BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and MARSHALL LOWE, Co-Petitioners, vs. COUNTY BOARD OF McHENRY COUNTY, ILLINOIS Respondents.	)	No. PCB 03-221 (Pollution Control Facility Siting Appeal)

NOTICE OF FILING

TO: See List Referenced in Proof of Service

PLEASE TAKE NOTICE that on September 12, 2003, we filed with the Illinois Pollution Control Board, the attached Co-Petitioners' ***Motion to Deem Lowe's Site Location Application Approved Due to the Board's Failure to Comply with the Act's Publication and Notice Requirements*** and ***Memorandum in Support of Motion to Deem Lowe's Site Location Application Approved Due to the Board's Failure to Comply with the Act's Publication and Notice Requirements*** in the above entitled matter, a copy of which is attached hereto.

LOWE TRANSFER, INC. and MARSHALL LOWE

By: _____
David W. McArdle

PROOF OF SERVICE

I, a non-attorney, on oath state that I served the foregoing documents on the following parties by depositing same in the U. S. mail on this 12th day of September, 2003.

Charles F. Helsten
Hinshaw and Culbertson
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Rockford, IL 61105-1389

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601 ***(also via facsimile)***

SUBSCRIBED and SWORN to before me this 12th day of September 2003

Notary Public

"OFFICIAL SEAL"
JOSEPHINE DOOLEY
Notary Public, State of Illinois
My Commission Expires 09/10/06

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FAX MESSAGE

DATE: September 12, 2003

TO: Bradley P. Halloran 312/814-3669

FROM: David W. McArdle

NOTE:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION TO DEEM LOWE'S SITE LOCATION APPLICATION APPROVED DUE TO THE BOARD'S FAILURE TO COMPLY WITH THE ACT'S PUBLICATION AND NOTICE REQUIREMENTS

Co-Petitioners, Lowe Transfer, Inc. and Marshall Lowe ("Lowe"), moves the Pollution Control Board, pursuant to 415 Ill. Comp. Stat. 40.1(a), to deem Lowe's site location application approved on the grounds that the hearing in this matter was not held in compliance with the notice and publication provisions of Section 40.1(a) of the Illinois Environmental Protection Act ("Act"), 415 Ill. Comp. Stat. 5/40.1(a), and the Board lacks authority to make a final decision on the merits of the appeal. In support of this motion, Lowe attaches their Memorandum in Support of this Motion as Exhibit 1 and states the following.

Background

1. On November 20, 2002, Lowe filed a local siting approval application with the McHenry County Board ("County") for the Northwest Highway Transfer Facility, a municipal solid waste transfer station, located in unincorporated McHenry County.

2. On May 6, 2003, the County denied Lowe's local siting approval application citing failure to meet Criteria (ii), (iii), and (v).

3. On June 5, 2003, Lowe filed a petition ("Petition") with the Board for a hearing to contest the decision of the County denying Lowe's application for local siting approval for the Northwest Highway Transfer Facility.

4. On June 19, 2003, the Board issued an order advising the parties of the hearing procedures, that the statutory deadline for the Board's decision on the Petition was October 2, 2003, and that if the Board "fails to take final action by the decision deadline, the petitioners 'may deem the site location approved.'"

5. On July 24, 2003, the Board caused to be published a notice for the Lowe hearing in the Pioneer Press's Northwest Zone newspapers.

6. The public hearing on Lowe 's Petition was held on August 14, 2003.

Grounds for Motion

7. Section 40.1(a) of the Act states: "The Board shall publish 21 day notice of the hearing on the appeal in a newspaper of general circulation published in that county." 415 Ill. Comp. Stat. 5/40.1(a). This requirement is mandatory and jurisdictional, and failure to comply with it nullifies a subsequent hearing taking place upon defective notice.

8. Under the Act, the Board is required to issue a final decision within 120 days of its receipt of Lowe's Petition for hearing appeal, and following a duly noticed public hearing. 415 Ill. Comp. Stat. 5/40.1(a).

9. The Board's notice for the hearing on Lowe's Petition was defective because it was not published in a newspaper of general circulation published in McHenry County.

10. Because the notice for Lowe's hearing was defective, and notice in accordance with the Act is mandatory and jurisdictional, the hearing held Lowe's Petition is a nullity.

11. Absent a valid hearing undertaken pursuant to statutory notice, the Board is without authority to issue a final decision on the merits of this appeal.

12. Administrative agencies exercise power strictly provided by statute and possess no inherent or common law powers. Any action taken outside of its statutory authority is without jurisdiction, void and is considered a nullity from its inception. *Daniels v. Industrial Commission.*, 201 Ill.2d 160.

13. In order to address the merits of the appeal and issue a final decision, the Board must have both a valid hearing and statutory notice. If both are not present, the Board lacks authority to issue a final decision on the merits. *Illinois Power Co. v. Illinois Pollution Control Bd.*, 137 Ill.App. 3d, 450 (4th Dist. 1985).

14. The Board's failure to comply with the mandatory notice and publication provision of the Act rendered void the hearing. There is no provision in the Act for a final decision to issued following a hearing held pursuant to defect notice. Thus, to do so would be *ultra vires* and void.

15. Section 40.1(a) provides in part that:

> If there is no final action by the Board within 120 days after the date on which it received the Petition, the petitioner may deem the site location approved

415 Ill. Comp. Stat. 5/40.1(a). If there is no final action by the Board within 120 days, the petitioner may deem the site location approved. *Waste Management of Illinois, Inc. v. Pollution Control Board*, 201 Ill.App. 3d 614 (1st Dist. 1990).

16. The notice for the public hearing held on August 14, 2003, was defective and in violation of the mandatory requirements of Section 40.1(a) of the Act and, therefore, is a nullity.

17. Where the 21-day notice can no longer be provided before the lapse of the 120-day time period, no hearing can legally be held. *See Illinois Power Company v. Illinois Pollution Control Bd.*, 137 Ill App. 3d 449, 450 (4th Dist. 1985).

18. Because there is no longer sufficient time before the statutory 120-day decision deadline for the Board to hold a public hearing on Lowe's Petition with proper 21-day notice, there is no time before the mandated decision deadline for the Board to meet the requirements of Section 40.1(a).

19. The Act requires both a public hearing and a final decision within the required time frame. If either is not forthcoming within that time, then the permit or siting approval is deemed issued under the Act. *Marquette Cement Manufacturing Company v. Illinois Environmental Protection Agency*, 84 Ill.App. 3d 434 (3rd Dist).

20. The Board lacks authority to dispense with the hearing or to violate wither the statutory notice requirement or the 120-day decisional limit under the Act. Accordingly, the Board is not authorized to issue a final decision, and pursuant to section 40.1(a), the site application must deemed approved as a matter of law.

WHEREFORE, for the reasons set forth above, the Petitioners request that the Board issue an order (1) finding that the hearing notice was defective and the Board lacks authority to

issue a final decision on the merits, and (2) deeming Lowe's site location application approved in accordance with 415 Ill. Comp. Stat. 5/40.1(a).

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

David W. McArdle, one of their attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

CO-PETITIONERS' MEMORANDUM IN SUPPORT OF MOTION TO DEEM LOWE'S SITE LOCATION APPLICATION APPROVED DUE TO THE BOARD'S FAILURE TO COMPLY WITH THE ACT'S PUBLICATION AND NOTICE REQUIREMENTS

Co-Petitioners, Lowe Transfer, Inc. and Marshall Lowe ("Lowe") have moved this Board to deem Lowe's site location application approved on the grounds that the hearing in this matter was not held in compliance with the notice and publication provisions of Section 40.1(a) of the Illinois Environmental Protection Act ("Act"), 415 Ill. Comp. Stat. 5/40.1(a), and the Board lacks authority to make a final decision on the merits of Lowe's appeal. The grounds for Lowe's motion are that: (1) the hearing in this matter was not held in compliance with the notice and publication provisions of Section 40.1(a) of the Illinois Environmental Protection Act ("Act"), 415 Ill. Comp. Stat. 5/40.1(a), and is thus void, and (2) the Board lacks authority to make a final decision on the merits of the appeal absent compliance with the notice and hearing provision of the Act.

Upon the receipt of Lowe's petition for a hearing, the Board is required to hold a duly noticed hearing and to issue a final decision within 120 days of its receipt of Lowe's petition .

The Act mandated that Lowe's hearing notice be published in a newspaper of general circulation published in McHenry County. The notice published by the Board was defective because it was not published in a newspaper of general circulation in McHenry County, nor one published in McHenry County. Because the notice for Lowe's hearing was defective, and notice in accordance with the Act is mandatory and jurisdictional, the hearing held on Lowe's appeal was a nullity. Absent a properly noticed hearing, the Board is without authority to issue a final decision on the merits.

Background

On November 20, 2002, Lowe filed a local siting approval application with the McHenry County Board ("County") for the Northwest Highway Transfer Facility, a municipal solid waste transfer station, located in unincorporated McHenry County. On May 6, 2003, the County denied Lowe's local siting approval application citing failure to meet Criteria (ii), (iii), and (v).

On June 5, 2003, Lowe filed a petition ("Petition") with the Board for a hearing to contest the decision of the County denying Lowe's application for local siting approval for the Northwest Highway Transfer Facility. On June 19, 2003, the Board issued an order advising the parties of the hearing procedures, that the statutory deadline for the Board's decision on the Petition was October 2, 2003, and that if the Board "fails to take final action by the decision by the decision deadline, the petitioners 'may deem the site location approved.'" A true and correct copy of the Board's 6/19/03 Order is attached here as Exhibit A. On July 24, 2003, the Board caused to be published a notice for the hearing in the Pioneer Press's Northwest Zone newspapers . A true and correct copy of Pioneer Press's Certificate of Publication for the notice is attached as Exhibit B. The public hearing on Lowe's siting location appeal was held on August 14, 2003.

Argument

A. The Board Failed To Comply With the Section 40.1(a)'s Mandatory and Jurisdictional Publication Notice Requirements

Publication and notice in accordance with the Act is mandatory and jurisdictional, and the notice and publication for the hearing on Lowe's appeal was defective. Section 40.1(a) of the Act states:

> The Board shall publish 21 day notice of the hearing on the appeal in a newspaper of general circulation published in that county.

415 Ill. Comp. Stat. 5/40.1(a). This requirement is mandatory and jurisdictional, and failure to comply with it nullifies a subsequent hearing taking place upon defective notice.

1. Compliance with Section 40.1(a) is mandatory and jurisdictional.

Section 40.1(a)'s requirement that the Board "shall publish" the specified notice is mandatory. *See People v. Youngbey*, 82 Ill. 2d 556 (1980). The term "shall" is mandatory where it is used with reference to any right or benefit to anyone and the right or benefit depends on the giving a mandatory meaning to the term. *See PACE v. RTA*, 2003 WL 21694403 (2nd Dist. 2003), citing *Armstrong v. Hedlund Corp.*, 316 Ill. App. 3d 1097, 1106 (3d Dist. 2000). *See also In re Application of Rosewell*, 97 Ill. 2d 434 (1983); *Ogle County Board v. Pollution Control* Board, 272 Ill. App. 3d 184 (2nd Dist. 1995); *Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board*, 162 Ill. App. 3d 801 (5th Dist. 1987). Section 40.1(a) provides the petitioner with a right to petition for a hearing before the Board to contest local denial of a site location application. Section 40.1(a)'s notice requirement is in place solely to protect the petitioner's right to a hearing with due process, as well as the rights of the citizens of McHenry County to attend the hearing and present their positions.

