BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and MARSHALL LOWE,	)	
Co-Petitioners,	)	
v.	)	PCB No. 03-221 (Pollution Control Board Siting Appeal)
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS,	)	
Respondent.	)	

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on August 27, 2003, we filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing, Response of the Village of Cary With Respect to Co-Petitioners' Motion to Strike Village of Cary's Brief and Motion for Sanctions Submitted as a Public Comment to the extent Required by the Board and Revised Brief on Behalf of Amicus Curiae Village of Cary, copies of which are attached and hereby served upon you.

Dated: August 27, 2003

VILLAGE OF CARY

By: Percy L. Angelo
One of its Attorneys

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CERTIFICATE OF SERVICE

Percy L. Angelo, an attorney, hereby certifies that a copy of the foregoing Notice of Filing, Response of the Village of Cary With Respect to Co-Petitioners' Motion to Strike Village of Cary's Brief and Motion for Sanctions Submitted as a Public Comment to the extent Required by the Board and Revised Brief on Behalf of Amicus Curiae Village of Cary was served on the persons listed below by facsimile and by U.S. Mail, or by personal delivery in the case of Hearing Officer Halloran, on this 27th day of August 2003.

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Response of the Village of Cary With Respect to Co-Petitioners' Motion to Strike Village of Cary's Brief and Motion for Sanctions
Submitted as a Public Comment to the Extent Required by the Board

Now comes amicus curiae, the Village of Cary ("Village" or "Cary"), by its attorneys and provides this response with respect to Co-Petitioners' Motion to Strike Village of Cary's Brief and Motion for Sanctions ("Lowe Motion"). To the extent the Board determines that the Village is not permitted to directly respond to Co-Petitioners motion directed against the Village brief amicus curiae and requesting sanctions against the Village it is asked that the Board consider this document as a public comment in this matter.

1) Cary has obtained a copy of Co-Petitioners' Motion to Strike Village of Cary's Brief and Motion for Sanctions. Even though his motion seeks sanctions against the Village and seeks to strike its brief, the Co-Petitioners did not serve it upon the Village or otherwise provide any notice to the Village, even as a courtesy.

2) The Village, on behalf of its citizens, asks leave to respond to the Lowe Motion by way of this response and/or public comment. Since the Lowe motion relates solely to the Village's brief, the Village suggests that such a response is appropriate under the circumstances, and that allowing the Village to respond would promote the interests of fairness.

3) Co-Petitioners move to strike the Village's brief as overlong. The Village did not intend to violate any requirement as to the length of the brief but understood itself to be in compliance with the instructions as to post-hearing filings provided at the Pollution Control Board hearing.

4) Toward the close of the hearing in this matter, the Hearing Officer consulted off the record with the attorneys for the parties as to the briefing process and then invited the attorney for the Village of Cary to join those discussions, explaining that he had previously discussed those issues with the parties in status conferences. He provided a schedule for briefing which made the parties' main briefs due August 22, a Friday, and the brief of the Village of Cary, as well as public comment, due the following Monday. Reply briefs for the parties were not to be due until the end of the week of August 25, later extended to September 2, 2003. There was no discussion of the required length of the briefs. After the proceedings went back on the record, the Hearing Officer announced the briefing and public comment process. Again there was no discussion of the required length of briefs or public comments.

5) Co-Petitioners' brief was sent by delivery service to the Village of Cary, not arriving Monday, August 25, the same day Cary's response was due.

6) Despite the very limited time to respond, Cary filed its brief on time (overnighting copies to attorneys for the Co-Petitioners and the County).

7) As the Board is aware, the record in this matter is almost 4000 pages long, encompassing eleven very long days of testimony and numerous witnesses presented by Co-Petitioners and objectors. The Village of Cary was the most active participant before the County, attending throughout the hearing, presenting five of the six expert witnesses for

objectors and becoming fully familiar with the voluminous record. The citizens and other objectors have relied on the participation of the Village to keep them informed and to address the issues of common interest.

8) Co-Petitioners have appealed under the manifest weight of the evidence standard as to four criteria on which the application was denied (criteria 2, 3 and 5 as well as the unnumbered experience criterion) as well as several additional matters. The numerous matters under appeal as well as the voluminous record make it extremely difficult to discuss the issues involved and provide the record support desired in severely limited space. Co-Petitioners have suggested on numerous occasions that objectors have made, are making or will make arguments outside the record. This is not correct. The Village is very satisfied to rely on the very strong record assembled by the County, and has believed it desirable to demonstrate that record support, not only to support the County decision, but also to assist the Board in dealing with the voluminous record. This is especially so where the Village is the sole objector participating formally as amicus curiae, in which role it has tried to address for the benefit of the Board the evidence presented by citizens and other objectors in the record below.

9) The Co-Petitioners' briefing of this record may encompass up to 100 pages, including its main brief of 50 pages and its reply brief, presumably also of 50 pages. The Co-Petitioners seeks to limit the Village's brief to 20 pages. This is very one-sided. It is very difficult, indeed the Village respectfully suggests that it is not possible, to deal with the multiple issues raised by Co-Petitioners and the County record in 20 pages.

10) The Village of Cary had no intention of violating the Board's requirements or the instructions of the Hearing Officer, but simply did not understand that in light of the record and issues presented, that its post-hearing filing was to be limited to 20 pages.

11) In light of the multiple challenges raised by Co-Petitioners and inherent complexities of the voluminous record, the Village of Cary believes that its brief will be helpful to the Board in considering the issues in this case, and respectfully requests that the Board accept the Village's brief as filed. Alternatively, should the Board choose not to accept the Village's brief as filed, in order to preserve its right, on behalf of its citizens, to provide an argument and record summary of the County proceedings, and to assist this Board in its consideration of the issues, Cary has prepared a revised brief of 32 pages and seeks leave of the Board and/or the Hearing Officer to file such revised brief. Despite substantial efforts it has not been possible for the Village to limit its discussion further without sacrificing issues of which it believes this Board should be apprised.

12) Such filing should cause no prejudice to the Co-Petitioners. No new material has been added and the Applicant has had Cary's full argument since at least August 26, one week prior to the filing date for its Reply. A copy of this revised brief is being sent by facsimile to Co-Petitioners' attorney with this document.

13) Accordingly, the Village of Cary, asks the Board and/or the Hearing Officer to accept the Brief of the Village as filed August 25, 2003. Alternatively, the Village asks leave of the Hearing Officer and/or the Board to file the attached Revised Brief on Behalf of Amicus Curiae Village of Cary of 32 pages instanter. To the extend the Board and/or Hearing Officer order that Cary's Revised Brief be filed, Cary asks that the Appendices to its original brief,

which in several cases are color reproductions, be accepted as appendices to its Revised Brief. If desired by the Board, Cary will file additional copies of its Revised Brief with the Appendices attached.

14) Applicant seeks sanctions against the Village of Cary but has not seen fit to serve or otherwise provide Cary even with a courtesy copy of its motion. While entirely unfair, it is also inappropriate to sanction a participant in a manner which is essentially ex parte.

15) The Village intended no disrespect to the Board and its rules or to Co-Petitioners by its filing. Indeed, its primary goal was to provide a summary of the record as to the issues under review, for the benefit of the Board, and also to lay to rest any concerns that the arguments of the objectors and citizens in this case were outside the record. While Co-Petitioners seek sanctions, there is no harm or prejudice to Co-Petitioners which, in fact, have been provided a more extensive example of supporting evidence and have had, and will have in comparison to the minimal time accorded the Village of Cary, a generous amount of time to respond.

Respectfully Submitted,

The Village of Cary

Dated: August 27, 2003

By Percy L. Angelo
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Revised Brief on Behalf of Amicus Curiae Village of Cary

The Village of Cary is adjacent to the proposed Lowe Transfer Station and participated actively as a party objector before the McHenry County Siting Committee. During the eleven days of hearing Cary and the other objectors presented six expert witnesses in opposition to the proposed siting. Cary appreciates the opportunity to participate as amicus curiae before the Pollution Control Board ("PCB" or "Board"), and provided a statement through its Acting Mayor Steve Lamal in the Board's hearing in this case. Cary strongly supports the denial of siting by the McHenry County Board. Its discussion below relies entirely on the record made before the County as to the criteria which the County found had not been met, and although the standard for review is whether the County's decision is against the manifest weight of the evidence, in fact, based on the assembled record, the County could not have reached any result other than to deny siting.

