ORIGINAL

ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and MARSHALL LOWE,	)	
Petitioners,	)	
vs.	)	Case No. PCB 03-221
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS	)	
Respondent.	)	

NOTICE OF FILING

TO: See Attached

PLEASE TAKE NOTICE that on the 4th day of August, 2003, we mailed for filing with the Illinois Pollution Control Board, the attached **Response to Motion in Limine**, a copy of which is attached hereto.

Respectfully Submitted,

On behalf of the County Board of McHenry County, Illinois

By: Hinshaw & Culbertson

Charles F. Helsten (HKL)
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RESPONSE TO MOTION IN LIMINE

NOW COMES COUNTY BOARD OF McHENRY COUNTY, ILLINOIS, through its attorneys, HINSHAW & CULBERTSON, and hereby moves the Pollution Control Board to deny Co-Petitioners, LOWE TRANSFER, INC. AND MARSHALL LOWE's Motion in Limine to preclude oral statements, limit public comments and limit all statements by parties and participants, and in support thereof, states as follows:

1. **LIMITING AND/OR RESTRICTING PUBLIC COMMENTS AND PUBLIC STATEMENTS IS INCONSISTENT WITH THIS BOARD'S PREVIOUS RULING IN THIS CASE.**

On June 5, 2003, Petitioners, Lowe Transfer, Inc. and Marshall Lowe, filed a petition asking the Board to review the May 6, 2003 decision of the County Board of McHenry, Illinois, which denied siting approval for a municipal solid waste transfer facility. On June 19, 2003, Village of Cary filed a motion to intervene in the siting appeal. This Board denied Village of Cary's motion to intervene in *Lowe Transfer Inc. and Marshall Lowe v. County Board of McHenry County, Illinois*, PCB 03-221 (July 10, 2003), 2003 WL 21753698, slip op. at *1. In its decision, this Board specifically provided: "Cary may, however, contribute oral or written statements at hearing in this matter in accordance with Sections 101.628 and 107.404 of the Board's procedural rules, but may not examine or cross-examine witnesses. Cary may also participate through public comments or

amicus curiae briefs pursuant to Section 101.110(c), and in accordance with Section 101.628." (Citations omitted), slip op. at *2.

Because this Board has explicitly held that participants who are not parties to this appeal have the right to contribute oral and written statements and participate through public comments, this Board should not now reduce or limit the rights of the participants to do so. Such a decision would be contrary to this Board's previous decision and also contrary to the general spirit and intent of landfill siting proceedings in Illinois, as set forth in sections 39.2 and 40.1 of the Illinois Environmental Protection Act. Consequently, this Board should deny Petitioners' Motion in Limine.

2. LIMITING AND/OR RESTRICTING PUBLIC COMMENTS AND PUBLIC STATEMENTS IS INCONSISTENT WITH POLLUTION CONTROL BOARD POLICY AND PROCEDURE.

The Pollution Control Board has a policy of encouraging public participation in matters such as the present case. In fact, Section 101.110 of the Board's procedural rules specifically provides: "The Board encourages public participation in all of its proceedings." (Emphasis added.) 35 Ill. Adm. Code 101.110. Furthermore, Section 107.404 provides: "Persons who are not parties . . . are considered participants and will have hearing participation rights in accordance with 35 Ill. Adm. Code 101.628." 35 Ill. Adm. Code 107.404. Additionally, the Board has explained that Section 40.1 of the Environmental Protection Act is "intended to offer the public and interested persons opportunity to participate through testimony and/or written statements." (Emphasis added.) *Waste Management of Illinois, Inc. v. Lake County Board,* PCB 87-75 (Oct. 15, 1987). Consequently, Petitioners' request to limit public participation is contrary to the Board's policy of encouraging public participation, and, as a result, Petitioners' Motion in Limine should be denied.

Furthermore, Petitioners have no right to invoke the limits and restrictions that they have requested in their Motion in Limine. Several sections of the Illinois Administrative Code provide

that participants and interested parties are to be afforded certain rights of comment and input. For example, Section 107.404 provides: "Participants may offer comment at a specifically determined time in the proceeding." This section explicitly provides that participants who wish to make comments will be allowed the opportunity to do so. Furthermore, Section 101.628 provides that participants should be allowed to make oral statements, written statements, public comments and submit amicus curiae briefs. 35 Ill. Adm. Code 101.628.