Administrative agencies such as the Pollution Control Board derive power solely from their enabling statutes, and they may not disregard the prerequisites in such enabling statutes for the exercise of such power. *See Illinois Power Company v. Pollution Control Board*, 137 Ill. App. 3d 449, 450 (4th Dist. 1985), citing *Spray v. Illinois Civil Service Com.*, 114 Ill. App. 3d 569 (1st Dist. 1983). Illinois courts have consistently ruled statutory notice requirements are a jurisdictional matter. *Id.*; *Kane County Defenders, Inc., v. Pollution Control Board*, 139 Ill. App. 3d 588 (2nd Dist. 1985). A failure to comply with statutory notice requirements, such as that in Section 40.1(a) is a violation of the Act, and any action premised upon such violation is void. *See Id.*; *Village of Mundelein v. Hartnett*, 117 Ill. App.3d 1011 (1983).

2. Section 40.1(a) required that notice of the hearing on Lowe's appeal be published in a newspaper of general circulation and published in McHenry County.

Section 40.1(a) mandates that the Board shall publish the 21-day notice of the hearing on the appeal in a newspaper of "general circulation **published in that county**." 415 Ill. Comp. Stat. 5/40.1(a). The Board did not comply with that publication requirement.

a. Notice was not in a newspaper published in McHenry County.

The Board published notice in the in the Northwest Zone of the Pioneer Press newspapers. Exhibit B. The Northwest Zone of the Pioneer Press includes the following Pioneer Press newspapers:

- ALGONQUIN COUNTRYSIDE
- ARLINGTON HEIGHTS POST
- BARRINGTON COURIER-REVIEW
- BUFFALO GROVE COUNTRYSIDE
- CARY-GROVE COUNTRYSIDE
- ELK GROVE TIMES
- HOFFMAN ESTATES REVIEW
- LAKE-IN-THE-HILLS COUNTRYSIDE
- LAKE ZURICH COURIER
- PALATINE COUNTRYSIDE
- ROLLING MEADOWS REVIEW
- SCHAUMBURG REVIEW
- WHEELING COUNTRYSIDE

Exhibit B. Of these thirteen newspapers which contained the legal notice for the public hearing on the Lowe siting location appeal, ***only five*** are distributed and circulated within McHenry County, and such distribution and circulation is confined to limited area in southeastern part of the County. Those papers are the following:

Pioneer Press newspapers distributed and circulated in McHenry County
ALGONQUIN COUNTRYSIDE
BARRINGTON COURIER-REVIEW
CARY-GROVE COUNTRYSIDE
LAKE-IN-THE-HILLS COUNTRYSIDE
LAKE ZURICH COURIER

Exhibit C, ¶ 3(a).

All Pioneer Press newspapers are printed and bundled for distribution at its Northfield facility in Cook County, Illinois. After bundling and separation of the newspapers by final destination, an independent private company delivers the newspapers to the post offices and newsstands appropriate for each newspaper. Exhibit C, ¶ 3(b). The delivery site of each of the five newspapers that have some connection to McHenry County is as follows:

Newspaper	**Delivery Site**	**County of Delivery Site**
CARY-GROVE COUNTRYSIDE	Cary Post Office	McHenry County
ALGONQUIN COUNTRYSIDE	Algonquin Post Office	McHenry County
LAKE-IN-THE-HILLS COUNTRYSIDE	Algonquin Post Office	McHenry County
BARRINGTON COURIER-REVIEW	Barrington Post Office	**Lake County**
LAKE ZURICH COURIER	Lake Zurich Post Office	**Lake County**

From these post offices the various editions of the Pioneer Press are circulated to their specific target communities. After dropping the newspapers at the various local post offices, the private company delivers the remaining newspapers to only those newsstands contracted with Pioneer Press within each targeted community. Exhibit C, ¶ 3(c).

It is long-established law in Illinois that a newspaper is "published where it is first issued to the public." *O'Connell v. Read*, 256 Ill. 408, 410 (1912) ("the place of publication of a newspaper is the place where it is first put into circulation, where it is first issued to be delivered or sent, by mail or otherwise, to its subscribers"). A newspaper can have only one place of publication: "Publication occurs at the place where the newspaper is first issued to the public, i.e., where actual distribution of bulk deliveries of the newspaper originates." *See* 1981 Ill. Atty. Gen. Op. 91 (No. 81-037), 1981 WL 37187 (Ill. A.G.); 1992 Ill. Atty. Gen. Op. No. 92-010; 1992 WL 469749 (Ill. A.G.) Copies of law attached as Exhibit D. The simultaneous circulation of a newspaper within several communities is not the equivalent of publication in each community. *Garcia v. Tully*, 72 Ill. 2d 1 (1978).

The place where the newspapers are first put into circulation is Pioneer Press' Northfield facility because all five of the Pioneer Press newspapers circulated within McHenry County are delivered to separate and distinct post offices with two of those post offices actually located in Lake County. The place of publication for the Pioneer Press is Northfield, Illinois – a location in Cook County – not McHenry County.

The notice for the statutorily mandated public hearing on Lowe's siting appeal was published outside of McHenry County in direct violation of Section 40.1(a) of the Act. For this reason, the notice of July 24, 2003 is jurisdictionally defective.

b. Notice was not in a newspaper of general circulation in McHenry County.

The mandatory publication requirement of Section 40.1(a) requires that "the Board shall publish 21 day notice of the hearing on the appeal in a **newspaper of general circulation** published in that county." 415 Ill. Comp. Stat. 5/40.1. Lowe's siting application was for property in unincorporated McHenry County and was required to be filed and decided by the McHenry County Board in compliance with the Act's requirements. Lowe's application notice was published in the Northwest Herald, a newspaper of general circulation published in McHenry County. See Exhibit E. Lowe's siting location application was not an application for only certain communities within McHenry County; it was a county-wide application. The population of McHenry County was 260,077 people in 2000. *See* C00001, §1, p. 1-5.

The only newspapers where the notice for the Lowe public hearing was published were the Northwest Zone papers of the Pioneer Press. According to Frank Carlton, Circulation Operations Manager of the Pioneer Press, at present, the total number of subscriptions of the Pioneer Press newspapers in McHenry County is only 5,203. See Exhibit F. This fact is confirmed on the Pioneer Press Internet website. See Exhibit G. The McHenry County circulation of Pioneer Press newspapers in McHenry County is insignificant (see attached Exhibit H, a McHenry County map depicting the area of Pioneer Press distribution) and does not establish these five papers as newspapers of "general circulation" in the County of McHenry. Clearly, publication of the hearing notice in the Pioneer Press's Northwest Zone weekly newspapers does not satisfy Section 40.1(a)'s requirements, nor the intent of the Act.

The Act requires that publication occur in a newspaper of "general circulation" in the County. Under the plain meaning of the terms, the requirement can not be satisfied for a McHenry County application by publication in a newspaper which is not circulated throughout McHenry County.

It is well settled that in construing statutes one must ascertain and give effect to the intent of the legislature. *Madigan v. Dixon-Marquette Cement, Inc.*, 2003 WL 22049138 (Ill. App. 2 Dist.), citing *Harris v. Manor Healthcare Corp.*, 11 Ill.2d 350. In ascertaining the intent of the legislature, one examines the statutory enactment and seeks " 'to determine the objective the statute sought to accomplish and the evils it desired to remedy' " *Madigan* at 5, citing *Harris*, 111 Ill.2d at 362. The courts presume that the General Assembly, in passing legislation, did not intend absurdity, inconvenience, or injustice. *Madigan* at 5, citing *Harris*, 111 Ill. 2d at 363.

The purpose of requiring publication of notice in newspapers of general circulation in the county is to enable the provisions of the notice to become known to the inhabitants of the county. *Second Federal Savings and Loan Association of Chicago v. Home Savings and Loan Association*, 60 Ill. App. 3d 248 (1st Dist. 1978), citing *People ex rel. Chicago Heights v. Richton* (1969), 43 Ill. 2d 267; *Garcia v. Tully* (1978), 72 Ill. 2d 1. Notice and opportunity to be heard are essential elements of due process of law. *Illinois Crime Investigating Commission v. Buccieri*, (1967), 36 Ill. 2d 556, citing *People v. Lavendowski*, 329 Ill. 223; *Coe v. Armour Fertilizer Works*, 237 U. S. 413.

Moreover, in interpreting a statute, the courts use the plain meaning of the language of the statute. The word "general" is universally understood to mean available to all, as opposed to available to only a few. For example, Black's Law Dictionary contains the following definition:

> "General" – universal, not particularized, as opposed to special; principal or central, as opposed to local; open or available to all, as opposed to select; universal or unbounded, as opposed to limited; comprehending the whole or directed to the whole, as distinguished from anything applying to or designed for a portion only.

Blacks Law Dictionary (7th Ed. 1999).

The only notice provided was to residents of the Cary area surrounding the proposed site – who are opposed to the siting for purely parochial ("NIMBY") reasons. The rest of McHenry County's residents were not notified of the hearing. As such, the greater portion of McHenry County was prevented from attending and participating in the hearing, whether to support or oppose the proposed location. The publication in the Pioneer Press limited the extent of the notice of the Lowe public hearing in a manner that clearly prejudiced Lowe. The failure to publish notice is the Northwest Herald, a daily newspaper published, delivered and circulated throughout McHenry County is inexplicable and inexcusable. See Exhibit I.

The notice for the statutorily mandated public hearing on Lowe's siting appeal was not published in a newspaper of general circulation within McHenry County in direct violation of Section 40.1(a) of the Act. For this reason, the July 24, 2003 published notice was jurisdictionally defective.

B. The Board Lacks Authority to Issue a Final Decision Where the Hearing Is Conducted Following a Defectively Published Notice, and Must Deem the Application Approved By Operation of Law

Section 40.1(a) of the Act outlines the procedure for appeal to the Board from a denial of an application for local site approval. Section 40.1(a) requires that upon a petition for hearing by an applicant, a hearing and final decision take place within one hundred twenty days of the Board's receipt of the petition for a hearing. 415 Ill. Comp. Stat. 5/40.1(a). *See Illinois Power*

Co. v. Pollution Control Board, 137 Ill. App. 3d 449 (4th Dist. 1985); *Marquette Cement Manufacturing Co. v. Illinois Environmental Protection Agency*, 84 Ill. App. 3d 434, (3rd Dist. 1980). Because the notice for the hearing on Lowe's Petition was defective, the Board lacks authority to issue a final decision, and the Board must deem Lowe's application approved by operation of law.