The Village of Cary brief will address the Lowe claims that the County's decision below is against the manifest weight of the evidence, that the record fails to show any basis for the County decision and that the County improperly considered the experience of the Applicant. Paragraphs 4(a), (c) and (d) of the Lowe Petition. For the additional Lowe claims regarding the host fee and the compliance of the County decision with County rules, Paragraph 4(a) and (e) of

the Lowe Petition, as well as for its discussion of the manifest weight of the evidence standard of review, Cary relies on and supports the brief submitted on behalf of McHenry County.[1]

I. The Experts Presented by Objectors Were Well Qualified, Credible, And On Many Dispositive Points Their Opinions Were Unchallenged

In his main brief Mr. Lowe includes a discussion of the experts who testified, a discussion which is very one-sided. See e.g. Lowe Br. 8 et seq. This, of course, is not the whole story, and the Board is referred to the record below for the full description of the qualifications of objectors' experts. A summary of the evidence concerning these qualifications is provided in Attachment 1 to this Brief. Objectors' experts are highly qualified.

The objectors' experts are practicing professionals, not professional testifying experts. Far from a liability, the County Board members were entitled to give their views added weight as a result. The County was entitled to consider this orientation where there was a conflict in the evidence.

The County was also entitled to consider inconsistencies in the experts' testimony. Mr. Lowe makes much of Mr. Gordon's role in teaching a course on transfer stations and preparing certain manuals. At hearing Mr. Lowe's attorney objected to consideration of those same manuals. See e.g. Tr. 5-7, C00181.[2] Mr. Lowe and his witness Mr. Gordon also objected when it was shown that the manuals are inconsistent with Mr. Gordon's design and operating plan for the Lowe station. See e.g. Tr. 56-57, 69-70, 72-76, C00181; App. Ex. 8, pp. 7-24, 10-21, C00238; App. Ex. 10, pp. 36-37, C00240 (manual recommendations for high daily volumes of washwater for cleanliness, vector management and regulatory compliance, rather than

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[1] The Lowe Petition also claims that "the record fails to show any basis for the County Board's decision." Paragraph 4(d). The Lowe Petition does not explain what this means and it misstates the applicable legal standard which is "manifest weight of the evidence." As discussed below this claim is also evidently wrong.

[2] Transcript references before the County Committee are cited Tr. ___, followed by the designation for that volume found in the Index of Record. References to the transcript of the PCB hearing held August 14, 2003, will be PCB Tr. ____.

washing once per week as proposed by Mr. Gordon); Tr. 45-46, 52, C00182; App. Ex. 10, p. 43, C00240 (manual recommendation to orient transfer building with its closed side to the prevailing winds to control litter and odors. Mr. Gordon did just the opposite, leaving the usually open side to the west, facing the McHenry County Conservation District Hollows conservation area ("MCCD" or "Hollows"), to the west). Mr. Lowe may argue that the manuals are overly conservative, but the County Board members were entitled to conclude that Mr. Gordon's design was not as conservative or state of the art as he claimed, and to rely more heavily on the contrary opinions of objectors' experts.

Finally, on many important points, there was no disagreement between the experts. As discussed below, no one challenged Mr. Larry Thomas' testimony for objectors as to the movement of shallow groundwater swiftly offsite to Lake Plote, Lake Atwood, Lake Killarney and certain "high quality" and "irreplaceable" area wetlands. No one challenged Mr. Nickodem's testimony of onsite spills or leaks which can get into stormwater. No one questioned that the site would have odors, litter and noise. No one questioned Mr. Andrew Nickodem's Auto Turn program showing larger transfer trailers can't make the turns onsite. No one questioned, indeed Mr. Lowe's own data show it, that the only owned residential area in the state near a transfer station has many homes showing negative or minimal appreciation, under 1%, despite an area norm of 5-6%. The County was entitled to look at these areas of agreement and find that, with everything else presented, they provided strong support for denial.

II. The Record Is Clear That the Facility Is Not Located, Designed or Proposed To Be Operated So As To Protect The Public Health, Safety and Welfare

Criterion 2 of Section 39.2 requires that the facility be located, designed and proposed to be operated to protect the public health, safety and welfare. Mr. Lowe devoted almost no time to this issue at the PCB hearing other than to argue that the proposed site was zoned industrial, as if

that answered every possible question. In fact, the experts presented by objectors, experts in transfer station design and operation, groundwater and surface water, demonstrated serious environmental risks posed by the site location, its design, and its operating plan.[3]

A. The Proposed Site Threatens Groundwater, Lake Plote, Lake Atwood, Lake Killarney and High Quality Wetlands

Because of the site's location near several sensitive uses and the Lowe proposal to use an infiltration chamber to handle stormwater flows, the groundwater at this site is especially vulnerable. The Village of Cary's groundwater expert, Larry Thomas from Baxter & Woodman, an engineer with extensive practice in hydrogeology in the area, testified to the groundwater concerns at the site, Tr. 6-59, C00188; Tr. 5-12, C00189; Cary Ex. 2, C00326, expanding on some misleadingly vague and wholly inadequate descriptions in the application. See Vol. 1, 2-4, C00001; Vol. 2, App. A, C00002. Without providing a groundwater flow map, the application says that groundwater flows from the site to a lake on the MCCD Hollows conservation area, which it fails to name. Mr. Thomas testified that shallow groundwater from the site flows from the site to the north and northeast to Lake Plote on the neighboring Plote property, then to Lake Atwood on the MCCD property and then to wetlands northeast of the site. To the extent the groundwater reaching Lake Atwood exits as surface water, it flows to Lake Killarney. All of these sensitive water bodies are in close proximity to the site. The groundwater flow is relatively rapid, 56 to 120 feet per day. Tr. 25, C00181. This testimony was not disputed. See. e.g. Tr. 87, C00186.

Unfortunately, the uses impacted by the site groundwater are highly sensitive. The significance of Lakes Plote, Atwood and Killarney are self-evident and it is irresponsible for the

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[3] In many respects the evidence supporting the County's findings on criteria 2 and 5 will overlap, e.g. the nature of the site will necessitate certain elements in the plan of operations and the plan of operations will directly address both criteria 2 and 5. To avoid repetition, the discussion of criterion 2 is incorporated in the discussion of criterion 5, and vice versa.

application not to discuss them. (Cary Ex. 5, C00334 & C00334A, attached hereto as Appendix A, is a site aerial showing the site and the surrounding uses, including the lakes and wetlands). Especially serious, however, is the failure to discuss the impacted wetlands. Mr. Lowe's consultants testified there were no wetlands onsite, but did not address offsite impacted wetlands. Tr. 138, C00178. The Lowe application, however, includes a letter from the U.S. Fish & Wildlife Service noting the presence of "high quality," "unmitigatable" and "irreplaceable" wetlands designated L-72, in the site vicinity. Vol. I, 2-21, C00001, see Appendix B, attached hereto.[4] Unaccountably, Lowe's application did not provide the locations of those wetlands, Tr. 32-34, C00181, so the Village of Cary obtained and provided the applicable map for the record. The mapped wetlands, designated L-72, are immediately north and east of the site, directly downgradient of the site and directly at risk from site groundwater and other site activities. Cary Ex. 14, C00394. The County record fully supports the conclusion, indeed the record demands it, that the site poses an immediate threat to groundwater and surface waters, including irreplaceable wetlands, which the Applicant had sought to obscure by leaving his application incomplete. Mr. Thomas' testimony concerning shallow site groundwater was undisputed, and, indeed, Mr. Lowe barely touches on these issues in his main brief. The failure to address these issues in the application raises serious concerns about the credibility of the consultants who prepared the Lowe application. (For Mr. Thomas' additional testimony about deeper groundwater beneath the

[4] The standard Fish & Wildlife Service Endangered Species Act clearance letter identified the presence or absence of endangered species. It specifically cautioned that it did not provide clearance with regard to possible impact on these wetlands due to contaminated groundwater flows. With regard to wetland L-72 the letter said: "ADID site #L 72 is a high quality habitat wetland which is considered "irreplaceable" and unmitigatable based on the fact that the complex biological systems and functions that this site supports cannot be successfully recreated within a reasonable time frame using existing restoration or creation methods. This site is designated a McHenry County Natural Area Inventory. In addition, this ADID site exhibits high water quality values for shoreline/streambank stabilization and stormwater storage." As Mr. Nickodem pointed out, even without contamination you can impact a wetland just by changing the flow to it. Tr. 19-20, C00214.

Tiskilwa Till and its flow toward the Village of Cary municipal wells, see the references at Attachment 1, Item 2).

There was also general agreement that the two downgradient monitoring wells proposed by Mr. Lowe would monitor only the top of the shallow aquifer, missing contaminants such as solvents and pesticides which are heavier than water and known as "sinkers." Tr. 36-39, C00180; Tr. 34-37, C00187; Tr. 51-52, C00187; Tr. 47, C00189.[5] And Mr. Lowe's consultants testified they did not know whether they would in fact be monitoring for the kinds of contaminants actually found in municipal wastes. Tr. 41-43, C00181.