Specifically, Section 101.628(a) provides that the hearing officer may permit participants to make oral statements on the record when the time, facilities and concerns for a clear and concise hearing record so allow. 35 Ill. Adm. Code 101.628(a). Based on Sections 101.110 and 107.404 and the Board's policy of encouraging public participation in Board hearings, it would be inappropriate for a hearing officer to deny and/or limit participants the right to make Section 101.628(a) oral statements. Because public participation is clearly encouraged by the Pollution Board, it would be inappropriate to preclude Section 101.628(a) oral statements by granting Petitioners' Motion in Limine. Consequently, the Board should deny Petitioners' request to preclude Section 101.628(a) oral statements.

Furthermore, Petitioners have no right to the limitations that they have requested regarding Section 101.628(b) written statements. Section 101.628(b) provides: "Any participant may submit written statements relevant to the subject matter at any time prior to hearing or at hearing. Participants submitting such a statement will be subject to cross-examination by any party." 35 Ill. Adm. Code 101.628(b). The hearing officer does not have authority under Section 101.628(b) to disallow participants from providing Section 101.628(b) written statements, and, therefore, should also have no authority to limit the time for such statements. Limiting such statements would be contrary to the specific mandates of Section 101.628(b), which allows participants to unconditionally submit written statements "at any time prior to hearing of at hearing." 35 Ill. Adm.

Code 101.628(b). Consequently, the Board should deny Petitioners' request to limit the time for Section 101.628(b) written statements.

Finally, this Board should deny Petitioners' request to limit Section 101.608 statements to the record generated in the proceeding before the McHenry County Board. As set forth above, the Board should not allow Section 101.628(a) oral statements to be limited in any way. Furthermore, the Board should not in any way limit Section 101.628(b) written statements because Section 101.628(b) specifically provides that participants may submit any comment that is "relevant to the subject matter." 35 Ill. Adm. Code 101.628(b). Therefore, any and all 101.628(b) statements that are relevant to the subject matter of the proceeding should be allowed. For these reasons, Petitioners' request to limit all Section 101.628 statements should be denied.

3. THE POLLUTION CONTROL BOARD IS MORE THAN CAPABLE OF DETERMINING WHAT PUBLIC STATEMENTS ARE RELEVANT AND APPROPRIATE TO CONSIDER.

Petitioners' assertion that permitting oral statements from participants at the hearing "may very well lead to reversible error" is simply incorrect and unsupported by any legal authority. See ¶5-6 of Motion in Limine. In fact, disallowing public comments could lead to reversible error because sections 101.628 and 107.404 of the Illinois Administrative Code specifically provide that the public be allowed to participate in such a hearing.

Furthermore, the cases cited by Petitioners for the proposition that the Pollution Control Board must review the record developed at the local siting hearing under a manifest weight of the evidence standard are simply irrelevant. No one contends that the Pollution Control Board is allowed or required to consider new facts. However, that does not mean, as Petitioners contend, that public statements should be limited or disallowed entirely. See ¶5 of Petitioners' Motion in Limine. In fact, nothing in section 101.628 limits public statements to *de novo* proceedings. The fact of the matter is that the Pollution Control Board is well-equipped to determine what, if any,

public comments should be disregarded if the comments provide additional facts not already in the record or are otherwise irrelevant to the proceedings.

Petitioners fail to acknowledge that the Pollution Control Board is clearly full well and able to determine what public statements or comments should not be considered by the Board, but instead, Petitioners suggest that the solution is to simply disallow or limit public participation. That solution is simply inadequate because participants and members of the public have a right to present comments and statements at the hearing. See 35 Ill. Adm. Code 101.626; 35 Ill. Adm. Code 107.404. Furthermore, if individuals are not allowed to provide their comments, it impossible to know whether or not those comments could have been relevant and should have been considered by the Board. Consequently, the most logical solution is to allow unlimited public comment and allow the Pollution Control Board to use its expertise in determining what comments should be considered in reaching its decision.

WHEREFORE, Respondent, COUNTY BOARD OF McHENRY COUNTY, ILLINOIS respectfully requests that this Board deny Petitioners' Motion in Limine in its entirety.

Respectfully Submitted,

On behalf of the County Board of McHenry County, Illinois

By: Hinshaw & Culbertson

Charles F. Helsten

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on August 4, 2003, a copy of the **Response to Motion in Limine** was served upon:

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Via facsimile and by depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 P.M., addressed as above, as well as providing a copy via facsimile to the facsimile numbers provided above.

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