to whether collectively the evidence in the record, taken in the best light for the Complainant, demonstrates a likelihood that Complainant may succeed on the merits on her claims of "unreasonable interference." Thus, the Board must go back and reconsider its May 6, 2004 order and undertake this analysis.

II. To withstand a motion for summary judgment at the close of discovery, Complainant must have evidence supporting the essential elements of her claim.

As stated by the Supreme Court in Celotex, "if the non-moving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." Id. at 331. While it is true that "to make out its case" of an Illinois statutory nuisance violation, a complainant does not have to provide evidence on every one of the Section 33(c) factors (Processing and Books, Inc. v. PCB, 64 Ill. 2d 68, 351 N.E.2d 865 (1975)), the complainant must have a sufficient quantum of evidence to support a Board finding that the complainant has a likelihood of success in proving "unreasonable interference." Wells Mfg. Co, 73 Ill. 2d at 383. In this case, Complainant does not.

Complainant's Response incorrectly states that she has provided sufficient evidence to withstand this Motion for Summary Judgment. Complainant's Response at 5. In fact, Complainant has failed to provide evidence on any element of her Section 9(a) and 24 claims except the alleged "interference." As the Board is well aware, "interference" alone is not a violation of the Act. *See e.g.*, Knox v. Turris Coal Co., PCB 00-140, 2003 Ill. ENV LEXIS 2 (January 9, 2003) (finding that complainants had not proven substantial interference). Complainant must have evidence of "unreasonable interference" as determined by reference to the Section 33(c) factors in order to succeed with her statutory nuisance claims and survive a

motion for summary judgment. Wells Mfg. Co., 73 Ill. 2d 226, 383 N.E.2d 148 (1978); Kamholtz v. Sporleder, PCB No. 02-41, 2003 Ill. ENV LEXIS 97 (February 20, 2003); Logsdon v. South Fork Gun Club, PCB No. 00-177, 2002 Ill. ENV LEXIS 692 (December 19, 2002); Roti v. LTD Commodities, PCB No. 99-19, 2001 Ill. ENV LEXIS 90 (February 15, 2001).

Since the Complainant in this case has not provided evidence on any of the other factors that go to the reasonableness of the emissions, she is standing entirely on her evidence of "interference" under Section 33(c)(i). Therefore, on this Motion for Summary Judgment, the Board should take the unrebutted evidence on the Section 33(c) (ii) –(v) factors presented by Boughton and weigh that evidence against Complainant's evidence on the "interference." If the Board finds in favor of Boughton on all of the other Section 33(c) factors, the sole basis for denial of this Motion for Summary Judgment would have to be on a finding that the alleged "interference," taken in the best light for the Complainant, is *per se* unreasonable, i.e. that it indicates a level of interference that is so significant that it makes the other factors irrelevant.

A multitude of cases have considered similar allegations of noise and dust and the opinions in those case make it clear that the alleged interference in this case, even taken in its best light for the Complainant, is not "unreasonable" in light of the strong and unrebutted evidence on the other Section 33(c) factors offered by Boughton. A review of just a few of those cases will make it clear that the evidence of interference in this case does not rise to the level of a *per se* nuisance. Knox v. Turris Coal Co., PCB 00-140, 2003 Ill. ENV LEXIS 2 (Jan. 9, 2003) (Noise from a mine ventilation fan was not an unreasonable interference when complainant could hear noise inside his house if the wind was "just right," the noise kept complainants awake at night, caused them to run the air conditioning slightly more, and caused complainant to spend less time at his duck pond); Gardner v. Township High School District 211, PCB 01-86, 2002 Ill.

ENV LEXIS 403 (July 11, 2002) (Complainants failed to carry burden of proving that noise substantially interfered with their lives given inconsistent testimony and testimony that the noise was "very irritating" or an annoyance); Logsdon v. Bowman, PCB 01-42, 2001 Ill. ENV LEXIS 139 (March 15, 2001) (Where Complainant testified that he was forced to wear earmuffs in his workshop and that the noise disturbed his sleep and gave him headaches, the Board held that the "complainant had not produced sufficient evidence to prove that the noise from respondent's sawmill operation was substantial and frequent, and beyond minor or trifling annoyance and discomfort").