The groundwater is at special risk at the Lowe site because of the stormwater system Mr. Lowe has proposed. The stormwater infiltration system proposed for the site is designed to inject stormwater into the ground and the groundwater without provision for sealing off spills or possible contamination. There is no question that a garbage transfer station can put contaminants in its stormwater – from spills, from broken hydraulic lines, from trucks dripping engine oil and from liquids from the waste which is tracked out of the tipping floor, drips off trucks, or is formed when stormwater comes in contact with wastes on the transfer station ramps. Tr. 84-85, C00181; Tr. 29-30, C00184; Tr. 58-60, C00216; Tr. 14, C00217. Such contact water, which is considered leachate, Tr. 48-49, C00181, can easily include hazardous wastes. The County's own figures show that 4080 lbs. of such hazardous wastes, (.34% of the waste load of 600 tons per day) will pass through the site each day. Tr. 33-34, C00187. Using Lowe's proposed infiltration system, any contaminated flows would go directly to groundwater.[6]

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[5] The Lowe witness also agreed that it is usual when monitoring groundwater to put in an upgradient and downgradient well. The Lowe application calls only for downgradient wells. Tr. 84, C00199.

[6] Mr. Lowe's brief states cryptically that Mr. Thomas' references to hazardous waste were in error. Lowe Br. 10. This is not correct. Mr. Thomas referred to the County data in Lowe's application as to the amount of hazardous waste in the County waste stream which would pass through the transfer station. While much of this material may (cont'd)

The evidence as to spills, leaks, tracking of leachate and contaminated stormwater was supported by the testimony of Cary's expert witness, Andrew Nickodem, an engineer with Earth Tech who designs transfer stations and has actually run transfer stations, publications prepared by Mr. Lowe's own experts, by Marshall Lowe himself, and by the witnesses who visited transfer stations and the video of transfer station operations presented at hearing. See e.g. discussion above, as well as Tr. 12-14, C00210; Tr. 9-56, C00215; Cary Exs. 26-27 and 37, C00421-422 and C00463.

Once in the stormwater system most contaminants will move directly to the groundwater. Oils and gasoline, which are lighter than water, may be trapped by the catch basins. All other contaminants heavier than water (many solvents), or dissolved in water, will pass right through the catch basins and into the groundwater. There is no capability to valve off a spill or to catch a contaminant for testing before it goes to groundwater, Tr. 82-83, C00181.

Why did Mr. Lowe's consultants design such a horrendous system? Basically it appears the infiltration system was chosen because the site is not big enough to have a more common stormwater detention basin. While such infiltration systems are relatively new, and Mr. Lowe has never run one, he commented that land for detention basins is so expensive now that an infiltration system, which can be put under a parking lot or elsewhere underground, is more attractive. Tr. 16, 18, C00201. More attractive perhaps if you don't consider the potential for groundwater damage from onsite wastes.

(... cont'd)

be household hazardous waste, such as paint thinner, cleaning products or nail polish remover, and thus not RCRA regulated hazardous waste, it nevertheless is hazardous waste with the same chemical properties as regulated hazardous waste and poses the same threat to groundwater if spilled or leaked. That Mr. Lowe may not have the experience to appreciate this risk is one of the issues the County was entitled to consider. See Section V below.

Mr. Lowe's record on stormwater management is not strong. Mr. Lowe's stormwater from his current site is being discharged to the Hollows conservation area. It is not disclosed in the application but it was testified at hearing that runoff on the access road to the site would also go to the existing Lowe Enterprises property and then by Lowe's existing stormwater pipe to the Hollows. Tr. 41, C00186. This means dripping leachate from garbage trucks on the long access road will be discharged to the Hollows. For a number of the reasons described, the McHenry County Conservation District voted to oppose the Lowe siting. Their resolution was in the record below at C04057-7235, App. 11, and is attached hereto as Appendix C.

Mr. Lowe's transfer station is designed and proposed to be operated using an untried stormwater system at an unusually small site which will infiltrate contaminated stormwater directly into groundwaters moving rapidly toward very sensitive groundwater, surface water and wetland uses. And this system is to be run by an individual with no experience and no sensitivity for environmental compliance. See discussion below at Section V. The County Board's decision to deny the application on the Section 2 criteria is fully justified, and in fact is required, by the groundwater and surface water concerns alone.

B. The Proposed Site Threatens Its Neighbors With Odors, Litter, Dust, Diesel Emissions, Noise and Vectors

There was widespread agreement, including agreement by Mr. Lowe, that transfer stations will have garbage odors that extend offsite. See e.g. Tr. 57-59, C00183; Tr. 24, C00201; Tr. 35, C00202. There will also be dust and diesel emissions. See e.g. Tr. 62, C00180. With the MCCD Hollows property and the Plote property right next door, the existing Bright Oaks subdivision only 1300 feet away, and no room onsite to provide a buffer for odors to disperse, the County's denial of siting based on criteria 2 could also have rested on the issue of odors alone. Indeed the statute says that under the best of circumstances, e.g. with an adequate buffer

zone, transfer stations can't be closer than 1000 feet to residential areas and construction and demolition debris recycling can't be closer than 1320 feet. See e.g. 415 ILCS 5/§§21(w), 22.38. The Lowe application presents anything but the best of circumstances.

A manual prepared by one of Lowe's witnesses for the Solid Waste Association of North America ("SWANA"), App. Ex. 8, pp. 43-44, C00238, recommends setbacks from neighboring areas, with downwind neighbors (the Plote property and Bright Oaks are downwind) needing greater setbacks. A USEPA manual recommends facing the blank side of the transfer building to the prevailing wind to provide protection, a recommendation Mr. Lowe's consultants did not follow because the open side of their building faces to the west toward the adjacent Hollows. App. Ex. 10, p. 43, C00240.[7] The site is simply too close to other uses.

Mr. Lowe and his consultants provided absolutely no evidence on air quality impacts to the site neighbors. No analysis of odors. No consideration of diesel emissions from waiting trucks. Tr. 25-30, C00182. Board Member Koehler specifically asked at the hearing if the Applicant was going to provide such data. Tr. 16, C00187. Air quality can be measured, diesel emissions can be identified and modeled. This was not done.

Mr. Lowe also agreed that noise could be an issue, Tr. 24, C00182, but failed to address it except to argue that the building orientation (closed to the northeast), plantings, and the use of ramps which would keep transfer trucks under berm levels at some points would help mitigate

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[7] Mr. Lowe's attitude toward these SWANA and USEPA manuals and one written for DuPage County was highly unusual. After marking them as Applicant's exhibits and offering them to the Committee, App. Exs. 8, 9 and 10, C00238, C00239, C00240, Mr. Lowe's attorney sought to prevent any attempts to refer to these manuals, written and edited by Mr. Lowe's witness, Mr. Gordon, for the purpose of showing that they endorsed a more protective approach than that offered by Mr. Lowe. See e.g. Tr. 5-7, 53-56, C00181. Mr. Gordon's attempts to distinguish what he has said for USEPA, for the County of DuPage and for SWANA from what he did at the Lowe site (saying essentially that smart people don't have to follow the published standards), see e.g. Tr. 8-9, C00181, are deeply troubling and could have been considered by the County in weighing the credibility of Mr. Gordon's work and testimony. Bottom line, the manuals recognize the need for setbacks and buffers. Mr. Lowe hasn't provided them. He can't. He doesn't have room.

noise impacts to uses to the east, such as Bright Oaks. The record shows, however, that the exhaust pipes from semi tractors will extend up above the berms and that truck traffic, including backup alarms, will take place outside the building. Of course, the building orientation will also do nothing to help or protect the MCCD Hollows conservation area, which will directly face the long length of the access road as well as the open side of the transfer station. Tr. 71-73, C00221; Tr. 23, C00182.[8]

Finally, it is clear that litter is a problem at transfer station sites. While Mr. Lowe's consultants said they would initially recommend litter pickup efforts in Bright Oaks, at least until it was clear that the subdivision would not be impacted, Mr. Lowe rejected that idea. So far the sole agreement in his application is to have his limited staff pick up litter along Route 14, a very minimal commitment in light of the proximity to the Hollows, the Plote property and Bright Oaks.