1. The Board Lacks Authority to Issue a Final Decision on the Merits of the Appeal in the Face of a Defectively Noticed Hearing.

There is no provision in the Act for a final decision to issued following a hearing held pursuant to defect notice. Thus, to do so would be *ultra vires* and void. Administrative agencies exercise power strictly provided by statute and possess no inherent or common law powers. *In re the Abandonment of Wells Located in Illinois by Leavell*, 2003 WL 21977009. *See also Ford Motor Co. V. Motor Vehicle Review Board*, 338 Ill.App. 3d 880 (an administrative agency is a statutory creature with no general or common law power and is powerless to act unless statutory authority exists). Any action taken outside of its statutory authority is without jurisdiction and is void and a nullity from its inception. *Daniels v. Industrial Commission.*, 201 Ill.2d 160.

The Board's failure to comply with the mandatory notice and publication provision of the Act rendered void the hearing. *See Illinois Power Company v. Pollution Control Board*, 137 Ill. App. 3d 449 (4th Dist. 1985) (the failure to comply with a mandatory provision of a statute renders void the proceeding to which the provision relates), citing *Village of Mundelein v. Hartnett*, (1983), 117 Ill. App. 3d 1011 (2nd Dist. 1983). See Exhibit D. In order to address the merits of the appeal and issue a final decision, the Board must have both a valid hearing and

statutory notice. If both are not present, the Board lacks authority to issue a final decision on the merits. *Illinois Power Co.*, 137 Ill. App. 3d at 450. See Exhibit D.

To interpret the Act in any other manner would eviscerate the due process protections in the Act. The General Assembly has determined the public should be notified before the Board holds a hearing on a petition from the denial of a site location application. The Board cannot simply disregard this directive. The statute is clear in its mandate: "The Board shall publish 21 day notice of the hearing on the appeal in a newspaper of general circulation published in that county." 415 Ill. Comp. Stat. 5/40.1(a). The Illinois Supreme Court has made it clear that the use of the word "shall" advises of a mandatory intent. *See People v. Youngbey*, 82 Ill.2d 556, 562 (1980); *Illinois Power Co.*, 137 Ill. App. 3d at 450. The failure to comply with a mandatory provision of a statute renders void the proceeding to which it relates. *Village of Mundelein v. Hartnett*, 117 Ill. App.3d 1011 (1983). Thus, because the Board here failed to comply with the mandatory notice provision of the Act, the hearing is void, and the Board lacks authority to issue a final decision on the merits of Lowe's appeal.

2. Under Section 40.1(a), the Board Must Deem Lowe's Application for Site Location Approved by Operation of Law.

In order to address the merits of the appeal and issue a final decision, the Board must have both a valid hearing and statutory notice. If both are not present, the Board lacks authority to issue a final decision on the merits. *Illinois Power Co.*, 137 Ill. App. 3d at 450. The Board's failure to comply with the mandatory notice and publication provision of the Act rendered void the hearing. There is no provision in the Act for a final decision to be issued following a hearing held pursuant to defect notice. Thus, to do so would be *ultra vires* and void.

Section 40.1(a) provides in part that:

> If there is no final action by the Board within 120 days after the date on which it received the petition, the petitioner may deem the site location approved

415 Ill. Comp. Stat. 5/40.1(a). If there is no final action by the Board within 120 days, the petitioner may deem the site location approved. *Waste Management of Illinois, Inc., v. Pollution Control Board*, 201 Ill. App. 3d 614 (1st Dist. 1990).

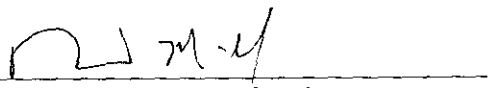
The notice for the public hearing held on August 14, 2003 was defective and in violation of the mandatory requirements of Section 40.1(a) of the Act and, therefore, is a nullity. Where the 21-day notice can no longer be provided before the lapse of the 120-day time period, no hearing can legally be held. *See Illinois Power Com v. Illinois Pollution Control Bd.*, 137 Ill App. 3d 449, 450 (4th Dist. 1985). Because there is no longer sufficient time before the statutory 120 day decision deadline for the Board to hold a public hearing on Lowe's Petition with proper 21 day notice, there is no time before the mandated decision deadline for the Board to meet the requirements of Section 40.1(a).

The Act requires both a public hearing and a final decision within the required time frame. *Marquette Cement Manufacturing Company v. Illinois Environmental Protection Agency*, 84 Ill. App. 3d 434 (3rd Dist). See Exhibit D. If either is not forthcoming within that time, then the permit or siting approval is deemed issued under the Act. *Id.* The Board lacks authority to dispense with the hearing or to violate either the statutory notice requirement or the 120-day decisional limit under the Act. Accordingly, the Board is not authorized to issue a final decision, and pursuant to section 40.1(a), the site application must deemed approved as a matter of law.

CONCLUSION

For the forgoing reasons, Petitioners request that the Board issue an order (1) finding that the hearing notice was defective and the Board lacks authority to issue a final decision on the merits, and (2) deeming Lowe's site location application approved in accordance with 415 Ill. Comp. Stat. 5/40.1(a).

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



David W. McArdle, one of their attorneys

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EXHIBIT LIST

A	Board's June 19, 2003 Order
B	Pioneer Press's Certificate of Publication
C	Dianne Roberta Turnball's Affidavit
D	Supporting Case Law
E	Lowe's Certificate of Publication
F	Frank Carlton's E-Mail Dated September 8, 2003
G	Pioneer Press Website Pages
H	McHenry County Map Depicting Area of Pioneer Press Distribution
I	Northwest Herald Circulation Data

Exhibit A

ILLINOIS POLLUTION CONTROL BOARD
June 19, 2003

LOWE TRANSFER, INC. and MARSHALL LOWE,	)	
Petitioners,	)	
v.	)	PCB 03-221
	)	(Pollution Control Facility
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS,	)	Siting Appeal)
Respondent.	)	

ORDER OF THE BOARD (by G.T. Girard):

On June 5, 2003, Lowe Transfer, Inc. and Marshall Lowe (petitioners) timely filed a petition asking the Board to review the May 6, 2003 decision of County Board of McHenry County, Illinois (McHenry County). *See* 415 ILCS 5/40.1(a) (2002); 35 Ill. Adm. Code 107.204. McHenry County denied the petitioner's request for application to site a pollution control facility located on U.S. Route 14 McHenry County.

Section 40.1(a) of the Environmental Protection Act (415 ILCS 5/40.1(a) (2002)) authorizes the petitioners appeal to the Board. The petitioners appeal on the grounds that McHenry County's decision to deny citing was against the manifest weight of the evidence. The petitioner's petition meets the content requirements of 35 Ill. Adm. Code 107.208. The Board accepts the petition for hearing.

The petitioners have the burden of proof. 415 ILCS 5/40.1(a) (2002); *see also* 35 Ill. Adm. Code 105.506. Hearings will be based exclusively on the record before McHenry County. 415 ILCS 5/40.1(a) (2002). Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40.1(a) (2002)), which only the petitioners may extend by waiver (35 Ill. Adm. Code 107.504; *see also* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, the petitioners "may deem the site location approved." 415 ILCS 5/40.1(a) (2002). Currently, the decision deadline is October 2, 2003 (the 120th day after June 5, 2003). *See* 35 Ill. Adm. Code 107.504. The Board meeting immediately before the decision deadline is scheduled for September 18, 2003.

McHenry County must file the entire record of its proceedings within 21 days after the date of this order. The record must comply with the content and certification requirements of 35 Ill. Adm. Code 107.304, 107.308. The petitioners must pay to McHenry County the cost of preparing and certifying the record. 415 ILCS 5/39.2(n) (2002); 35 Ill. Adm. Code 107.306; *see also* 35 Ill. Adm. Code 107.502(b).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 19, 2003, by a vote of 6-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

Exhibit B

ILLINOIS POLLUTION CONTROL BOARD

Date 08-13-03

Number of pages including cover sheet 2

TO: Diane Turnball

Phone 815-459-2050

Fax Phone 815-459 9057

CC:

FROM: Don Brow

Pollution Control Board

James R. Thompson Center

100 West Randolph Street

Suite 11-500

Chicago, Illinois 60601

Phone *312-814-3620*

Fax Phone *312-814-3669*

Web Site *http://www.ipcb.state.il.us/*

REMARKS: ☐ Urgent ☒ For your review ☐ Reply ASAP ☐ Please Comment

PN-Lowe Transfer Inc PCB 03-221
ADORDERNUMBER: 723226

PONUMBER: Don Brown

AMOUNT: 21.00

NO. OF AFFIDAVITS: 1

PUBLIC NOTICE
ILLINOIS POLLUTION CONTROL BOARD
NOTICE OF HEARING

Public Notice is hereby given that the Pollution Control Board will hold a public hearing in the matter of Lowe Transfer, Inc. and Marshall Lowe v. County Board of McHenry County, Illinois, PCB 03-221. The hearing will commence at [illegible] 2003, at the [illegible] Gymnasium, [illegible] Lake Road, Cary, Illinois, beginning at 10:30 a.m. [illegible] is subject to [illegible] without notice and may be [illegible] by contacting [illegible] of the Clerk [illegible]

Thomas Johnson, Chairman

Published in Pioneer Press 7/24/03 (723226) NW

Pioneer Press
Certificate of Publication

State of Illinois - County of ☒ Cook ☒ Kane ☒ Lake ☒ McHenry ☐ DuPage

Pioneer Press, does hereby certify it has published the attached advertisements in the following secular weekly newspapers. All newspapers meet Illinois Revised Statue requirements for publication of Legal Notices.
Note: Legal Notice appeared in the following checked positions.

PUBLICATION DATE(S): 7/24/03 to 7/24/03 1 Week(s)

☐ **WEST ZONE**

Elm Leaves, Forest Leaves, Franklin Park Herald - Journal, Maywood Herald, Melrose Park Herald, Northlake Herald - Journal, Oak Leaves, River Grove Messenger, Westchester Herald, West Proviso Herald

☐ **NORTH ZONE**

Evanston Review, Glencoe News, Glenview Announcements, Northbrook Star, Wilmette Life, Winnetka Talk

☐ **LAKESHORE ZONE**

Antioch Review, Deerfield Review, Grayslake Review, Gurnee Review, Highland Park News, Lake Forester, Libertyville Review, Lincolnshire Review, Mundelein Review, Review of Lindenhurst / Lake Villa, Vernon Hills Review

☐ **CENTRAL ZONE**

Des Plaines Times, Edgebrook - Sauganash Times Review, Edison - Norwood Times Review, Lincolnwood Review, Morton Grove Champion, Mount Prospect Times, Niles Herald - Spectator, Norridge / Harwood Heights News, Park Ridge Herald-Advocate, Skokie Review

☒ **NORTHWEST ZONE**

Algonquin Countryside, Arlington Heights Post, Barrington Courier-Review, Buffalo Grove Countryside, Cary - Grove Countryside, Elk Grove Times, Hoffman Estates Review, Lake Zurich Courier, Palatine Countryside, Rolling Meadows Review, Schaumburg Review, Wheeling Countryside

☐ **THE DOINGS ZONE**

The Doings - Clarendon Hills, The Doings - Hinsdale, The Doings - Oak Brook, The Elmhurst Doings, The La Grange Doings, The Weekly Doings, The Western Springs Doings

IN WITNESS WHEREOF, the undersigned, being duly authorized, has caused this Certificate to be signed and its official seal affixed at Glenview, Illinois

By John G. Bieschke (signature)

John G. Bieschke
Legal Advertising Manager (Official Title)

OFFICIAL SEAL
RUTH M. WIRTH
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 2-9-2007

Ruth M. Wirth (signature)

Exhibit C

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

AFFIDAVIT

NOW COMES the affiant, Dianne Roberta Turnball, and after being duly sworn, states:

1. I am a consultant retained by Zukowski, Rogers, Flood & McArdle on behalf of Lowe Transfer, Inc. and Marshall Lowe. I assisted on a daily basis in the preparation of the Siting Location Approval Application and participated in the underlying Pollution Control Facility Siting hearings held by the McHenry County Board.

