

COPY

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and  
MARSHALL LOWE,

Co-Petitioners,

vs.

COUNTY BOARD OF McHENRY  
COUNTY, ILLINOIS,

Respondent.

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JUL 7 2003

PCB 03-221  
(Pollution Control Board  
Siting Appeal)

STATE OF ILLINOIS  
Pollution Control Board

NOTICE OF FILING

TO: See List Referenced in Proof of Service

PLEASE TAKE NOTICE that on July 2, 2003, we filed with the Illinois Pollution Control Board, the attached *Co-Petitioners' Response to the Village of Cary's Motion to Intervene* in the above entitled matter.

LOWE TRANSFER, INC. and  
MARSHALL LOWE

By: David W. McArdle

PROOF OF SERVICE

I, a non-attorney, on oath state that I served the foregoing Response on the following parties by depositing same in the U.S. mail at or before 5:00 p.m. on this 2<sup>nd</sup> day of July, 2003:

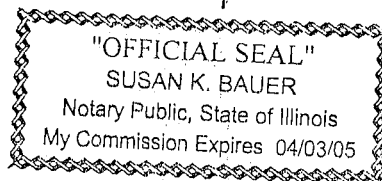
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SUBSCRIBED and SWORN to before  
me this 2<sup>nd</sup> day of July, 2003

Susan K. Bauer  
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LOWE TRANSFER, INC. and )  
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**RESPONSE TO VILLAGE OF CARY'S MOTION TO INTERVENE**

Co-Petitioners, LOWE TRANSFER, INC. and MARSHALL LOWE ("Lowe"), by Zukowski, Rogers, Flood & McArdle, their attorneys, respectfully request that the Pollution Control Board deny the Village of Cary's ("Cary") Motion to Intervene as a party in this siting appeal. In support of its response, Lowe states as follows:

1. On June 5, 2003, Lowe filed the instant appeal contesting the May 6, 2003, decision of the County Board of McHenry County, Illinois ("County Board") denying Lowe's application for site location approval for a proposed waste transfer station pursuant to Section 40.1(a) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/40.1(a)).
2. Cary seeks leave to intervene on the basis that (a) its citizens will be significantly impacted by the proposed transfer station; (b) its participation is necessary to insure that the County's decision is vigorously defended on appeal and (c) to the extent the Lowe application was granted, and it was approved with respect to several criteria, (it) also seeks to participate to the extent necessary to preserve its right to appeal any grant of the Lowe application. Cary's motion to Intervene, ¶¶ 7-9.
3. The Board's procedural rules at 35 Ill. Adm. Code 107.200 provides that proper party petitioners are either the applicant if the application was denied or "other participants" at the hearing if the application was granted:

The following persons may file a petition for review of a decision concerning siting of a new pollution control facility pursuant to Section 40.1 of the Act:

- a) Siting applicants. Any person who has properly applied to one or more units of local government, pursuant to Section 39.2 of the Act, for siting approval of a new pollution control facility and has been denied siting approval under Section 39.2 of the Act, may file a petition for review of the decision to deny siting.
- b) Other persons. Any person who has participated in the public hearing conducted by the unit of local government and is located as to be affected by the proposed facility may file a petition for review of the **decision to grant siting**. [Emphasis added.] (35 Ill. Adm. Code 170.200)

In this case, Lowe's application was denied and therefore, Lowe is the only proper petitioner on appeal.

4. The Board's procedural rules at 35 Ill. Adm. Code 107.202 further provides that, on appeal, the only parties to the appeal of a denial at the County Board level are the petitioner and the County Board:

- a) In a petition to review a local government's decision concerning a new pollution control facility, the following are parties to the proceeding:
  - 1) The petitioner or petitioners are the persons described in Section 107.200 of this Part. If there is more than one petitioner, they must be referred to as co-petitioners; and
  - 2) The unit(s) of local government whose decision is being reviewed must be named the respondent(s). In an appeal pursuant to Section 107.200(b), the siting applicant must also be named as a respondent. (35 Ill. Adm. Code 170.202)

5. Section 101.402 permits intervention by persons under limited situations. The past decisions of the Illinois Pollution Control Board and Appellate courts have consistently denied intervention status to third parties following a County Board denial of a site approval request. *See, McHenry County Landfill, Inc. v. Environmental Protection Agency*, 154 Ill. App. 3d 89 (2<sup>nd</sup> Dist 1987) (the court determined that following a county board denial of a site approval request, Section 40.1 of the Act precludes objectors from becoming parties to a PCB review hearing); *Laidlaw Waste Systems, Inc. v. The McHenry County Board*, PCB 88-27 (3/10/87) (the Board denied intervention status to adjacent

villages raising jurisdictional issues relating to defective notice by an applicant where villages fully participated in County Board proceedings).

6. This application of the law was reaffirmed by the Second District in *Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*, 160 Ill. App. 3d 434 (2<sup>nd</sup> Dist 1987). Since the *McHenry County Landfill* and *Waste Management* decisions, the Pollution Control Board has also consistently denied intervention when there is a local siting application denial. See, *Waste Management of Illinois, Inc. v. Lake County Board*, PCB 87-75 (July 16, 1987); *City of Rockford v. Winnebago County Board*, PCB 87-92 (November 19, 1987); *McLean County Disposal Company, Inc. v. County of McLean*, PCB 87-133 (March 10, 1988); *Waste Management of Illinois, Inc. v. McHenry County Board*, PCB 88-39 (March 24, 1988); *Laidlaw Waste Systems, Inc. v. McHenry County Board*, PCB 88-27 (June 16, 1988); *City of Rockford v. Winnebago County Board*, PCB 88-107 (November 17, 1988); *Clean Quality Resources, Inc. v. Marion County Board*, PCB 90-216 (February 28, 1991)

7. The “significant impact” of the Lowe transfer station on the residents of the village of Cary is no different than the proposed landfill on the aquifer below the Villages of Algonquin and Lake in the Hills (“Villages”) in PCB Docket No. 88-27. In Docket No. 88-27, the McHenry County Board denied a landfill siting. In Docket No. 88-27, after fully participating in extended hearings before the County Board, the Pollution Control Board denied intervention status to the Villages who argued that adverse water quality impacts and jurisdictional issues qualified them for intervention. See, *Laidlaw Waste Systems v. The McHenry County Board*, PCB 88-27 (3/10/88).

8. Cary’s assertion in its motion that its participation is “necessary to insure the county’s decision is vigorously defended” arrogantly assumes the incompetence or questions the capability of the County board and its counsel, Charles Helsten. All one needs to do is search for Mr. Helsten’s name in the field of transfer stations and landfill siting cases to see just how misleading Cary’s position really is. The record is complete, the rules set out who the parties are on appeal, and there is only one issue, i.e., whether the County Board’s decision was against the manifest weight of the evidence. Established law

prohibits third party participation when the applicant's request was denied below and Cary's motion should be denied.

WHEREFORE, Co-Petitioners, LOWE TRANSFER, INC. and MARSHALL LOWE, request that the Village of Cary's Motion to Intervene as a party in this proceeding be denied.

Respectfully submitted,  
LOWE TRANSFER, INC. and  
MARSHALL LOWE  
By: Zukowski, Rogers, Flood & McArdle

By:   
\_\_\_\_\_  
David W. McArdle

David W. McArdle, Attorney No: 06182127  
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