C. Mr. Lowe's Only Argument For Site Suitability Rests On Its Industrial Zoning Even Though the Standard of Section 39.2(ii) Is Much Broader

Mr. Lowe's consultant named two key items making the site favorable from the standpoint of protection of public health, safety and welfare – those items being the access to major roadways and the location in an industrial zone. Notably, he said nothing about environmental concerns. Tr. 136, C00178. No testimony was provided that this is a good site environmentally. Instead Mr. Lowe's consultants testified that the site was already selected by Mr. Lowe before they were hired. Tr. 53, C00182.[9]

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[8] Mr. Lowe produced a report by a noise consultant as part of his public comment after the hearing was closed and when there was no opportunity for cross-examination, C03993-4031. This turned out to be a pattern. See e.g. the public comment on Mr. Lowe's legal compliance, discussed below at Section V. Even without cross-examination, however, this public comment shows substantial noise levels from the proposed operations, close to the state limits for backup alarms at Bright Oaks, 1300 feet away. There is no estimate of noise impacts for the much closer Hollows Conservation Area or the Plote property and the implication must be that noise levels from equipment and backup alarms will violate state standards at those locations.

[9] Oddly, Mr. Lowe's brief complains that Cary resolved to oppose the transfer station before hiring its experts. Lowe Br. at 1. The situations are hardly comparable. Cary had the benefit of its own planning experience, (cont'd)

Mr. Lowe has argued that under the applicable zoning the site could have an asphalt concrete facility, a meat packing plant, a rendering plant, a slaughterhouse, fertilizer products, smelting, a sawmill, a trucking terminal and so on. PCB Tr. 23; Lowe Br. 27. Putting aside the obvious, that at 2.64 acres the site would also be too small for most of the uses threatened by Mr. Lowe, as indeed it is too small for a transfer station, it is submitted that Mr. Lowe is missing the point. First, the Environmental Protection Act assumes that the decision of the County Board will consider a wider range of environmental and safety concerns that those traditionally encompassed by local zoning, including surface and groundwater quality and air quality. Industrial zoning does not answer the questions mandated by Section 39.2 of the Act, as to which the County's decision is supported by unrebutted evidence in the record. Second, consistent with his overall attitude toward environmental compliance, discussed at Section V below, Mr. Lowe's argument assumes that he would be able to operate the uses listed without any consideration for their environmental impacts. Indeed, Mr. Lowe's attorney, Mr. McArdle sought to bar any discussion of zoning operational and performance standards from the County hearing, even though his entire argument rests on the property's zoning. See e.g. Tr. 71-72, C00207. In fact, local zoning rules as well as Pollution Control Board rules and the Environmental Protection Act itself impose standards to prevent those listed uses from being a burden to the neighborhood. For example, under McHenry County requirements, if used for any of the uses referenced by Mr. Lowe, the site would require a 100 foot setback from any residential use as well as screening and other protections. McHenry County Zoning Ordinance, Cary Ex. 56, pp. 937 and 947, C00884. The Environmental Protection Act, of course, imposes additional requirements. Industrial

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(... cont'd)

its own Comprehensive Plan which was inconsistent with the Lowe proposal and its intimate familiarity with the area by which to evaluate the acceptability of the Lowe proposal.

zoning, if relevant, is meaningful only in the context of the impacts that zoning would permit and those impacts are limited by the setbacks and buffers and performance standards which Mr. Lowe sought to exclude. We are long past the era, if it ever existed, when you could do whatever you wanted with your property without regard to your neighbors or your community. Industrial zoning is not a license to pollute. If it were so, there would have been no need for the Environmental Protection Act in the first place.

D. Mr. Lowe's Argument That Certain Elements of His Design and Operating Plan Would Mitigate Concerns Regarding His Location Is Unavailing

At the PCB hearing, Mr. Lowe attempted to argue, apparently with respect to both criteria 2 and 5, that certain proposed design and operating features were state of the art and would mitigate any problems with the site location. PCB Tr. 34. He proceeded by trying to compare these allegedly desirable measures to features proposed by the Village of Cary's witness Andrew Nickodem for the Woodland facility in Kane County, a facility for which siting has been denied. By selection Mr. McArdle argued that the Lowe features were as good or better than the Woodland features, but the whole record does not bear him out. For reason of space, the Board must be referred to the summary of the testimony on this point in Attachment 1, Item 3, but the contrast is striking between Mr. Nickodem's designs, with larger sites, paved and curbed sites, valved catch basins to isolate spills, detention ponds, sprinkler systems, water supplies, tollway type noise barriers and adequate buffers and Mr. Lowe's site with no curbing, gravel site areas, "vegetative waterways," an infiltration system without mechanisms for isolating spills, a burning pit and sensitive areas such as the Hollows, the Plote property and Bright Oaks next door or within 1346 feet.

Lowe does have a concrete building with a liner under the building alone. Lowe has to rely on luck for any accidents, leaks, spills or drips which happen anywhere else on the site, even

on the ramps to and from the transfer building, which his infiltration system will send straight to groundwater.[10] The County could have readily determined, and obviously did, that the lined concrete transfer building did not overcome the bad site or the other serious risks of the site design and operation plan.

Mr. Lowe claims that County Board members commented that his design was state of the art and overdesigned. Lowe Br. 11. The two comments quoted occurred early on the third day of hearing, before any of objectors' testimony. Significantly, the two Board members made the comments in light of their concerns that the Lowe protections were not broad enough, foreshadowing the very points made later by the objectors. Committee Chair Brewer asked if the barrier kind of protection provided by the liner couldn't be extended to more of the site. Tr. 65, C00186. In light of Lowe's testimony that he was providing an overdesigned facility, Board Member Koehler asked why the Lowe experts could not provide good information on odors and noise. Tr. 16, C00187. Clearly, the Committee members were paying close attention to these issues and decided them against Mr. Lowe when they had the whole record, including the testimony of Cary's experts, before them.

Mr. Lowe's brief makes frequent references to his claims that his facility exceeds standards, is state of the art, is overengineered, or frequently is "extraordinary" (underlining in original). There are no Illinois regulations for transfer station design so the only bases for these statements is the contradicted testimony of the Lowe experts and Mr. Lowe's hyperbole.

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[10] Lowe's attorney argued at the PCB hearing that the amenities or mitigating elements to be provided by Mr. Lowe in his design were essentially eight: the concrete building, the geomembrane liner under the transfer building, the monitoring wells, the long entrance road for queuing, indoor tarping, indoor scales, the fire pit, and the fact of underground loading. PCB Tr. 45. In addition to the points above, Cary's witness pointed out that several of Lowe's design features were either not advantageous (indoor scales, underground loading and radiation detection) or were dangerous (indoor tarping and underground loading without adequate room to turn on the ramp coming out).

Mr. Lowe makes up standards for irrelevant matters and claims to exceed them, but leaves important issues unaddressed. As Mr. Helsten for the County pointed out at the PCB hearing, Mr. Lowe's attorney argued by picking out nuggets of information here and there in the record, hoping no one would notice the many elements of contrary data which the record also contained. As noted above, in many respects his "nuggets" were misstatements of the record, but in any event it is the record as a whole which must be considered and Mr. Lowe must show that the County's decision was against the manifest weight of the evidence.

III. The Lowe Transfer Station Is Not Located So As To Minimize Incompatibility With The Character Of The Surrounding Area Or To Minimize The Effect On The Value Of The Surrounding Property

In support of his argument on criterion 3, Mr. Lowe at the PCB hearing relied on two issues, he pointed again to his industrial zoning, and, apparently abandoning the damaging study of Princeton Village in his own application, he referred to two public comment letters from residents of Princeton Village in the vicinity of the Northbrook Transfer Station. His arguments are factually and legally insufficient.

A. The Applicant Focuses On Zoning and Provides No Showing of Compatibility With the Character of the Surrounding Area.

The application identifies the zoning of the surrounding area as primarily industrial, a conclusion reached by assuming the Plote property is industrial (even though the Applicant was well aware, and had been for years, of residential development plans for the property as well as its designation as residential in the Cary Comprehensive Plan).[11] Consistent with that planning,

[11] The extensive process of residential development planning for that property is laid out in the testimony of Mr. Cameron Davis, the Cary Village Administrator, Tr. 23-30, C00205, and Mr. Dave Plote, Tr. 4-10, C00210 (development discussions beginning in mid 80s – held up by litigation which has been resolved). See also Cary Ex. 22, C00404 & C00404A, Cary Ex. C00398, C00404 and C00404A, and extensive Plote exhibits 1-11, C01193-1232. Many years ago Cary had extended water and sewer service to the area in anticipation of this residential development. C0334 and C00334A, (blue and red lines showing water and sewer), provided as Appendix A to this brief. Mr. Lowe, who bought his site in April 2002, Tr. 27-28, C00200, was well aware of this planning since at (cont'd)

the area is now zoned residential. C04057-7235, App. 4. The application also assumed the Hollows conservation area was industrial, even though it has been reclaimed for many years and is clearly devoted to very successful conservation and recreational open space uses. Mr. Lowe's witnesses made the same mistake, relying only on zoning not actual land, use in drawing their conclusions. See e.g. Tr. 73, C00194. On cross-examination the Lowe experts admitted the unsuitability of the site as a matter of land planning. Tr. 14, C00194. These misassumptions about actual land use render Lowe's conclusions as to the nature of the area, see Vol. I, 3; p. 12 of 23, C00001, materially, in fact overwhelmingly, incorrect. In fact, the only current heavy manufacturing uses in the area are Mr. Lowe's two parcels and the neighboring Welsh Brothers facility. See e.g. Cary Ex. 5, C00334 & C00334A, attached as Appendix A; Tr. 17-56, C00203; Tr. 6-67, C00205; Tr. 75-98, C00208. And the Cary Comprehensive Plan, originally adopted in 1982 and updated in 1992, makes it clear that the area is designated for residential and less intensive uses. Cary Ex. 21, C00403. For the convenience of the Board, the map from the Cary Comprehensive Plan is attached as Appendix No. D to this Brief.