2. On behalf of Zukowski, Rogers, Flood and McArdle and Lowe, I had a telephone conversation with Mr. John G. Bieschke, Legal Advertising Manager of the Pioneer Press newspapers on September 3, 2003. In that telephone conversation, Mr. Bieschke advised me that Frank Carlton, Circulation Operations Manager, was the employee at Pioneer Press with personal knowledge regarding circulation and distribution of Pioneer Press newspapers within McHenry County.

3. Subsequently, on several occasions beginning on September 3, 2003, I had telephone conversations with Frank Carlton, Circulation Operations Manager of Pioneer Press. In these conversations, I discussed with Mr. Carlton the extent of the Pioneer Press newspaper circulation within McHenry County, Illinois and the distribution of the newspapers to McHenry County. If called to testify, I would testify that Mr. Carlton confirmed the following facts with regard to the Pioneer Press newspaper circulation within McHenry County and its distribution:

    a). Of the thirteen Pioneer Press newspapers in the Northwest Zone, only five (5) of the newspapers are distributed and circulated within some parts of McHenry County. [Algonquin Countryside,

Barrington Courier-Review, Cary-Grove Countryside, Lake-in-the-Hills Countryside and Lake Zurich Courier]

b). All of the Pioneer Press newspapers are printed and bundled for distribution at the Pioneer Press Northfield facility, Cook County, Illinois. After bundling and separation of the newspapers by final destination, an independent private company delivers the newspapers to the post offices and newsstands appropriate for each distinct and separate newspaper.

c). The Cary-Grove Countryside is delivered to the Cary Post Office; the Algonquin Countryside and the Lake-in-the-Hills Countryside are delivered to the Algonquin Post Office; the Barrington Courier-Review is delivered to the Barrington Post Office [located in Lake County] and The Lake Zurich Courier is delivered to the Lake Zurich Post Office [also located in Lake County]. From these post offices the various editions of the Pioneer Press are circulated to their respective communities. After dropping the newspapers at the various local post offices, the private company delivers the remaining newspapers to every newsstand contracted with Pioneer Press within each community.

Dianne Roberta Turnball

Dianne Roberta Turnball

SUBSCRIBED AND SWORN to before me
this 12th day of September, 2003

Cynthia Andersen
Notary Public

"OFFICIAL SEAL"
CYNTHIA M. ANDERSEN
Notary Public, State of Illinois
My Commission Expires 08/24/04

Exhibit D

1981 Ill. Atty. Gen. Op. 91
(Cite as: 1981 WL 37187 (Ill.A.G.))

Office of the Attorney General
State of Illinois

*1 File No. 81-037
December 10, 1981

PUBLIC RECORDS AND INFORMATION:

Publication of Legal Notices

Honorable Chris E. Freese
State's Attorney
Moultrie County
Courthouse
Sullivan, Illinois 61951

Honorable Michael G. Carroll
State's Attorney
Douglas County
Courthouse
Tuscola, Illinois 61953

Gentlemen:

I have your letters wherein you raise questions concerning the publication of legal notices in the Arthur Graphic Clarion newspaper. Mr. Freese asks whether the Arthur Graphic Clarion is published in Moultrie County and thus a proper medium for the publication of legal notices by units of local government in Moultrie County. Mr. Carroll asks whether, if the Arthur Graphic Clarion is published in Moultrie County, it is eligible to publish the legal notices of units of local government in Douglas County. For the reasons hereinafter stated, it is my opinion that the Arthur Graphic Clarion is published in Moultrie County and not in Douglas County. The only unit of local government in Douglas County which may publish legal notices in the Arthur Graphic Clarion is the village of Arthur.

Section 5 of 'AN ACT to revise the law in relation to notices' (Ill. Rev. Stat. 1979, ch. 100, par. 5) defines the term 'newspaper' for the purpose of publishing notice required by law or contract:

'When any notice is required by law or contract to be published in a newspaper (unless otherwise expressly provided in the contract), it shall be intended to be in a secular newspaper of general circulation, published in the city, town or county, or some newspaper specially authorized by law to publish legal notices, in the city, town, or county. * * *'

The rule with respect to publication of a newspaper in Illinois was stated in the case of People v. Read (1912), 256 Ill. 408, 410, as follows:

'***

* * * It is immaterial where the printing is done, but the place of publication of a newspaper is the place where it is first put into circulation,--where it is first issued to be delivered or sent, by mail or otherwise, to its subscribers. * * *'

The term 'first' is defined in the case of In re Estate of Lalla (1935), 281 Ill.App. 124, 133, as follows:

'* * * 'preceding all others; first in time or a series, position, or rank; earliest in time or succession; foremost in position; in front of, or in advance of, all others; foremost in rank, importance, or worth.' * * *'

Where a newspaper is circulated in different communities or counties, the one in which it is first circulated is the place of publication. People v. Read (1912), 256 Ill. 408, 410.

It is clear that there is only a single publication of a newspaper, publication occurring at the place where the newspaper is first issued to the public, i.e., where actual distribution of bulk deliveries of the newspaper originates. This conclusion is in accordance with opinion File No. S-1050, issued by my predecessor on February 26, 1976. 1976 Ill. Att'y Gen. Op. 96.

*2 In their affidavit, the owners and publishers of the Arthur Graphic Clarion, state that the newspaper is printed in Villa Park, Douglas County, Illinois. There are 2,250 copies of the newspaper printed weekly with approximately 1,400 being distributed pursuant to paid mail subscriptions, and 683 being distributed pursuant to newsstand sales. The majority of the copies are distributed in Douglas and Moultrie Counties, with both counties receiving approximately the same number of newspapers. Mr. Freese states in his letter that the newspapers are first taken to the Post Office in Moultrie County for mailing to subscribers and then are delivered to newsstands in Moultrie County and Douglas County with the first newsstand deliveries being made in Moultrie County. On the basis of these facts, it is clear that the Arthur Graphic Clarion is published in Moultrie County and not in Douglas County.

In regard to the question raised by Mr. Carroll, section 5 of 'AN ACT to revise the law in relation to notices' requires that the newspaper be published in the city, town or county giving the notice. Section 2 of 'AN ACT requiring certain custodians of public moneys to file and publish statements of the receipts and disbursements thereof' (Ill. Rev. Stat. 1979, ch. 102, par. 6) is to the same effect:

'Such public officer shall also, within 30 days after the expiration of such fiscal year, cause a true, complete and correct copy of such statement to be published one time in a newspaper published in the town, district or municipality in which such public officer holds his office, or, if no newspaper is published in such town, district or municipality, then in a newspaper printed in the English language published in the county in which such public officer resides. * * *'

The purpose of limiting publication of notices to newspapers meeting certain standards is to insure that the published material will come to the attention of a substantial number of persons in the area affected. (1976 Ill. Att'y Gen. Op. 96, 98.) There is no restriction in section 5 of 'AN ACT to revise the law in relation to notices' which would prevent a unit of local government, such as the village of Arthur, which extends into two or more counties, from publishing a legal notice in any newspaper published within the unit's boundaries.

On the basis of the above discussion, it is my opinion that the only unit of local government in Douglas County which may publish legal notices in the Arthur Graphic Clarion is the village of Arthur.

Very truly yours,

Tyrone C. Fahner
Attorney General
1981 Ill. Atty. Gen. Op. 91, 1981 WL 37187 (Ill.A.G.)
END OF DOCUMENT

1992 WL 469749 (Ill.A.G.)
(Cite as: 1992 WL 469749 (Ill.A.G.))

Office of the Attorney General
State of Illinois

*1 File No. 92-010
June 19, 1992

REVENUE:

Publication of Assessment Lists

Honorable Michael Curran
Chairman, House State Government Administration Committee
1121 Stratton Building
Springfield, Illinois 62706

Honorable Gary Johnson
State's Attorney, Kane County
719 South Batavia Avenue
Geneva, Illinois 60134

Gentlemen:

I have your letters wherein you inquire whether the schedule of fees set out in section 103 of the Revenue Act of 1939 (Ill.Rev.Stat.1991, ch. 120, par. 584) for the publication of assessment lists in counties of less than 2,000,000 inhabitants is mandatory, or represents only the maximum rates which may be paid for publication. State's Attorney Johnson has also inquired whether a newspaper may be "published" simultaneously in several townships, for purposes of the same section. For the reasons hereinafter stated, it is my opinion that the fee schedule set out in section 103 is mandatory, and does not merely set maximum rates. Further, in response to Mr. Johnson's second question, it is my opinion that there is only one publication of a newspaper, which occurs at the place where the actual distribution of bulk deliveries of the newspaper originates.

The final paragraph of section 103 of the Revenue Act of 1939 provides:

"***

The newspaper shall furnish to the local assessment officers as many copies of the paper containing the assessment list as he or they may require. The newspaper shall be paid a fee for publishing the assessment list according to the following schedule:

(1) For a parcel listing including the name of the property owner, an index number and the total assessment, 80cents per parcel;

(2) For a parcel listing including the name of the property owner, an index number, the assessed value of improvements and the total assessment, $1.20 per parcel;

(3) For a parcel listing including the name of the property owner, a legal description of the property and the total assessment, $1.20 per parcel;

(4) For a parcel listing including the name of the property owner, an index number, a legal description and the total assessment, $1.60 per parcel;

(5) For a parcel listing including the name of the property owner, a legal description, the assessed value of improvements and the total assessment, $1.60 per parcel;

(6) For a parcel listing including the name of the property owner, an index number, a legal description, the assessed value of improvements and the total assessment, $2.00 per parcel; and

(7) For the preamble, headings, and any other explanatory matter either required by law, or requested by the supervisor of assessments, to be published, the newspaper's published rate for such advertising."

Although there is support for either interpretation, it is my opinion that the use of the phrase "shall be paid" in section 103 indicates a legislative intent to set mandatory, rather than maximum, publication rates.