In Glasgow v. Granite City Steel, Complainants testified that they could hear a roar 'like a big wind tunnel' coming from the plant, the squeal of the trucks' brakes, their beds vibrate due to activity at the facility, and that their homes shook so severely that one complainant's glasses would fall off of his VCR. PCB 00-221, 2002 Ill. ENV LEXIS 112 (March 7, 2002). They also alleged that they were awakened by vibrations, rattling noise from bulldozers, slamming noise from trucks' tailgates, general plant noise, shackle noise like rocks, pressure noise, and noise from intercoms. One complainant claimed that booms from the Granite City Steel facility would knock him out of bed, while another complainant said the booming would shake her house. After considering all of the factors, the Board found there was an "interference," but not "unreasonable interference" under the Act.[2] Therefore, there was no violation.

In comparison, in this case, the complaints regarding dust and noise were not unreasonable given the factors under 33(c). One of Complainant's witnesses claimed that he

[2] The Board found for GCS on the following factors: the social and economic value of the pollution source; the suitability of the source/priority of location; and the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits. While the Board found the factor of subsequent compliance neither for nor against GCS, the record is clear that Boughton has taken more action to mitigate any dust and noise perceived to be emanating from its property than GCS.

kept the windows of his house closed in the spring and summer because the dust was too great. Another witness alleged that her family did not use their backyard because of the dust. Complainant alleged that dust accumulated on her furniture and she could rarely open her windows due to the dust. Complainant's witnesses also claimed that the noise awoke their children. Given the evidence set forth by Boughton on all 33(c) factors, as a matter of law, such complaints do not rise to the level of unreasonable interference.

III. Complainant is simply wrong as to who bears the burden of proof on "unreasonable interference."

What is troubling is that Complainant continues to believe that she has no responsibility for proving the essential elements of "unreasonableness," and, furthermore, that she has no duty to rebut the evidence of "reasonableness" presented by Boughton." The leading Illinois Supreme Court case, Wells Manufacturing Company v. Pollution Control Board, 73 Ill. 2d 226, 233, 383 N.E.2d 148, 151 (1978), stated unequivocally:

> The Act places the burden of proof on the Agency or other complainant to show that the respondent has caused or threatened to cause air pollution, which in the context of this case means unreasonable interference with the enjoyment of like or property. (Ill. Rev. Stat. 1971, ch. 111 ½, par. 1031(c); Incinerator, Inc. v. Pollution Control Board (1974), 59 Ill. 2d 290, 300.)

An examination of the series of Supreme Court cases leading up to Wells make it clear that evidence on "unreasonableness" under the Section 33(c) factors is an integral part of a complainant's burden of proving a statutory nuisance violation under the Act. In fact, the constitutionality of Section 9(a)'s "air pollution" provisions has been held to depend on the standards for determining "unreasonableness" contained in Section 33(c). See City of Monmouth v. Pollution Control Board, 57 Ill. 2d 482, 313 N.E.2d 161 (1974).

In Lonza, Inc. v. IPCB, 21 Ill. App. 3d 468, 472, 315 N.E.2d 652, 654 (3d Dist. 1974), the Appellate Court rejected the argument that the Section 33(c) factors were not a part of the Complainant's burden, explaining:

> The argument has been made that the factors in section 33(c) are relevant only as matters of defense yet in City of Monmouth v. The Pollution Control Board, filed 1974, Ill., 313 N.E.2d 161, the Supreme Court in responding to respondent's contention that section 9 of the Environmental Protection Act was unconstitutional for the reason that it did not contain sufficient standards for determining what constitutes air pollution declared, 'We hold that Section 9(a), when read in conjunction with sections 3(b), 3(d) and 33(c), contains sufficient standards.' *Accordingly, to determine the existence of air pollution it is necessary to examine the factors listed in section 33(c). The reasonableness described in section 33(c) refers both to the cause and effect of the emissions.*
>
> *Section 31(c) provides that the burden shall be on the Agency or other complainant to show either that the respondent has caused or threatened to cause air or water pollution. According to the Monmouth case a necessary prerequisite to determining the existence of air pollution is to examine the factors in section 33(c). Therefore, such examination becomes part of complainant's burden under section 31(c).*

If, as Complainant argues, the Complainant has no duty to present evidence addressing the critical element of her claim "unreasonable interference," how can the Board make factual findings that these standards have been met? In fact, Board decisions in which the Board has not sufficiently detailed its consideration of the Section 33(c) standards in its opinions have been reversed. Mystik Tape v. Pollution Control Board, 60 Ill. 2d 330, 328 N.E.2d 5 (1975). The lack of evidence in the record contesting Boughton's evidence on the remaining 33(c) factors requires that summary judgment be granted.