Consistent with the Cary plan, the trend in the area is to increased residential uses. Mr. Lowe himself described Cary as having evolved into a bedroom community. See also Tr. 11, C00205. The Hollows property is now a very successful, very cherished park, whose Trustees have unanimously voted to oppose the transfer station. C04057-7235, App. No. 11, found at Appendix C to this Brief. The Plote property is at the conclusion of an extensive post-mining reclamation process and is about to be developed as multiresidential pursuant to the Cary Comprehensive Plan and its annexation by the Village. The long-existing Bright Oaks

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(... cont'd)

least the period when he sat on the Cary Village Board from 1983 to 1989, and indeed tried to expedite his siting application in order to preempt the Plote development. Tr. 90-92, C00200; Tr. 20-21, C00202.

subdivision which Mr. Lowe's expert, Mr. Peterman, assumed was protected by an 8 to 12 foot berm, Vol. I, § 3, p. 9 of 23, C00001, quite simply isn't. Testimony and pictures demonstrate that there are Bright Oaks homes at the top of the level of the so-called berm which look directly at the proposed site.[12] Cary Ex. 18, C00400, several of those photographs are also included as Appendix No. E to this Brief. Across Route 14, a business and commercial development is planned by Mr. Bill Kaper. This development is of vital interest to the Village of Cary because of its need for tax-base diversification. Impacts to this property weren't even studied by Lowe. Tr. 9-15, C00205. Nothing in the area is heavy industrial except Mr. Lowe and Welsh Brothers.

Another Lowe expert, Mr. Zinnen, agreed that the closest he had previously put a transfer station to a residence was 1100 feet – to a single residence in Coles County. He'd never worked on a site so close to a large subdivision. Tr. 71, C00183; Tr. 6-7, C00184.

Applicant's testimony as to compatibility was essentially an argument that the actual surrounding uses should be ignored and planned uses should change and become industrial. See e.g. Tr. 125, C00193, Tr. 64, C00194 (Plote property should be industrial – Hollows is zoned industrial). The County's decision against him was fully supported, and in fact inescapable.

B. The Applicant's Own Data Shows a Potential Serious Impact on Surrounding Properties.

Mr. Lowe's analysis of the impact of his proposed site on surrounding property values proves the opposite of what he intends. The County Committee noted that and was clearly concerned by it, going through extensive questioning to be sure it understood the data. See e.g. Tr. 77 et seq., C00220. Mr. Lowe himself has now realized that and, at the PCB hearing, abandoned reliance on his own application. The evidence, however, is clear and fatal to the application.

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[12] A Lowe expert agreed there can be noise at the top of the berm from as far as the area of the site. Id.

Mr. Lowe's consultant, Frank Harrison, began his property value analysis by trying to find residential subdivisions located near transfer stations. In the entire state of Illinois he found only one, a fact which should demonstrate that transfer stations simply don't belong near residential areas. He testified he wasn't surprised there were no others since transfer stations are an industrial use, Tr. 115, C00193.[13] The one site Mr. Harrison found was the Princeton Village subdivision across the Northwestern line railroad tracks from the Northbrook Transfer Station on Shermer Road in unincorporated Northfield Township, a subdivision which, unlike Bright Oaks, was built after the transfer station, and which, unlike Bright Oaks, is generally upwind of the transfer station. Tr. 67, C00191. In order to do his study, Mr. Harrison drew an arbitrary line through the subdivision to create a target and control group, with the target group generally closer to the station. He did no analysis to demonstrate that the control was a valid control, unaffected by the station. Thus his conclusion, that the target and controls both appreciated at about the same rate of slightly over 1%, supposedly demonstrating a lack of transfer station influence, is entirely unsupported. In fact, he admitted that if the entire neighborhood were influenced by the transfer station, then he would expect about the same appreciation rate for both target and control. Tr. 72, C00193. His data shows exactly that.

What his study did show, a fact noted forcefully by Committee members at the County hearing, is that many properties in Princeton Village appreciated very little and several even declined in value over the period studied. Seven properties declined in value, including properties closer to the transfer station; 18 of 37 had appreciation rates under 1%. See Princeton Village appreciation rates from the Lowe application, C00001, which for ease of reference are included in Appendix No. F. This is a startling result for properties in north suburban Cook

[13] Mr. Harrison studied other sites but his other studies involved industrial neighborhoods or nearby rental properties, Lowe Br. 30-36, and are not relevant to the Lowe effect on nearby residential or commercial properties.

County where appreciation rates of 5-6% may be expected. Tr. 87, C00220. In fact, Northbrook, adjacent to where the site is located, has a rate of 16%. Bright Oaks' appreciation rate has been 9.8%. Tr. 54, C00193. A more logical conclusion, and one closely explored by the County members, see e.g. Tr. 69-74, C00194 (questioning by Board Member Koehler); Tr. 79-80, C00220 (questioning by Board Member Klasen), is that the transfer station did significantly influence property values throughout the subdivision, with the influence most severe on those properties closest to the station.[14]

Bright Oaks' appraisal expert, John Whitney, testified to many problems with the Harrison studies. His testimony appears at C00220, V-3-13-03. Among other matters, he testified that Mr. Harrison's control properties were too close and were likely influenced by the Princeton Village station. Lowe's study could be interpreted as showing a negative transfer station impact throughout Princeton Village. Tr. 42-43, 50-51, 75. And he noted that the 1-2% average appreciation rate found in Princeton Village was not only incorrectly calculated, it was also ["not very good"] compared to the "significantly greater" rates he would expect to see. Tr. 45, 87-88. He testified that the norm was 5-6%. Tr. 87. He agreed with questions by Board Member Klasen that on 30-37 Dartmouth Court in Princeton Village where four of eight homes lost money and one appreciated just 0.1% over 84 months, and in Princeton Village as a whole where 18 of 37 homes had an appreciation rate under 1%, the rates were not good and suggested problems. Tr. 78-80, 88. As Board Member Klasen described it, the data on home value appreciation in Princeton Village was "not pretty." Tr. 79-80.

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[14] Mr. Harrison's studies used (and Michael McCann whom he consulted recommended) targets within roughly ¼ mile of the station and controls over ¾ mile away. Tr. 47, C00191. Similar standards applied to Princeton Village would have made most of the subdivision a target and would have disqualified any part for use as a control. Mr. Harrison later agreed there might be other possible controls ½ mile or so away. Tr. 37, C00194.

Oddly, at the PCB hearing Mr. McArdle, Tr. 28-30, criticized Mr. Whitney on the grounds that he had replied to a Committee Member's "hypothetical" fact scenario by saying he couldn't answer the question without a proper study. See Tr. 80-81. Mr. McArdle claimed that without having done such a study of a hypothetical question, Mr. Whitney's testimony was completely negated. That's unfounded. It was Mr. Lowe who must submit an application, bears the burden of proof, faces the manifest weight of the evidence standard and must do the studies if studies are required. Mr. Whitney's testimony was that Mr. Lowe had, in fact, not properly studied property value impact and he provided extensive testimony explaining why that was so and identifying specific inadequacies. That is a perfectly appropriate challenge to the sufficiency of the application. See e.g. CDT Landfill Corporation v. City of Joliet, PCB 98-60 (March 5, 1998) 1998 WL 112497, *8-*9, aff'd 303 Ill. App.3d 1119, 756 N.E.2d 493 (3d Dist. 1993)(Table). Mr. McArdle's argument proves too much and emphasizes that the Applicant's own record is insufficient to support a favorable decision on criteria 3 because he had not provided a valid study and the work he did provide shows serious impacts on property values.