*2 The last paragraph of section 103 was rewritten by Public Act 84-1031, effective November 21, 1985. Prior to that date, that paragraph had provided that newspapers which published assessment lists "shall be entitled to a fee of 30cents per column line ***". (See Ill.Rev.Stat.1983, ch. 120, par. 584.) The brief legislative remarks prior to the passage of House Bill 1680 (which was enacted as Public Act 84-1031) indicate that the amendment was intended to be revenue neutral, but to reflect a different basis used by newspapers for calculating advertising rates. (Remarks of Senator Netsch, Senate Debate on House Bill 1680, June 18, 1985, at 166, and October 30, 1985, at 30-31.) In addition to changing the basis for calculating the fee, the amendment also changed the language "shall be entitled" to "shall be paid".

Attorney General Scott, in opinion No. S-1404, issued January 10, 1979 (1979 Ill. Att'y Gen.Op. 4), construed the former provision as providing only for a maximum rate, thereby permitting counties to contract for a lower price. My predecessor found support for his position in several cases reported in other jurisdictions. (See e.g., Cook v. Payne (Okla.1944), 148 P.2d 174; Democrat Printing Co. v. Logan (Ark.1933), 56 S.W.2d 1013; Wisner v. Morrill County (Neb.1928), 220 N.W. 280.) As will be explained more fully below, however, I disagree with the conclusion expressed in opinion No. S-1404.

The Illinois Supreme Court has held that the General Assembly has the right to fix the rate for publication of assessment lists, provided that the rate set is not so unreasonable as to be unconstitutional. (Lee Publishing Co. v. County of St. Clair (1930), 341 Ill. 257, 262.) In that case, the court treated the phrase "shall be entitled" in section 26 of the Revenue Act of 1898 (see Ill.Rev.Stat.1929, ch. 120, par. 308), the predecessor of section 103 of the Revenue Act of 1939, as mandatory, requiring the payment of the rate of 10cents per line for publication of assessment lists. Citing that case, Attorney General Clark, in opinion No. UP 993, issued September 9, 1963, concluded that the rate set in section 103 was mandatory. While it is true, as Attorney General Scott later suggested, that the word "shall" can be construed as permissive, depending upon the legislative intent, when "shall" is used in a statute with reference to any right or benefit, and the right or benefit depends upon giving the word a mandatory meaning, it cannot be given a permissive meaning. Andrews v. Foxworthy (1978), 71 Ill.2d 13.

Moreover, as previously noted, the last paragraph of section 103 was amended significantly after the issuance of opinion No. S-1404. In the amendatory language, the General Assembly continued the use of the term "shall", but changed the phrase "shall be entitled" to "shall be paid". The latter phrase connotes not only a private entitlement to payment for the publisher, but also a command to the several assessors, supervisors of assessment and boards of assessors, as the case may be, to pay those amounts specified in the statute. Where the term "shall" is used in a statute directing the performance of an act by public officials, it will be accorded a mandatory and imperative meaning. See DeYoung v. DeYoung (1978), 62 Ill.App.3d 837, 841; People v. Nicholls (1977), 45 Ill.App.3d 312, 316.

*3 In view of the authorities which have construed the section as mandatory, as well as the recent amendment thereto which used language generally construed as mandatory, it would be contrary to the established rules of statutory construction and the apparent legislative intent to construe section 103 otherwise. A mandatory construction, based upon similar language, has also been followed in other jurisdictions. (See Steuben Advocate v. Bd. of Supervisors (1957), 161 N.Y.S.2d 199; Hoffman v. Chippewa Co. (Wis.1890), 45 N.W. 1083.) Therefore, it is my opinion that the rate schedule fixed in section 103 of the Revenue Act of 1939 is mandatory, and that a county is required to pay the requisite fee for publication of its assessment lists.

Mr. Johnson's second question relates to the place of publication of a newspaper which is printed outside the county, shipped to a township within the county and there labeled and sent to various post offices in other townships for distribution by mail. The last sentence of the third paragraph of section 103 of the Revenue Act of 1939 provides:

"***

*** In every township or assessment district in which there is published one or more newspapers of general circulation, the list [of assessments] of such township shall be published in one of the newspapers.

***"

The publisher contends that "publication", for purposes of section 103, occurs in each township in which the publisher's truck delivers the papers to a post office. This contention was rejected in opinion No. F-1287, issued November 6, 1964 (1964 Ill. Att'y Gen.Op. 249), wherein Attorney General Clark concluded that a newspaper could have only one place of publication. The publication of a newspaper takes place where it is first issued to the public, i.e., where the first actual distribution of bulk deliveries of the newspaper originates. This conclusion

is supported by the opinion in Garcia v. Tully (1978), 72 Ill.2d 1, wherein the court distinguished between "publication" and "circulation" of a newspaper, concluding that simultaneous circulation of a newspaper within several townships is not the equivalent of publication in each township. Accordingly, it is my opinion that the newspaper in question is published, for purposes of section 103 of the Revenue Act of 1939, only in the township to which it is delivered for labeling and distribution to post offices.

Respectfully yours,

ROLAND W. BURRIS
Attorney General
1992 WL 469749 (Ill.A.G.)
END OF DOCUMENT

484 N.E.2d 898
(Cite as: 137 Ill.App.3d 449, 484 N.E.2d 898, 92 Ill.Dec. 167)
< KeyCite History >

Appellate Court of Illinois,
Fourth District.

ILLINOIS POWER COMPANY, Petitioner,
v.
ILLINOIS POLLUTION CONTROL BOARD and Illinois Environmental Protection Agency, Respondents.

No. 4-84-0803.

Oct. 10, 1985.
Rehearing Denied Nov. 19, 1985.

Power company appealed from order of the Pollution Control Board which affirmed a decision of the Environmental Protection Agency denying permit for one unit at power plant and issuing a permit for another unit subject to conditions. The Appellate Court, McCullough, J., held that Board's action was invalid because Board failed to give requisite statutory notice of its hearing to members of the public and the General Assembly, and since a valid hearing was not held within 90 days of company's petition, permits were deemed issued.

Reversed.

West Headnotes

[1] Administrative Law and Procedure k305
15Ak305

While circuit courts derive their jurisdiction directly from the Constitution, an administrative authority derives its power solely from statute by which it was created.

[2] Administrative Law and Procedure k305
15Ak305

Failure to comply with a mandatory provision of a statute will render void the administrative proceeding to which the provision relates.

[3] Environmental Law k18
149Ek18
(Formerly 199k25.5(9) Health and Environment)

Failure of Pollution Control Board to follow statutory notice procedure on appeal of permit denial and grant of permit with conditions rendered its action upholding Environmental Protection Agency invalid, and because a valid hearing was not held within 90 days of power company's petition, permits would be deemed issued. S.H.A. ch. 111 1/2 , ¶ 1040(a).

**898 *450 ***167 Sheldon A. Zabel, Carolyn A. Lown, Schiff, Hardin & Waite, Chicago, for petitioner.

Neil F. Hartigan, Atty. Gen., Springfield, Jill Wine-Banks, Sol. Gen., Chicago, Greig R. Seidor, Asst. Atty. Gen., Springfield, for respondents.

McCULLOUGH, Justice:

Illinois Power Company (IPC) appeals from an order of the Illinois Pollution Control Board (Board), which affirmed a decision of the Illinois Environmental Protection Agency (Agency). The Agency had decided to deny a permit for Unit 2 at IPC's Vermilion power plant. The Agency had also issued a permit for Unit 1 subject to conditions which IPC found objectionable. On appeal, IPC contends: (1) The Board's action was invalid because the **899 ***168 Board failed to give the requisite statutory notice of its hearing to members of the public and the General Assembly; (2) the Board's action was invalid because the Board violated its own provision for notice to parties; and (3) the Board's decision was against the manifest weight of the evidence. Due to our disposition of the first issue, we need not address the latter two.

On July 28, 1982, the Agency denied two permit renewal applications for IPC's Units 1 and 2 at its Vermilion power plant. Pursuant to section 40 of the Environmental Protection Act (Ill.Rev.Stat.1983, ch. 111 1/2 , par. 1040), IPC appealed the permit denials to the Board. The Board decided the Agency had incorrectly denied the permits and remanded the case for review consistent with its opinion. The IPC appealed, but this court dismissed the appeal, holding that the Board's order was not final. On October 2, 1983, the Supreme Court denied leave to appeal.

IPC filed additional permit applications for Units 1

and 2 on February 8, 1984. On June 8, the agency denied a permit for Unit 2. The Agency issued a permit for Unit 1 subject to certain operating conditions. IPC appealed these decisions to the Board on July 13, 1984.

Section 40(a) of the Act outlines the procedure for permit appeals:

> "(1) If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. The Board shall give 21 day notice to any person in the county where is located the facility in *451 issue who has requested notice of enforcement proceedings and to each member of the General Assembly in whose legislative district that installation or property is located; and shall publish that 21 day notice in a newspaper of general circulation in that county. The Agency shall appear as respondent in such hearing. At such hearing the rules prescribed in Sections 32 and 33(a) of this Act shall apply, and the burden of proof shall be on the petitioner.
> (2) Except as provided in paragraph (a)(3), if there is no final action by the Board within 90 days, petitioner may deem the permit issued under this Act * * *." Ill.Rev.Stat.1983, ch. 111 1/2 , par. 1040(a).

The Board assigned the case to a hearing officer on September 24, 1984. On September 25, the hearing officer notified the Board that because 21-day notice could no longer be provided before the lapse of the 90-day period, he was of the opinion that no hearing could legally be held. The Board directed the hearing officer to hold the hearing, and the hearing was scheduled for October 3. Both parties received notice of the hearing on September 28. At the hearing, IPC filed what it called a special appearance. IPC contended the hearing was illegal because the proper statutory and regulatory notice was not provided. IPC declined to present any evidence at the hearing. IPC also declined to relate how it had been prejudiced by the lack of notice. The Agency presented its record of the application pertaining to Units 1 and 2.

On October 12, 1984, the Board affirmed the Agency's decisions. The Board found the 21-day statutory notice provision was not met, but it also decided IPC lacked standing to challenge the failure to comply. The Board also held the regulatory 21-day notice to the parties had not been met. The Board, however, decided the error was not prejudicial to IPC. Finally, the Board decided IPC had not met its burden of demonstrating the invalidity of the Agency's decision. Two dissenters believe the complete lack of notice to the persons specified in section 40(a) deprived the Board of the authority to adjudicate the merits of the controversy.