If the complainant doesn't bear the burden of proof on the elements of its claim in these cases, who does? Is the answer that the burden shifts to the respondent, once the complainant has provided *prima facie* evidence of merely "interference," as Complainant in this case suggests?

No -- the leading U.S. and Illinois Supreme Court case law from Celotex to Incinerator, Inc. and Wells are clear on this point. The Complainant bears the full burden of coming forward with evidence proving "unreasonable interference" -- not just "interference."

> [T]he EPA had the burden of proving all essential elements of the type of air pollution violation charged, and the Board must then assess the sufficiency of such proof by reference to the section 33(c) criteria, basing thereon its findings and orders.

Incinerator, Inc. v. Pollution Control Board, 59 Ill. 2d 290, 300, 319 N.E.2d 594 (1974).

Who bears the burden of proof on the Section 33(c) factors in nuisance cases was again made very clear by the Supreme Court in Wells Manufacturing Company v. Pollution Control Board, 73 Ill. 2d 226, 383, 383 N.E.2d 148 (1978) in which the Court walked through the evidence on each of the Section 33 (c) factors and concluded that the complainant had not carried its burden of proof as to the technical practicability of abating odors – factor (iv). Id. at 73 Ill. 2d at 236, 383 N.E.2d at 153. In fact, Dissenting Justice Clark in Wells, in his pointed criticism of the majority opinion, argued that the Wells majority should have treated Section 33(c)(ii)- (v) factors as simply "affirmative defenses" on which the Respondent bears the burden proof. 73 Ill. 2d at 242, 383 N.E.2d at 155. This minority opinion is at odds with the Illinois Supreme Court's position in Incinerator, Inc. and its reaffirmation of this position by the majority in Wells.[3] The controlling Illinois Supreme Court law is Wells which makes it clear that the burden of proof does not shift, that the Section 33(c) factors are not "affirmative defenses," and that "unreasonableness" is an essential element of the violation that must be proven by the complainant.

[3] Notably, the dissent in Wells recognized that the majority opinion effectively overruled the Supreme Court's 1975 decision in Processing and Books, Inc. on the issue of burden of proof: "The majority opinion in the instant case (Wells) silently overrules the [Processing and Books, Inc.], unanimous holding of this Court." 383 N.E.2d at 155, 679.

Although we have spent considerable effort to address Complainant's misstatements about who bears the burden of proof, the fact is that even if Complainant didn't bear the full burden of proof as to unreasonableness from the beginning, summary judgment still should be granted in this case because Complainant failed to rebut the evidence provided by Boughton. Even if the Section 33(c) "reasonableness" factors were just "affirmative defenses" and the burden of proof on those factors were on the respondent, once the respondent has provided evidence on those factors the complainant must have some evidence rebutting that evidence in order to survive a motion for summary judgment. Celotex, 477 U.S. at 324. In this case, Boughton has carried any such "affirmative defense" burden of proof and the evidence Boughton has placed in the record is unrebutted by any evidence from Complainant. Therefore, even if there were a legal basis for arguing that Complainant does not have an initial burden of proof as to "unreasonable interference" Complainant in this case has failed to provide any evidence rebutting Boughton's evidence and dismissal on summary judgment should follow.

Under Celotex and the Illinois Supreme Court's holdings in Incinerator and Wells and the long line of statutory nuisance cases decided by the Board over the years, it is clear that this case should be dismissed on summary judgment. The Complainant has presented no evidence of interference which is so overwhelming that it must be deemed *per se* unreasonable – thus there is no issue as to interference which would be material to the outcome of this case. There is also no evidence of unreasonable emissions under any of the remaining factors, including the technical feasibility of further reducing noise or dust from Boughton's quarry operations, the critical factor in Wells. Thus, Complainant cannot succeed in demonstrating "unreasonable interference" under the Act and justice and the controlling Supreme Court decisions demand that this case be

dismissed on Summary Judgment in its entirety and with prejudice. See Celotex, 477 U.S. 317, at 331, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505 (1986) ("If the non-moving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.").

IV. Complainant has offered no legal support for her contention that it is premature to grant summary judgment at this point.