At the Pollution Control Board hearing, Mr. Lowe's attorney did not refer to his client's own studies showing the devastating effect on Princeton Village, but to two letters he had solicited from local Princeton Village property owners after the County hearing began and it became apparent that his client's study actually supported the objectors. Without support, each contended that property values had increased. Neither letter writer was present at the hearing, let alone subject to cross-examination. Speaking charitably, it is possible they were referring to the 1 to 2% average overall increase, which is so much less than the surrounding area. It is possible they forgot about the seven homes which lost value and the 18 which appreciated less than 1% despite a strong market. It is clear that as current owners their interest is in maintaining their

own values.[15] What is stunning, however, is Lowe's decision to abandon his application and point instead to two letters of untested and manifestly insufficient public comment to support his showing on criterion 3. The County's decision on this criterion was clearly correct, and indeed there is no evidence in the application or in the record to the contrary.

C. The Act Sets Required Setbacks From Residential Property Which Confirm the Propriety of the County Decision and Bar Establishment of the Lowe Site

Even though he considered it in selecting his site, Mr. Lowe has argued that the 1000 foot setback of Section 22.14 of the Act is somehow not applicable in siting. The residential setback, in fact, is important in several ways. Most directly, Section 22.14 prevents establishment of a garbage transfer station within 1000 feet of a residence or a property zoned residential. No such station can be permitted. Equally important, however, Section 22.14 is important evidence of the legislature's understanding of how close is too close to comply with criteria 2, 3 and 5. As a matter of law, even for an otherwise great site, less than 1000 feet would be too close.

Similarly, Section 21(w) of the Act states that a construction and demolition debris site cannot be any closer than 1360 feet to residences. Such a site would not be likely to have odors or groundwater impacts, but it is still too close as a matter of law.

In light of these legislatively established bare minimums, minimums which apply even where the site itself has adequate buffers and good protections for groundwater and surface water and the like, the decision of the County Committee and County Board are manifestly reasonable, even if the Plote property were not residential. Reasonable County Board members, like reasonable legislators, could look at the site and the proximity to nearby homes and conclude that they are just too close not to have an unreasonable impact.

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[15] As Board Member Klasen noted with regard to the letters, "I can't see a housing development with these letters that Mr. McArdle gave us from these homeowners that are saying how great this is. You think it would be great if you wanted to get out of there." Tr. 79.

IV. The Transfer Station Plan Of Operations Is Not Designed To Minimize The Danger To The Surrounding Area From Fires, Spills Or Other Operational Accidents

In addition to the problems discussed in Section II above, a significant problem with the facility design and plan of operations, one created by the very small size of the site, is the fact that the larger transfer trailers contemplated by the application, and on which site volume and truck traffic calculations rely, cannot maneuver around the site without hitting the buildings! The Village of Cary's expert, Mr. Nickodem of Earth Tech, had his staff use a widely accepted computer model called Auto Turn to determine whether a 65 foot transfer trailer truck could make the tight turn down the ramp into the transfer building and then make the tight uphill turn coming out. The Auto Turn program showed it could not. The truck would hit the building going in and hit the inside ramp retaining wall coming out. The program also showed that transfer trucks coming into the site and turning right as contemplated by the site plan would hit the site fence on the right side of the entrance. Tr. 45-52, C00214; Cary Ex. 40, C00466-C00466A. A copy of this exhibit is also attached as Appendix G to this Brief. This analysis was supported by the SWANA manual written by Mr. Lowe's own expert which also demonstrated that the turning radii provided were at the limit of viability. The manual also recommended straight and level road segments into and out of the transfer station tunnel. App. Ex. 8, pp. 8-9, C00238. The Lowe site obviously doesn't have them.[16]

Mr. Lowe's expert, Mr. Gordon, responded to this problem not by checking Mr. Nickodem's work, which is therefore unchallenged. Tr. 16-17, 19-20, C00223.[17] Instead,

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[16] Mr. Nickodem's office also ran Auto Turn to see whether the transfer trailers could really be parked on the site and brought into use as needed as assumed by the application. It concluded that only six could be parked (instead of 8 or even 10 as testified by Mr. Lowe's consultants, Tr. 36, C00182, and that there would be difficulty moving them around the site unless a smaller yard jockey were used and there were places to unhitch and recouple on such a small site. Mr. Nickodem also identified numerous other onsite truck management problems. Tr. 52-56, C00214; Cary Ex. 41, C00467 & C00467A; Tr. 28-34, C00214.

[17] See Tr. 61-62, C00227, regarding the lack of logic in Mr. Gordon's response.

Mr. Gordon said he had used a handheld template to design the site, which was less conservative than Auto Turn, and that in any event the site could use smaller transfer trailers which would be able to turn. If the site uses smaller trailers, however, the assumptions which were used throughout the application and the Applicant's testimony to calculate site capacity and traffic volume are no longer supported. See e.g. Vol. I, 5-7, C00001; Tr. 24, C00179; Tr. 19, 26, C00223. Mr. Gordon's backtracking is inconsistent with the application and two weeks of testimony. Mr. Nickodem testified that it is standard practice to design for WB62s – 65 foot combinations, and indeed this is the only practice that makes sense. Tr. 32, C00223.

The turning radius debacle is only one of the more stunning problems posed by the very small site area. Besides the lack of adequate buffer, and the deficient stormwater management discussed above, others include the serious compromises made in site safety in the case of fires and spills. The lack of storage for contact waters and the lack of a detention pond to provide water may or may not have influenced the decision, but the record shows that the site will have neither a sprinkler system nor water capacity to fight fires. Transfer stations do have fires, Tr. 75, C00179; indeed Andy Nickodem testified on behalf of Cary that he had recently designed a replacement transfer station for one which had burned down in Peshtigo, Wisconsin. Tr. 13, C00216. His current practice is always to include sprinkler systems and other firefighting equipment. Instead, Mr. Lowe plans to resort to a pit in which to push burning wastes. Fires for which the pit can't be used, for example because the volume of burning material can't be managed with a front end loader, will simply burn until the Fire Department arrives and even then, because there is no onsite detention pond to furnish water, the Fire Department will have to pump or truck its water from a hydrant at Three Oaks Road and U.S. 14, Tr. 79, C00179, further away even than Bright Oaks.

Similarly, management of spills is left unaddressed. Mr. Gordon, an expert for Mr. Lowe, initially ignored the fact that spills from operations other than fueling could occur. Tr. 61, C00179. When confronted with his own written or edited manual referring to such spills, he pretended it referred to "leaks" rather than "spills," as if that makes a difference, even though it uses the term "spills." Tr. 7-14, C00180; App. Ex. 10, p. 35, C00240. Whatever term Mr. Gordon prefers, it is clear both spills and leaks will occur. They will flow into the stormdrains to the infiltration system and then to the groundwater, without any mechanism to halt that flow. The application has no discussion regarding any spill other than on the tipping floor where it will be inside, Vol. I, § 5, Att. 1, p. 5, C00001.[18] Rather than minimizing damage from spills, the Applicant assumes there won't be any – a clear failure to respond to Criterion 5.[19] For the reasons discussed in this Section IV, as well as in Section II above, it is clear that the County decision on criterion 5 is supported by the record.

V. Marshall Lowe Has Neither the Experience, Nor the Environmental Compliance Record Necessary to Run a Transfer Station and This Was Properly Considered in Ruling on Criteria 2 and 5

Section 39.2 of the Act specifically provides that the County Board may consider as evidence the previous operating history and past record of convictions or admissions of violations of the Applicant (and any subsidiary or parent corporation) in the field of solid waste

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[18] The application also doesn't even provide the correct information for required immediate notification of releases. Compare Vol. I, § 5, Att. 1, p. 9, C00001, and 40 CFR 302.6, (notifications are required by law to U.S. Coast Guard's National Response Center). Indeed, neither Mr. Lowe's consultants nor Mr. Lowe were aware of the correct notification requirements. Tr. 15, C00180; Tr. 18-19, C00201.

[19] The hearing also included an ongoing, and evolving, series of interpretations from Mr. Lowe's consultant about what would be done if hazardous waste was found. Mr. Gordon initially insisted that suspected hazardous wastes could be taken offsite immediately. Response people would be hired to take such wastes "home with them." Tr. 30, C0180. After a series of corrections, see e.g. Tr. 24 (C00215), it was clear this was incorrect. Suspected hazardous waste cannot be taken offsite without toxicity testing which may take days. See C04057-7235, App. No. 14. This is also what the law says and is what other transfer sites have to do as well. 40 CFR 262.11 et. seq. See Tr. 24-27, C00215. Mr. Lowe's lack of experience, and his experts' apparent lack of actual operating experience, were evident throughout the proceedings.

management when considering criteria (ii) and (v). The County's vote specified that it had taken Mr. Lowe's experience into account in ruling on criteria 2 and 5.