Through an administrative oversight, the Board found itself faced with a dilemma. In order to address the merits of the permit appeal, the Board had to dispense with the hearing or violate either the statutory notice requirement or the statutory 90-day decisional limit. In *Marquette Cement Manufacturing Co. v. Pollution Control Board* (1980), 84 Ill.App.3d 434, 39 Ill.Dec. 759, 405 N.E.2d 512, the court held section 40 contemplates both a hearing and a final **900 ***169 decision within 90 days, and *452 if either is not forthcoming within that time, the permit is deemed issued as a matter of law. The effect of inaction by the Board for 90 days simply protects the party seeking review from charges of operation without a permit, a violation of both state and federal law. The permittee is still vulnerable to any other charge for illegal violation, and the Agency may still bring an enforcement action. (*Illinois Power Co. v. Pollution Control Board* (1983), 112 Ill.App.3d 457, 462, 68 Ill.Dec. 176, 180, 445 N.E.2d 820, 824.) In view of *Marquette Cement*, the Board decided to hold a hearing and render a decision within 90 days. The Board, therefore, dispensed with the notice required by the statute.

[1][2] IPC contends the Board's failure to give the statutory notice renders the hearing invalid. IPC concludes the permits issued as a matter of law. The Board notes IPC suffered no prejudice by the failure to give notice and argues IPC lacks standing to raise the issue. The Board also contends any error was technical and, therefore, does not require reversal. (Ill.Rev.Stat.1983, ch. 110, par. 3-111(b).) Rather than a matter of standing or technical error, we deem the statutory notice requirement to be a jurisdictional matter. While circuit courts derive their jurisdiction directly from the constitution (*In re Estate of Mears* (1982), 110 Ill.App.3d 1133, 66 Ill.Dec. 606, 443 N.E.2d 289), an administrative authority derives its power solely from the statute by which it was created (*Spray v. Illinois Civil Service Com.* (1983), 114 Ill.App.3d 569, 70 Ill.Dec. 302, 449 N.E.2d 176). The legislature has determined that certain of its members and the public should be notified before the Board holds a hearing on a permit appeal. The Board cannot simply disregard this directive. The

statute requiring the notice to be given states in part: "The Board *shall* give 21 day notice * * *; and shall publish * * *." (Ill.Rev.Stat.1983, ch. 111 1/2 , par. 1040(a).) The Illinois Supreme Court in *People v. Youngbey* (1980), 82 Ill.2d 556, 562, 45 Ill.Dec. 938, 941, 413 N.E.2d 416, 419, stated that the use of the word "shall" is regarded as indicative of a mandatory intent. (Also see *In re Application of Rosewell* (1983), 97 Ill.2d 434, 73 Ill.Dec. 748, 454 N.E.2d 997.) The failure to comply with a mandatory provision of a statute will render void the proceeding to which the provision relates. *Village of Mundelein v. Hartnett* (1983), 117 Ill.App.3d 1011, 73 Ill.Dec. 285, 454 N.E.2d 29.

[3] The state agency and, in this instance, the Pollution Control Board cannot ignore the mandatory requirements of notice in an effort to evade the responsibility to complete a hearing within the required time, *i.e.* 90 days from the time of filing. The Board failed to follow the statutory procedure. Because a valid hearing was not held within 90 days of IPC's petition, the permits are deemed issued under section 40.

*453 For the foregoing reasons, the decision of the Illinois Pollution Control Board is reversed.

Reversed.

WEBBER and TRAPP, JJ., concur.

484 N.E.2d 898, 137 Ill.App.3d 449, 92 Ill.Dec. 167

END OF DOCUMENT

405 N.E.2d 512
(Cite as: 84 Ill.App.3d 434, 405 N.E.2d 512, 39 Ill.Dec. 759)
<KeyCite Citations>
Appellate Court of Illinois, Third District.

MARQUETTE CEMENT MANUFACTURING COMPANY, Petitioner-Appellant,
v.
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and Illinois Pollution Control Board, Respondents-Appellees.

No. 79-851.

May 30, 1980.

Petitioner sought review of Pollution Control Board's order dismissing petition for review of Environmental Protection Agency's decision denying petitioner's application for air operating permit for petitioner's cement plant. The Appellate Court, Third District, Alloy, P. J., held that: (1) where Board failed to hold hearing within 90 days after petition for review of Agency's decision, permit would be deemed to have been issued; (2) dismissal of petition for review of Agency's decision could not be sustained on basis of fact that additional data submitted by Agency indicated possible violations by petitioner's plant; and (3) fact that petitioner filed a summary judgment motion requesting Board to issue permit on basis of record before it did not constitute a waiver of petitioner's right to have Board hold a hearing within 90 days.

Reversed.

West Headnotes

[1] Environmental Law k294
149Ek294
(Formerly 199k25.6(8) Health and Environment)

Where Pollution Control Board failed to hold hearing within 90 days after applicant filed petition for review of Environmental Protection Agency's denial of application for air operating permit for applicant's cement plant and where there was no delay on part of applicant, permit would be deemed to have been issued; Board's breach of requirement that hearing be held within 90 days was not cured by making final decision within 90 days, but without a hearing. S.H.A. ch. 111 1/2 , § 1040.

[2] Environmental Law k294
149Ek294
(Formerly 199k25.6(8) Health and Environment)

In proceeding in which Pollution Control Board dismissed the petition for review of Environmental Protection Agency's denial of application for air operating permit for applicant's cement plant, in which Board failed to hold hearing on petition within 90 days as statutorily required and in which applicant satisfied its initial burden of production with regard to a showing that no violations would be caused by issuance of permit, the dismissal could not be sustained on basis of fact that additional data submitted by Agency indicated possible violations by the plant. S.H.A. ch. 111 1/2 , § 1040.

[3] Environmental Law k290
149Ek290
(Formerly 199k25.6(8) Health and Environment)

Pollution Control Board's decision must be based on the record and findings of fact must be supported in the evidence.

[4] Environmental Law k294
149Ek294
(Formerly 199k25.6(8) Health and Environment)

Fact that applicant, which sought review of Environmental Protection Agency's denial of application for air operating permit for applicant's cement plant, filed a summary judgment motion requesting Pollution Control Board to issue permit on basis of record before it did not constitute a waiver of applicant's right to have Board hold a hearing within 90 days after petition for review was filed, in light of fact that such motion was a defensive move by applicant in face of Board's indication that no hearing would be held and that the matter would be decided without a hearing.
*434 **513 ***760 Johnine Brown Hazard and Joseph S. Wright, Jr., Rooks, Pitts, Fullagar & Poust, Chicago, for petitioner-appellant.

*435 George Wm. Wolff and William Blakney, Asst. Attys. Gen., William J. Scott, Atty. Gen.,

Environmental Control Division, Chicago, Michael Mauzy, Illinois Environmental Protection Agency, Springfield, for respondents- appellees.

ALLOY, Presiding Justice:

Petitioner Marquette Cement Manufacturing Company (hereinafter Marquette) appeals from the order of the Pollution Control Board (hereinafter PCB) dismissing Marquette's Petition for Review of the Illinois Environmental Protection Agency's decision, denying Marquette's permit application. Review in this Court is pursuant to Section 41 of the Illinois Environmental Protection Act (hereinafter Act). Ill.Rev.Stat.1977, ch. 1111/2, par. 1041.

Marquette had filed an application for an air operating permit for its Oglesby cement plant with the Agency. The Agency denied the permit application, specifying as its principal reason the fact that Marquette had not sufficiently shown that the plant's operations would not cause violations of air quality rules and regulations. Review of the Agency's denial was sought before the PCB. (Ill.Rev.Stat.1977, ch. 1111/2, par. 1041.) Due, however, to scheduling problems, the requested and required hearing before the PCB was not set within the 90 days provided by statute. (Ill.Rev.Stat.1977, ch. 1111/2, par. 1040.) When the Board sought a waiver of the 90-day provision from petitioner, Marquette refused to waive the 90-day requirement.

Thereafter, fearing dismissal of the Petition for Review without a hearing, Marquette filed a motion, designated a summary judgment motion, with the PCB. In that motion, Marquette requested that the PCB order the permit to issue on the basis of the record before it at that time. In a 3-2 vote, after discussion of the case at the PCB's meeting, the PCB thereafter dismissed Marquette's Petition for Review, for lack of a hearing and for an alleged deficiency in the Petition. From that dismissal Marquette appeals. It raises three issues: (1) whether the PCB erred in dismissing the petition for review for lack of a hearing; (2) whether the PCB erred in dismissing the petition for review as deficient; and (3) whether, given the record, the PCB and the Agency erred in not granting Marquette its requested operating permit.

The record reveals that Marquette owns and operates a portland cement manufacturing facility known as the "Oglesby plant," near the city of Oglesby in LaSalle County. Operation of the plant generates particulate matter which is emitted into the atmosphere. The plant is equipped with a variety of air pollution control devices. The plant is also subject to the requirements of the Illinois Environmental Protection Act provisions (Ill.Rev.Stat.1977, ch. 1111/2, par. 1001, et seq.), specifically, in the instant case, to the permit requirements thereunder.

*436 Marquette first applied to the Agency for an air operating permit in May, 1973. A permit was thereafter deemed issued by operation of law on August 1, 1973. Again **514 ***761 in June, 1976, Marquette applied for a permit and it was deemed issued by operation of law. Then, on April 9, 1979, Marquette asked that its 1976 application for an air operating permit for the Oglesby plant again be acted upon. At the time of the April, 1979 permit application, Marquette and the Agency had been co-operating to implement a proposed settlement agreement which included a program to improve the control and monitoring of particulate emissions at the Oglesby plant. The proposed agreement grew out of an enforcement proceeding brought by the Agency in 1977, Illinois Environmental Protection Agency v. Marquette Cement Manufacturing Company, PCB 77-25. The program was designed to conclusively establish Marquette's compliance with the Act and the Board's regulations and to end the dispute with the Agency.

By letter dated May 8, 1979, the Agency denied Marquette's application for a permit, alleging in the denial letter the possibility of air pollution violations, the existence of citizen complaints, and the lack of information from Marquette about whether emissions from the plant caused or contributed to ambient air quality violations in the immediate area. Marquette then filed, on June 28, 1979, a Petition for Review of the denial with the PCB and thereby sought a hearing on the Agency's actions. Under Section 40 of the Act, the PCB must take final action on a petition within 90 days of the date on which the petition is filed. (Ill.Rev.Stat.1977, ch. 1111/2, par. 1040.) If the Board does not do so, then Section 40 provides that a default permit is thereafter deemed issued. Under the 90-day statutory requirement, a final PCB decision in the instant case was due on or before September 26, 1979. Section 40 of the Act also requires a hearing on the Petition for Review, which hearing must be conducted only after the Board has provided 21 days notice to the public and the parties. Ill.Rev.Stat.1977, ch. 1111/2, par.

1040.

No hearing was held, although Marquette engaged in substantial discovery in preparation for such a hearing. Due to scheduling difficulties of an unspecified nature, the Hearing Officer appointed by the Board to hear the case, unilaterally, on September 4, 1979, set a hearing date for October 3, 1979. That date allowed for compliance with the 21-day public notice provision of the statute, but it did not comply with the requirement for Board action within the statutorily specified 90-day period. According to affidavits in the record, a Board officer then suggested that Marquette file a waiver of the 90- day requirement so that a hearing could be held in October. Marquette declined to file a waiver. The bases for their refusal to such a waiver were (1) that the Hearing Officer could have complied with all requirements by setting the hearing *437 on September 25, instead of October 3; (2) that the unnecessary delay, caused by the Hearing Officer, was prejudicial to their interests, given potential civil penalties in the enforcement proceeding then pending; and (3) that the Act neither authorizes nor requires an extension of the 90-day period. Marquette also took the position that the PCB could order issuance of the permit on the merits, given the record before it, even without a hearing.