Complainant's contention that it is "premature" to require her to produce evidence on anything but "interference" and thus premature to grant this Motion for Summary Judgment is completely unfounded. She has failed to provide any legal support whatsoever for this position. Rather, Complainant continues to point to the Board's order in Loshen v. Grist Mill Confections, Inc., PCB 97-174 (Sept. 18, 1997) which, as Boughton has previously pointed out, involved a motion for summary judgment *on the pleadings* – not after the close of discovery. In that case, the Respondent filed a motion for summary judgment *two days* after the Complainant had filed her first discovery requests, obviously before the Complainant had had received any discovery from the Respondent. The Board's opinion discusses Illinois pleading requirements and makes it clear that its denial of summary judgment in that case was based on its conclusion that the complainant was "not required to present facts in the *complaint* concerning Section 33(c) of the Act in order to file a *sufficient pleading*..." Slip. Op. at 3, 1997 WL 593982 (emphasis added). That is a fundamentally different case than the case at bar where during a lengthy discovery period Complainant had every opportunity to produce evidence supporting the essential elements of her claim and to obtain discovery from Boughton.

The Complainant is essentially making the argument that the Board can *never* grant summary judgment where a complainant alleges a nuisance – whether that complainant has evidence to support such a claim or not. Response at 7. Her position is that the question of

whether there has been "unreasonable interference" doesn't have to be proved until hearing. Response at 10. This is simply an effort to avoid summary judgment and it is simply wrong. Again, Complainant offers no support for this novel theory that would insulate statutory nuisance claims from the legal procedures which apply to all other claims – whether under the Act or under common law. If a complainant has the burden of proving "unreasonable interference," as the Supreme Court has held, and she fails to disclose evidence of "unreasonable interference" during discovery, there is no reason that "unreasonable interference" can't be determined on summary judgment based upon the evidence and pleadings in a complete record – this is done in nuisance cases all the time. *See, e.g.*, Hansen v. Orth, 247 Ill. App. 3d 411, 617 N.E.2d 357 (1st Dist. 1993) (affirming grant of summary judgment in favor of defendant homeowner in the neighbor's nuisance action, finding the plaintiffs failed to produce evidence to support their claim); Pyne v. Witmer, 159 Ill.App.3d 254 (2d Dist. 1987) *aff'd* 129 Ill.2d 351, 543 NE.2d 1304 (1989) (affirming summary judgment for defendant property owner in auto accident case for failure to support claim that foliage created an obstruction or encroachment so as to constitute a public nuisance); 512 N.E.2d 993, Markowski v. City of Naperville, 249 Ill.App.3d 110, 617 N.E.2d 1251 (2nd Dist. 1993) (affirming summary judgment for defendant City on public nuisance claim in action challenging location of a road where plaintiff failed to produce sufficient evidence of a statutory violation, a necessary element of its claim).

Contrary to Complainant's statement, in Gardner v. Township High School District 211, PCB 01-86 (Dec. 6, 2001), the Board did not make a blanket determination that "the issue of unreasonableness is not the proper subject of summary disposition..." Response at 7. Rather, in Gardner, the Board concluded that in that case the testimony of witnesses who had been identified but apparently not deposed "would be directly relevant to the question of whether the

chillers cause unreasonable interference." Thus, in that case the record was incomplete. In the case at bar, all of Complainant's witnesses have been deposed and the facts to which they would attest at hearing are all in the transcripts in the record and can be examined for purposes of this Motion for Summary Judgment.

No serious claim can be made that a motion for summary judgment is premature when a motion is filed after over two years of discovery. Celotex, 477 U.S. 317, at 318 (Holding Summary Judgment motion is not premature after one year of discovery.). At the close of discovery and in response to a Motion for Summary Judgment, Complainant has a duty to produce all of the evidence she has supporting the alleged violation of "unreasonable interference." In some cases, like Gardner, a Respondent may not have done its homework and deposed all of Complainant's witnesses. But, in this case, Boughton did its homework and all of the evidence is in the record. Thus, this dispositive summary judgment motion is not premature. On the contrary, it is timely, it is completely appropriate and in order and, in fact, it is favored because the totality of evidence presented by Complainant and admissible at hearing does not support the central element of the violation. See Celotex, 477 U.S. at 327. ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.' See Schwarzer, 'Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,' 99 F.R.D. 465, 467 (1984).")