While Mr. Lowe appeals on the basis of the County's consideration of experience with regard to criteria 2 and 5, it is not clear what his reasoning is, and the PCB hearing provided no further elaboration except a comment by Mr. McArdle that the law does not say that no experience is disqualifying. PCB Tr. 48-50.[20] What the law does say, of course, is that experience can be considered, and where the site is located near sensitive uses, threatens vulnerable ground and surface waters, is so small as to have no buffer area or operational room, and is designed without protective systems such as sprinkler systems or firefighting water, it is entirely reasonable, and consistent with the evidence, to consider lack of experience an element in judging compliance with criteria 2 and 5. Notably, Mr. Lowe has changed his mind on this point. At the County hearing, in refusing to provide further information on Mr. Lowe's activities to the County, Mr. Lowe's attorney agreed that Mr. Lowe's past operations "go[es] to his ability to run a transfer station" and could be argued by the parties and considered by the County. Tr. 18, I-3-14-03, C00221. Mr. Lowe has waived his right to argue that his experience couldn't be considered.

So what is known about Mr. Lowe's experience? First, responding to a question from Board Member Koehler, Mr. Lowe admitted he didn't even read his own application. Tr. 48, C00203. He also admitted that he has no experience in solid waste management or in running a

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[20] If Mr. Lowe's argument is that actual experience may be disqualifying but that total ignorance is protected, he has not provided any support for that proposition, which is contrary to the entire protective plan of Section 39.2. Under that theory the large waste companies should try to find the least experienced people they know to front for them on their applications. No experienced waste company, however, would propose a site so small it can't turn its trucks or a monitoring well system without an ungradient or a deep well.

transfer station. Tr. 19-20, C00200.[21] Mr. Lowe admitted he had "no clue" who would be the operator of the transfer station. Tr. 59, C00202. He plans to own the site: operations are to be carried out by his wholly owned shell corporation Lowe Transfer, Inc. ("Transfer"). Tr. 50, C00202. Transfer has no experience, no employees, no money. Tr. 27, 51-52, C00201. It is set up to shield Lowe from liability if anything goes wrong. Mr. Lowe and his attorney admitted as much at hearing. Tr. 50-51, 54, C00202.

Arguing that a transfer station is just a trucking terminal, PCB Tr. 22-33, though obviously without the putrescible odor causing materials, Mr. Lowe himself brought up his current business operations as an example of his background. Next door to his proposed site he has operated a construction and demolition debris recycling business called Lowe Enterprises ("Enterprises") since 1991. He also runs Lowe Excavating ("Excavating") from a separate location. Tiker Trucking is owned by Mr. Lowe and his family and is also run from a separate location. Tr. 8-9, 75-76, C00200. It is expected that Tiker will do the hauling to the landfills. Tr. 5, C00201. At Lowe Enterprises Mr. Lowe takes in construction and demolition materials, including asphalt from roads and other materials from building projects, separates them, crushes them, stores them and then sells some portions and disposes of the residuals which he collects in a rolloff and agrees are wastes. See e.g. Tr. 30-33, 40-41, C00200. Section 21(d) of the Act, ILCS 5/21(d) requires a permit for the conduct of "any waste-storage, waste-treatment or waste-disposal operation." Lowe does not have such a permit. Lowe eventually decided, at or after the County hearing, that he does not fall under this provision because his construction and demolition debris is not waste. In fact, he separately admitted it included residuals which are waste and are disposed of, so this argument is unavailing, but it is likely legally incorrect as well

[21] Mr. Lowe was scheduled to testify in his own case only after the Village of Cary noticed him to appear and indicated it would call Mr. Lowe as a witness in its case for the objectors. C03833-3834.

since there is a separate exception in the statute for construction and demolition debris sites in counties over 700,000, an exception which would be unnecessary if the construction and demolition debris is not covered by the permitting requirement. It is clear Lowe had never considered the relevance of the solid waste management requirements of the Act to his own operations until this proceeding. And what Lowe still fails to acknowledge is that even if he were not subject to the permit requirement of 21(d) he would still be subject to the operating requirements of Sections 21(w) and 22.38. He clearly is not in compliance with these requirements.[22]

Section 21(w) requires a construction and demolition debris operator to maintain documentation identifying the hauler, generator, place of origin and weight or volume of the debris or soil and the place where it is disposed of or treated. Mr. Lowe is not following these requirements. He maintains no documentation; indeed he even allows dumping of materials at his site after hours when it is entirely unattended, and has had consequent fly dumping problems. See e.g. Tr. 30-36, 44, 47-57, C0200.

Section 22.38 applies to facilities accepting exclusively general construction and demolition debris for transfer, storage and treatment and sets out a precise set of operating standards for such a facility. In order to be eligible for the permit exemption in Section 21(d) for facilities in large counties, one must comply with Section 22.38, making clear that it is the

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[22] Other questions regarding Mr. Lowe's operations were raised as well, e.g. his servicing of vehicles from his operations at one site and taking the wastes to another for burning, without manifests or permits, see e.g. Tr. 7-11, 14-16, C00201; Tr. 76-77, C00200. Objectors moved that the County require Lowe to provide additional information to allow a compliance review of these activities, see C03837-3838, but Lowe's attorney refused. See Tr. 16, C00221. Instead Lowe hired yet another lawyer to provide a "public comment," after the record closed, claiming that certain of Lowe's operations were in compliance, notably the burning of used oil for fuel, and noting that there were no IEPA forms for a Section 21(d) permit. Of course, this statement was not subject to cross-examination, and it certainly is not evidence of Lowe's compliance where the underlying facts are in the possession of Mr. Lowe and are not provided. Most tellingly, there was no Lowe response to the allegations that he is in violation of Sections 21(w) and 22.38.

intention of the Act that all construction and demolition debris recycling facilities be regulated. Among other things under Section 22.38, at Enterprises, Mr. Lowe must follow certain procedures to ship recycled materials offsite within six months, to dispose of non-recyclables within 72 hours, to take no more than 25% non-recyclables, to control noise and stormwater runoff, to control site access, and to keep certain records of his waste sources and material handling and do certain labeling and tagging to show compliance. Again, he has done none of these things. Tr. 30-36, 44-57, C00200.

Mr. Lowe and Mr. McArdle reacted to questions concerning these issues defensively. Lowe claimed that he would do them if necessary and that an IEPA air inspector, who he could not name except that it might be "Terry something," had not mentioned these land pollution violations. He also could not remember when or how often Terry had visited. Tr. 41, 69-70, C0200. Lowe and his attorney also questioned where the requirement for a permit and for compliance with operating standards appears, apparently unfamiliar with the Environmental Protection Act or the possibility that it might apply to Mr. Lowe. Later in the hearing, and presumably after reading the statute, Mr. McArdle said that if Mr. Lowe needed a permit for Enterprises he would get one. Tr. 17-18, C00221. In fact, the principles underlying the Environmental Protection Act assume that persons causing pollution impacts must understand their legal obligations and comply in advance – not just when they get caught. The County Board was entitled to consider Mr. Lowe's lack of concern for identifying and following the applicable environmental laws and regulations.

Mr. Lowe and his consultants testified that he would buy expertise by hiring a so-called "certified operator" with the help of his consultants. This is not sufficient. As noted in several areas above, his consultants' own testimony indicates important areas of operation where they are

uninformed. But more important, the application makes no reference to hiring of a certified operator, See Tr. 17, C00180, and the statute does not contemplate a promise to obtain expertise in the future.[23]

Even if a promise to hire expertise could make up for the lack of experience, the evidence at hearing raised serious doubts about that solution in this case. Throughout the testimony of Mr. Lowe's consultants they proved themselves willing again and again to make commitments/recommendations to satisfy the many questions raised about the site (e.g. use of a certified operator, possibility of recycling, litter pickup in surrounding areas, receipt of high level of construction and demolition debris, bonds and etc.). These commitments were not in the application and should not be considered in ruling on site suitability, but the important point here is that Mr. Lowe had already begun to disavow them even before the hearing was concluded. See e.g. Tr. 19-20, C00201; Tr. 36, C00201; Tr. 64-67, C00201; Tr. 64, C00202; Tr. 6-7, C00202; Tr. 16, C00204. These repudiations forcefully demonstrated the practical and legal impossibility of approving a transfer station to be run by an unqualified operator on the assumption that he will hire good people to do the job.