Thereafter, on September 18, 1979, prior to the running of the 90-day period, Marquette filed a motion with the PCB, asking for summary judgment on their Petition for Review. Marquette requested that the PCB order the permit issued on the basis of the record before it. Marquette's petition and motion were considered at the Board's September 20, 1979, meeting. After a discussion between the five Board members on the best approach to take in the matter, the Board voted 3-2 to deny the Petition for Review without prejudice. The asserted grounds for their dismissal were the lack of a hearing and an alleged deficiency in the Petition. From this decision by the PCB, Marquette appeals.

(1) Marquette first argues that the PCB erred in dismissing its petition for lack of hearing. Under Section 40 of the Act, a hearing is required to be held by the Board, upon petition by an applicant who has been denied a permit by the Agency. If there is **515 ***762 no final action by the Board within 90 days from filing the petition, then a petitioner may deem the permit issued under the Act, except for certain inapplicable exceptions. The statute clearly contemplates and requires that both the hearing and final agency action shall occur within 90 days from the filing of the Petition for Review. According to the statutory timetable, as applied in the instant case, a hearing and final decision should have both been forthcoming by September 26, 1979.

In the instant case, however, the PCB, through its appointed Hearing Officer, had set the date for a hearing on October 3, 1979, almost a week beyond the 90- day limit set in the statute. There is no assertion made that the delay in the date for a hearing was caused by petitioner Marquette, nor does the PCB deny that compliance with the statute was possible. The reason for setting the October date was a perceived inability to meet the 21-day notice requirement within the 90-day limitation period. Whatever the reasons behind setting the October date, by setting October 3 as a hearing date, the Hearing Officer, and through him the PCB, clearly indicated to Marquette that there would be no hearing for them within the required 90-day period. The solution to the problem, so far as the PCB and the Agency were concerned, was for Marquette to file a waiver of its right to a decision within 90 days. Marquette refused to make any such waiver, arguing prejudice in the enforcement action and the fact that the delay was not occasioned by them at all.

*438 According to the uncontradicted affidavit of Marquette's counsel, attached to the motion before the PCB, Marquette was then informed by an official of the PCB that "if by September 20, 1979 (the next meeting of the Pollution Control Board) Marquette does not file a waiver of its right to a 90-day decision by the Board, the Board will deny Marquette's petition for review without a hearing." Faced, it believed, with the prospect of having its petition denied without a hearing, and as a punitive measure for refusing to waive its right to a hearing within 90 days, Marquette responded by filing a motion for summary judgment with the PCB, requesting that it grant the Petition for Review and order the Agency to issue the air operating permit. The record shows that this action by Marquette was a defensive move seeking to force the issue on the Board, in the face of the threat to dismiss the petition without a hearing. Marquette argued in the motion that the record as it stood at that time was sufficient to show that it had met the requirements for issuance of the permit, and it asked the PCB to order the permit issued.

Thereafter, on September 20, 1979, the PCB held

its scheduled meeting. Marquette's Petition for Review and motion came up, although the record indicates that the Board members did not fully apprehend the nature of summary judgment motions as utilized in the circuit courts. At the meeting, the Chairman of the PCB opened discussion among board members by noting that no hearing had been held and that the 90 days was going to run out without a hearing. He recommended, at the outset, that the PCB either dismiss the petition without prejudice or remand it to the Agency. His stated grounds for the dismissal were the lack of a hearing and, secondarily, the Petition's alleged lack of conformity with Procedural Rule 502(a)(2)(iv) of the PCB. His recommended dispositions expressly did not reach the merits of the Petition for Review. In the discussion that followed three board members, including the Chairman, expressed their firm belief that a hearing was necessary, prior to any decision on the Petition, in order to ensure a complete record with full factual development. The Agency had apparently presented the Board with data opposing the permit on the day of the hearing. No discussion of the petition itself took place. After some discussion on how best to address the "procedural goof up," and after the three members indicated their unwillingness to grant the petition without more information by way of a hearing, the Chairman put it to Marquette directly:

> "Well, it seems to me to be very simple. Either Marquette waives and gives us **516 ***763 time for the hearing, or we have to make some kind of decision today."

Thereafter, the members voted 3-2 to dismiss the petition without prejudice. In a brief discussion after the vote, one of the Board members *439 voting with the majority stated that "the only reason" he was voting to deny the petition was the fact that the hearing had not been held.

What the record in this case reveals is unfortunate and regrettable conduct on the part of the Board. We find that Marquette has sufficiently established that the true basis for the Board's action in dismissing their petition was the failure to have a hearing. Yet responsibility for that failure lay not with Marquette, but with the PCB and its Hearing Officer. It is evident that the PCB's action dismissing the Petition for Review, as it did, effectively punished Marquette for failure to waive its rights and also punished Marquette for the PCB's own failure to satisfy the statutory requirement of a hearing and a decision within 90 days. The action taken by the PCB was a transparent attempt to circumvent the requirements of the statute and should be reversed as arbitrary, capricious and unreasonable under the circumstances. See Illinois Coal Operators Association v. Pollution Control Board (1974), 59 Ill.2d 305, 310, 319 N.E.2d 782; SCA Services v. Illinois Pollution Control Board (4th Dist. 1979), 71 Ill.App.3d 715, 718, 27 Ill.Dec. 722, 389 N.E.2d 953. Marquette had a right to a hearing and to a final decision within 90 days from filing the petition, absent their own delay or other extraordinary circumstances not present in this case. When the PCB indicated its unwillingness to provide the hearing within that time, which it did by setting the October 3 hearing date, it thereby breached the requirements of the statute. The permit should have been deemed issued as of September 26, 1979, the final day of the 90-day period. The Board's attempt to cure its breach of the statutory requirement of a hearing by making a final decision within 90 days, but without a hearing, cannot stand. The statute contemplates both a hearing and a final decision within 90 days. If either is not forthcoming within that time, then the permit is deemed issued under the Act. In the instant case, the hearing was not held, and the permit is, therefore, deemed to have issued.

(2) The Board seeks to support its dismissal order with its alternate finding, that Marquette failed to comply with Rule 502(a)(2)(iv), requiring submission of material as may be necessary to show the issuance of a permit will not cause a violation of the Act or regulations. Such a basis does not support the dismissal. Regardless of the merits of the Petition, the essential and controlling fact remains that the Board did not provide for the hearing within the required 90 days, and therefore the permit must be deemed issued. We would also note that insofar as the PCB uses subsection (a)(2)(iv) of Procedural Rule 502 to address the issue of the sufficiency of the petition in satisfying Petitioner's ultimate burden of proof, such question is one on the merits. Once supporting material is submitted indicating that issuance of a permit would cause no violations, that is, once Petitioner has met his burden of production, then the *440 sufficiency and weight of such proof is a question on the merits, which would be addressed after a hearing. In this case, the Petition did contain supporting material, in the form of information from the Agency's own reports and figures, which indicated the plant's compliance with applicable regulations. Thus, Marquette clearly satisfied its initial burden of production with regard to a showing that no violations would be caused by issuance of the

permit. However, additional data submitted by the Agency to the Board, after the Agency's denial but prior to the Board meeting, indicated possible violations by the Oglesby plant.

(3) That data would properly have been presented by the Agency at a hearing, to support its denial. It was this data which was alluded to by board members in expressing doubts over compliance. Yet, because no hearing was held, Marquette was prevented from challenging the accuracy and reliability of that additional data which **517 ***764 was before the PCB at their meeting. We conclude that, under these circumstances, the finding of the PCB concerning the sufficiency of proof supporting the petition was a finding on the merits. That issue could not properly be addressed until after a hearing. Additionally, in passing, we would note that no inquiry into the sufficiency of the petition and its compliance with Rule 502(a)(2)(iv) was made by board members prior to arriving at their decision to dismiss. One of the members voting with the majority to dismiss the petition openly stated, on the record, that his only reason for so going was the failure to hold the hearing. In these circumstances the Board's attempt to prop up its decision with citation to Procedural Rule 502 was not effective. A board decision must be based on the record and findings of fact must be supported in the evidence. Central Illinois Light Company v. Pollution Control Board (3d Dist. 1974), 17 Ill.App.3d 699, 308 N.E.2d 153.

(4) The Board also argues, in urging affirmance of its decision, that by filing the summary judgment motion, Marquette waived its right to a hearing within 90 days. Such argument is unpersuasive and incredible in light of the uncontroverted facts on that issue. At the time of the filing of the motion by Marquette, it had been informed that a hearing would not be held within 90 days, as required. Marquette indicated its desire for a hearing and also its firm refusal to waive its right to a hearing. It refused to waive its right to a hearing both before and during the September 20, 1979, PCB meeting. As we noted earlier, the motion was a defensive move by Marquette in the face of the PCB's indication that no hearing would be held and that the matter would be decided without a hearing. Throughout the proceedings Marquette has insisted on its right to a hearing within the 90 days specified in the statute. Under the circumstances, we cannot agree with counsel for PCB that the record shows that Marquette intentionally and knowingly abandoned its right to a hearing when it filed the motion. At the time Marquette filed its motion, the PCB had taken Marquette's *441 right to a hearing, within 90 days, away from Marquette. We cannot ignore the facts and tortuously construe allegations in the motion to find a waiver of that right.

Accordingly, the decision of the Pollution Control Board in this matter is reversed, and a permit is deemed to have issued to Marquette as of September 25, 1979.

Reversed.

STOUDER and BARRY, JJ., concur.

405 N.E.2d 512, 84 Ill.App.3d 434, 39 Ill.Dec. 759

END OF DOCUMENT

Exhibit E

COPY

PUBLISHER'S CERTIFICATE OF PUBLICATION

I, John Rung, do hereby

certify that I am the publisher of Northwest Herald

a daily secular newspaper of general circulation within the county(s) of McHenry

and Kane regularly published in the city of Crystal Lake

in the county of McHenry and state of Illinois, and which has been so published

for more than 12 months prior to the first publication of hereunto annexed notice or

advertisement relating to the matter of

LOWE TRANSFER, INC.

was published in said newspaper 1 time being 1 day

commencing November 4, 2002

and ending November 4, 2002

which were the dates of first and last insertions. I further certify that said newspapers

is a newspaper as defined by the terms and conditions of Chapter 100, paragraph 1 et. Seq.

Illinois Revised Statutes 1981.