V. The Complainant is poised to misuse the Board's May 6, 2004 order to try to introduce evidence at hearing that was not provided during discovery.

The Board has made it clear several times that discovery is closed and no new evidence can be manufactured at this late date and brought into a hearing. Aug. 7, 2003 Slip Op. at 4; Sept. 4, 2003 Slip Op. at 2; May 6, 2004 Slip Op. at 1. Yet the Board's May 6, 2004 conclusion

that there are remaining issues of material fact pertaining to the level of "interference" has unfortunately been interpreted by the Complainant as opening the door for the introduction of additional evidence – not provided in discovery – at hearing. Complainant is desperate to keep this weak case alive and is looking for any opportunity to reopen the door on the long pending and now closed evidentiary period. This type of ambush litigation tactic is explicitly prohibited by Board Rules 101.616 and 101.800 (35 Ill. Admin. Code 101.616 and 101.800) and by Illinois Supreme Court Rule 219 ("Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences"). If Complainant is allowed to bring in evidence on "unreasonable interference" which was not made available in discovery it would constitute prejudicial and reversible error. See 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"). A complainant cannot circumvent summary judgment at the end of discovery by contending it may be able to bring in more evidence later at hearing. The system simply doesn't work that way.

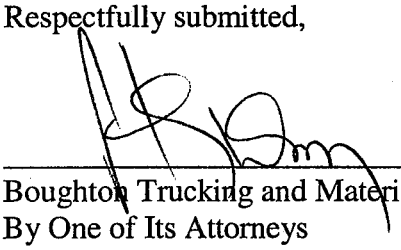
CONCLUSION

As stated in Boughton's motion, this is actually a very simple and straight-forward case. It represents an extreme, even for nuisance cases, in the Complainant's complete absence of evidence on "unreasonableness." The Complainant who alleges noise and dust interferes with her enjoyment of her property, moved next door to an existing quarry and subsequently made her living selling property and homes to others next to the same quarry. Her property values have

not gone down – they have increased at a higher rate than other comparable subdivisions not located adjacent to a quarry. The Appellate Court has held this very quarry is the "highest and best use" of the quarry property. Boughton has voluntarily undertaken an entire program of noise and dust reduction measures that has dramatically reduced emissions and that meets and exceeds the measures the Board has imposed in other cases. All of this is unrebutted.

The Board should not allow summary judgment to be circumvented on a specious basis where there is no likelihood of success on the merits. Boughton urges the Board to take this opportunity to reaffirm the holding in Wells, straighten out Complainant's muddy thinking about the elements of a nuisance claim under the Act, and provide clear guidance for the swift disposition of future nuisance cases by summary judgment where the evidence is insufficient.

Respectfully submitted,



Boughton Trucking and Materials, Inc.
By One of Its Attorneys

Patricia F. Sharkey
Kevin Desharnais
Mark R. Ter Molen
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, Illinois 60603-3441
(312) 782-0600

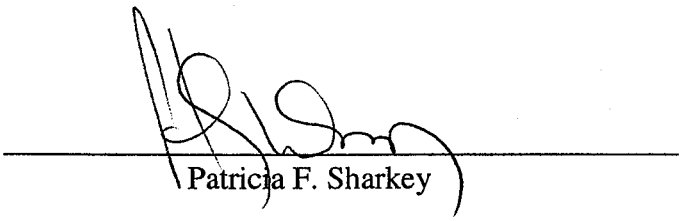
CERTIFICATE OF SERVICE

Patricia F. Sharkey, an attorney, hereby certifies that a copy of the attached Notice of Filing and BOUGHTON'S REPLY TO COMPLAINANT'S MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION was served on the persons listed below by First Class U.S. Mail, proper postage prepaid, on August 19, 2004.

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601
(Courtesy Copy)

Michael S. Blazer
Matthew E. Cohen
The Jeff Diver Group, LLC
1749 S. Naperville Road, Suite #102
Wheaton, IL 60187
(U.S. Mail)

Kenneth A. Carlson
Tracy Johnson & Wilson
Sixth Floor, Two Rialto Square
116 North Chicago Street
Joliet, IL 60432
(U.S. Mail)



Patricia F. Sharkey

Patricia F. Sharkey
Mark R. Ter Molen
Kevin Desharnais
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, Illinois 60603-3441
(312) 782-0600