After acknowledging the burden posed by his transfer station, Mr. Lowe was asked if he had given any consideration to the impacts to the Village of Cary. Mr. Lowe's answer was firm.

> Q. Have you given any consideration to the costs to Cary of having this on its border?
>
> A. No.
>
> Q. Do you feel any obligation --
>
> A. Not in the least.

---

[23] Mr. Lowe's consultant, Mr. Gordon, testified that a certified operator, an idea which has no official standing in Illinois but which Mr. Gordon is promoting, must have a high school degree or a G.E.D., some transfer station experience and have taken Mr. Gordon's three day transfer station course (even though he frequently rejected attempts to rely on the manual for that course). Tr. 93, C00184. Clearly these very minimal requirements insure nothing.

Q. -- to consider that?

A. Not in the least.

Q. Why?

A. Cary and I don't get along. Let's get something straight right now. Cary and I don't get along at all, period. So if you want to go there, go ahead and go there, but it isn't -- I wouldn't.

Mr. McArdle: Do you need that clarified?

Ms. Angelo: No thanks, it's pretty clear.

By Ms. Angelo:

Q. Do you consider any obligation to consider the costs to -- do you feel you have any obligation to consider the costs to your neighbors such as Bright Oaks to have that near them?

A. No, I have not because -- you know, no, I haven't.

Tr. 46-47, C00201.

He emphasized his unwillingness to be responsible for damages to neighbors. Tr. 56-57, C00202. In fact, Mr. Lowe was stunningly blunt:

Q. Do you believe that the risk associated with your facility on the surrounding home values to your neighbors should be borne by your neighbors, not by you?

A. Yes.

Tr. 58, C00202.

Mr. Lowe believes the McHenry County Conservation District, the residents in Bright Oaks, the Village of Cary, the Plote family and the citizens of McHenry County should take the risk of impacts from his transfer station and he has set up Lowe Transfer as a corporate shell to make sure that happens. Mr. Lowe couldn't be bothered to read his own application, but he plans to be legally and financially off the hook when something goes wrong. This is the last person who ought to be running a solid waste transfer station. The County's consideration of Mr. Lowe's experience, or lack thereof, was entirely proper and consistent with the manifest weight of the evidence.

VI. Conclusion

The record in this case runs to 4000 pages, representing eleven long (often 10+ hour) hearing days and multiple experts presented by objectors, as well as the experts presented by Mr. Lowe. The County Committee participated actively, not only in their attendance and analysis of the documents but in their own questioning of witnesses, which was both observant and informed. While objectors presented a powerful case, the Board members themselves were active in asking the tough questions about the Lowe application. See Attachment 1, Item 4. Based on its careful analysis, the Committee and then the Board rejected the application on criteria 2, 3 and 5. Their decision was strongly supported, and in fact, inescapable, as discussed above.

Mr. Lowe and his attorney, Mr. McArdle, have suggested that the County succumbed to public pressure.[24] Inconsistently, at the same time, Mr. McArdle noted that the 81 people who gave testimony before the County Committee represented less than ½ of 1% of the County population.

After the first three days, all of the hearings were held in Woodstock, a good one-half hour drive or more from Cary. Despite this distance many citizens attended multiple hearing days. The fact that 81 commenters testified, many of whom may have been afraid to speak at first, (as one mentioned at the PCB hearing, PCB Tr. 104), is a substantial comment on the level of concern regarding this site and the numbers who will be affected. Many others signed

[24] Mr. Lowe and his attorney have sought to discredit and marginalize the citizen participants, suggesting they improperly influenced the decision and objecting to commenters as outside the record before they could even begin to speak, PCB Tr. 54, 65, 75. Mr. Lowe filed motions in limine to prevent and limit public participation before the County hearing, C00173, and before the PCB hearing. Mr. Lowe also attacks the motives of objectors, complaining, for example, that Cary resolved to oppose the transfer station before hiring its experts. In fact, the objectors and other citizens have been entirely professional and responsible, hiring their own experts, providing valuable and pertinent testimony and asking very thoughtful questions. This proceeding was a model of public participation.

petitions and wrote letters. It was announced that 161 people attended the PCB hearing, in the morning of a weekday.

At the same time, the suggestion that the objectors improperly influenced the County Board or Committee is ludicrous. As one of the citizens noted, County Board members are elected from districts, not county wide. Only two members, and only one on the Committee, represent the Cary area. Board Member Klasen who so forcefully pointed out the devastating impact of a transfer station on the Hollows and Princeton Village explained in the hearing that he represents an area on the west end of the County. Mr. Lowe has explicitly announced that he is not making a fundamental fairness attack on the County proceedings and his oblique attack on the participating citizens and County Board members is simply improper. In fact, it is clear that the Committee and the Board were persuaded by overwhelming evidence that this site was not adequately protective and was wrongly located. The citizens and other objectors assembled expert testimony, presented their evidence, and the system contemplated by Section 39.2 for making siting an objective local process worked. The County decision should be affirmed by the Board.

Respectfully Submitted,
The Village of Cary

Dated: August 27, 2003

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ATTACHMENT I

The following matters are, in part, discussed in the record at the locations indicated:

1) Qualifications of experts presented by the objectors: Tr. 6-12, C0188; Cary Ex. 1, C00316-325 (Lawrence Thomas of Baxter & Woodman); Tr. 63-66, C00218; Cary Ex. 44, C00475 (Kevin Sutherland of Baxter & Woodman); Tr. 3-6, 17-18, C00214, Cary Ex. 36, C00458-462 (Andrew Nickodem of Earth Tech); Tr. 57-60, C00207; Cary Ex. 28, C00423-425 (Drew Petterson of Thompson, Dyke & Associates); Tr. 24-26, C00220, Bright Oaks Ex. 2, C01283-85 (John Whitney, MAI).

2) Testimony with regard to the deeper groundwater under the Tiskilwa Till: Tr. 85, C00185; Tr. 22-23, C00189; Cary Ex. 2; C00326; Cary Ex. 49-52, C00770-773, C00774-776, C00777-778, C00779-781; Tr. 30, C00224; Tr. 75-77, C00199, Tr. 33, C00024.

3) Comparison of Lowe design with standards applied by Mr. Andrew Nickodem in station design at Woodland and other locations: Tr. 17-18, C00214; Tr. 30, C00218 (Woodland had only one residence 1400 feet to the west compared to 422 unit Bright Oaks 1346 feet to the east); Tr. 18-19, 25-26, 46, 50-54, C00217; Tr. 16-17, C00218; Lowe Br. 15 (Woodland paved with curbing, walls, multiple valved catch basins and detention pond to isolate spills and leaks. Lowe has gravel areas, no curbing and "vegetative waterways."); Tr. 9-10, C00126; Tr. 29-30, C00218 (Woodland has sprinkler system, 200 lb. wheeled water fire extinguisher and detention pond (in addition to sand and hand-held extinguishers which both sites have) while Lowe has a burn pit); Tr. 21, C00218 (Woodland has groundwater monitoring system associated with Woodland landfill. Lowe has two shallow downgradient wells); Tr. 25-26, C00214 (In recent designs Nickodem has provided tollway type noise, visual and litter barrier walls); Tr. 27-28, C00214 (Nickodem's recent Chicago area projects were between 5 and 6, 8 and 20 acres vs. 2.64 acres at Lowe site); Tr. 22-27, C00218 (Woodland system for load inspections, including surveillance cameras vs. Lowe random load checking in minimum space); Tr. 18-19, C00218; Brief § IV (insufficient room for onsite traffic movement at Lowe). See also Tr. 32-33, 42-43, C00216 (little or no advantage to indoor scales, and or scales and radiation detector); Tr. 20-27, C00217 (indoor tarping and underground loading present dangers at Lowe site).

4) The Committee members participated in every hearing and asked questions of every witness. For example:

Committee Chair and Board Member Brewer: Tr. 65, C00186 (protective barriers under site as a whole); Tr. 96, C00195 (concerns regarding whether Lowe experts assumed site would be a first class operation).

Board Member Kate: Tr. 80-81, C00220 (concerns regarding effects on Bright Oaks).

Board Member Klasen: Tr. 79-80, C00220 (concerns regarding conclusions of Princeton Village data); Tr. 16-17, C00218 (shouldn't paving be an industry standard for transfer stations); Tr. 15, C07237 (concerns regarding effects on the Hollows conservation area).

Board Member Koehler: Tr. 16, C00187 (lack of data on odor and noise); Tr. 69-74, C00194 (concerns regarding conclusions of Princeton Village data); Tr. 48, C00203 (concerns regarding whether Mr. Lowe read his application).

Board Member Munaretto: Tr. 83-84, C00195 (concerns regarding whether Lowe experts assumed site would be a first class operation).