Given under my hand at Crystal Lake, Illinois

November 4, 2002

ACCT #10396

AMT $0.00

RECEIVED

NOV 04 2002

McHenry Co. Board

PUBLIC NOTICE

NOTICE OF APPLICATION TO THE COUNTY BOARD OF McHENRY COUNTY, ILLINOIS REQUESTING APPROVAL OF SITE LOCATION FOR THE NORTHWEST HIGHWAY TRANSFER FACILITY

Pursuant to 415 ILCS 5/39.2, PLEASE TAKE NOTICE that Lowe Transfer, Inc., an Illinois corporation and Marshall Lowe, 1021 Spring Beach Road, Cary, Illinois 60013 ("Applicants"), will file an Application with the County Board of McHenry County, Illinois ("County") requesting approval of the site location for the Northwest Highway Transfer Facility ("Application"). The proposed site is owned by Marshall Lowe and consists of approximately 2.64 acres located approximately 1,600 feet north/northwest of the intersection of U.S. Route 14 and Three Oaks Road in Algonquin Township, McHenry County, Illinois. The proposed site is commonly known as 3412 Northwest Highway and is legally described as follows:

That part of the Northeast Quarter of Section 11, Township 43 North, Range 8 East of the Third Principal Meridian in McHenry County, Illinois, described as follows: Commencing at the northwest corner of Lot 2 of Kochis Resubdivision, being a resubdivision of part of Lot 1 and 2 in Kochis Subdivision of that part of the Southeast Quarter of the said Northeast Quarter according to the plat thereof, recorded May 14, 1993 as Document No. 93R027230; thence North 00 degrees 42 minutes 43 seconds East (Bearings assumed for description purposes only) along a line lying 33 feet easterly of and parallel with the east line of the Southwest Quarter of the said Northeast Quarter, a distance of 507.24 feet to the point of beginning, said point being the southeast corner of a parcel of land described in Parcel 3 of Document No. 2002R0037598; thence North 86 degrees 24 minutes 27 seconds West along the southerly line of

Exhibit F

Dianne Turnball

From: Frank Carlton
To: <dturnball@zrfmlaw.com>
Sent: Monday, September 08, 2003 11:33 AM
Subject: circ. in McHenry Cty.

September 8, 2003

Ms. Diane Turnball
Crystal Lake, IL

Diane -

I have not yet received the fax from your office, so I am not certain of exactly what information you need, but I am able to tell you based on my inquiries here that we have at present a total of 5203 Pioneer Press subscriptions that go into McHenry County. Please remember the following points in this connection: i) this total changes somewhat from week to week, since people are always subscribing or ceasing to susbcribe; ii) the total includes complimentary subs as well as paid (comps are perhaps 1-2% of the total); iii) the number includes businesses as well as individuals and also includes PO box subscriptions; iv) the total covers every paper we have (all 57), although it is nearly all made up of subscriptions to a handful of papers (Algonquin, Barrington, Lake in the Hills, and Lake Zurich - I can give you the separate numbers by paper if you want them); v) we also have a small amount of weekly newsstand distribution, as follows: Algonquin 85, Barrington 475, Cary 115, Lake in the Hills 60, and Lake Zurich 215 - these are the draws for each paper and not the net sales, which vary from week to week, and in the case of Barrington would be only partially in McHenry, if at all, and in the case of Lake Zurich are probably not at all in McHenry.

When I receive your fax I will let you know.

Thank you.

Sincerely,
Frank Carlton
Circulation Ops. Mgr.
Pioneer Press, Glenview, IL
847-486-7265

Exhibit G

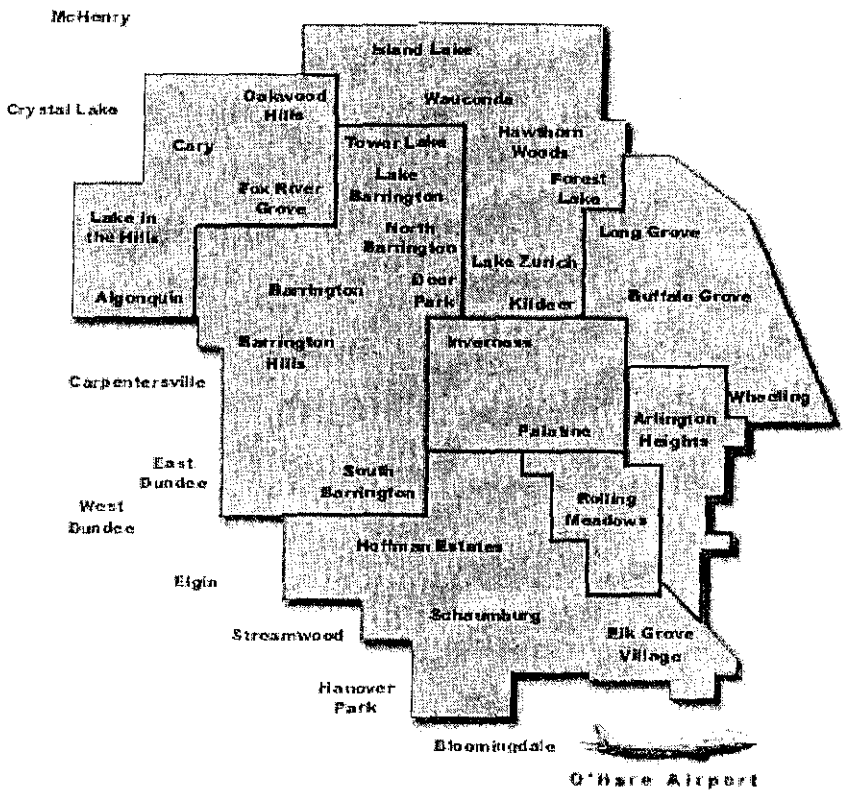
Print
Online
Contact Us

- Classifieds
- Food
- Health/Family
- Movie Guide
- Newsstand
- Real Estate
- Weather

ad info home | general info | demographics

Home Lake North Northwest Central West Suburbs

Northwest group



Newspaper name	Circulation	Coverage Area
Barrington Courier-Review	7,604	Barrington, 60010; Barrington Hills, 60010; Deer Park, 60010; Lake Barrington, 60010; North Barrington, 60010; South Barrington, 60010; Tower Lake, 60010
Palatine Countryside	6,231	Palatine, 60067, 60074; Inverness, 60067
Algonquin Countryside	2,243	Algonquin, 60102; Lake in the Hills, 60102

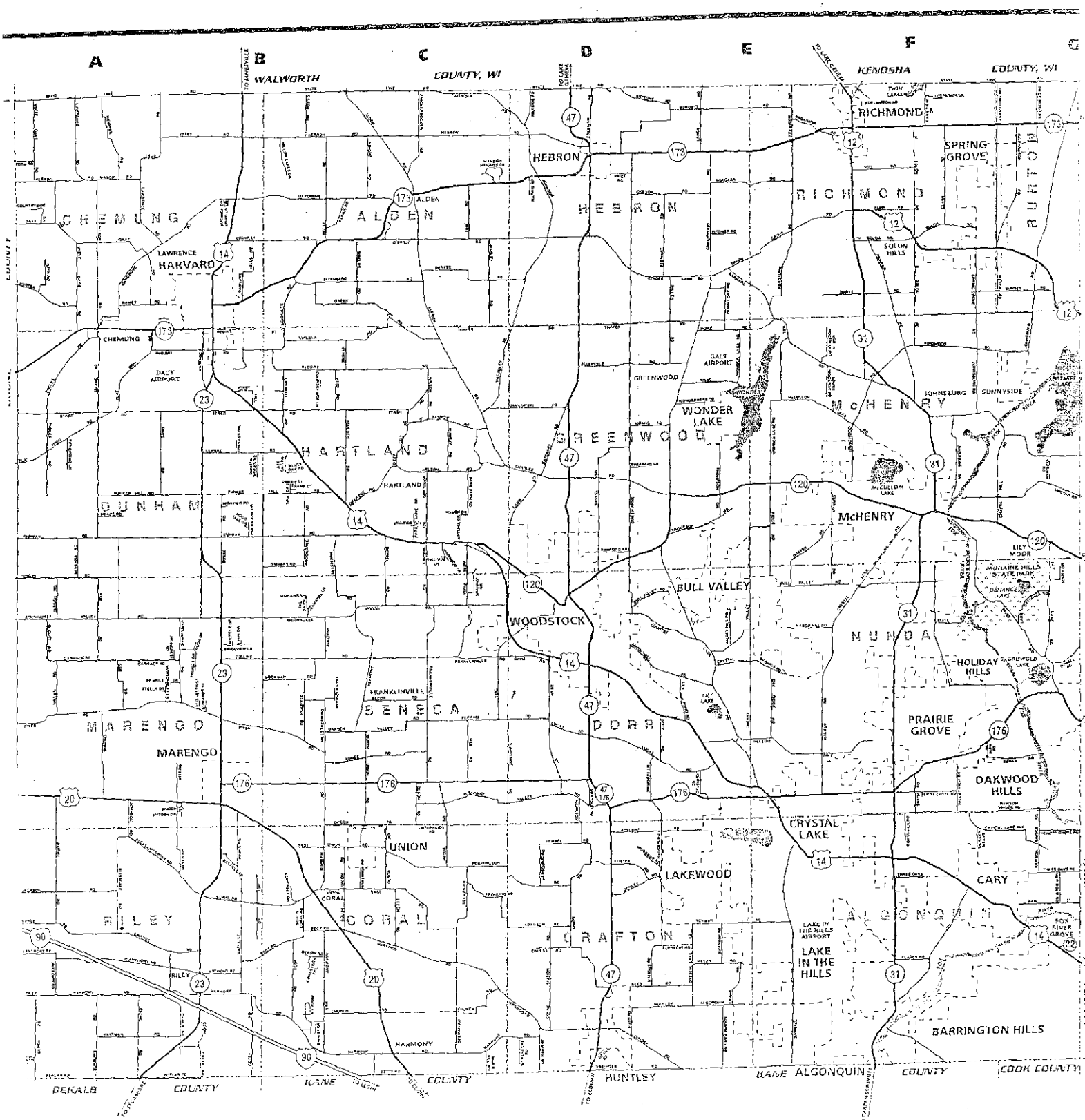
Wheeling Countryside	1,902	Wheeling, 60090
Buffalo Grove Countryside	6,020	Buffalo Grove, 60089; Long Grove, 60047
Cary-Grove Countryside	2,442	Cary, 60013; Oakwood Hills, 60013; Fox River Grove, 60021; Silver Lake, 60013
Schaumburg Review	5,089	Schaumburg, 60159, 60168, 60172-3, 60193-6
Lake Zurich Courier	4,279	Lake Zurich, 60047; Hawthorn Woods, 60047; Kildeer, 60047; Forest Lake, 60047; Island Lake, 60042; Wauconda, 60084
Hoffman Estates Review	2,281	Hoffman Estates, 60172, 60192-6
Arlington Heights Post*	6,231	Arlington Heights, 60004, 60005
Elk Grove Times	2,547	Elk Grove Village, 60007
Rolling Meadows Review	1,756	Rolling Meadows, 60008

Total circulation 48,625

Source: Pioneer Press ABC Publisher's Statement September 30, 2001

back to top

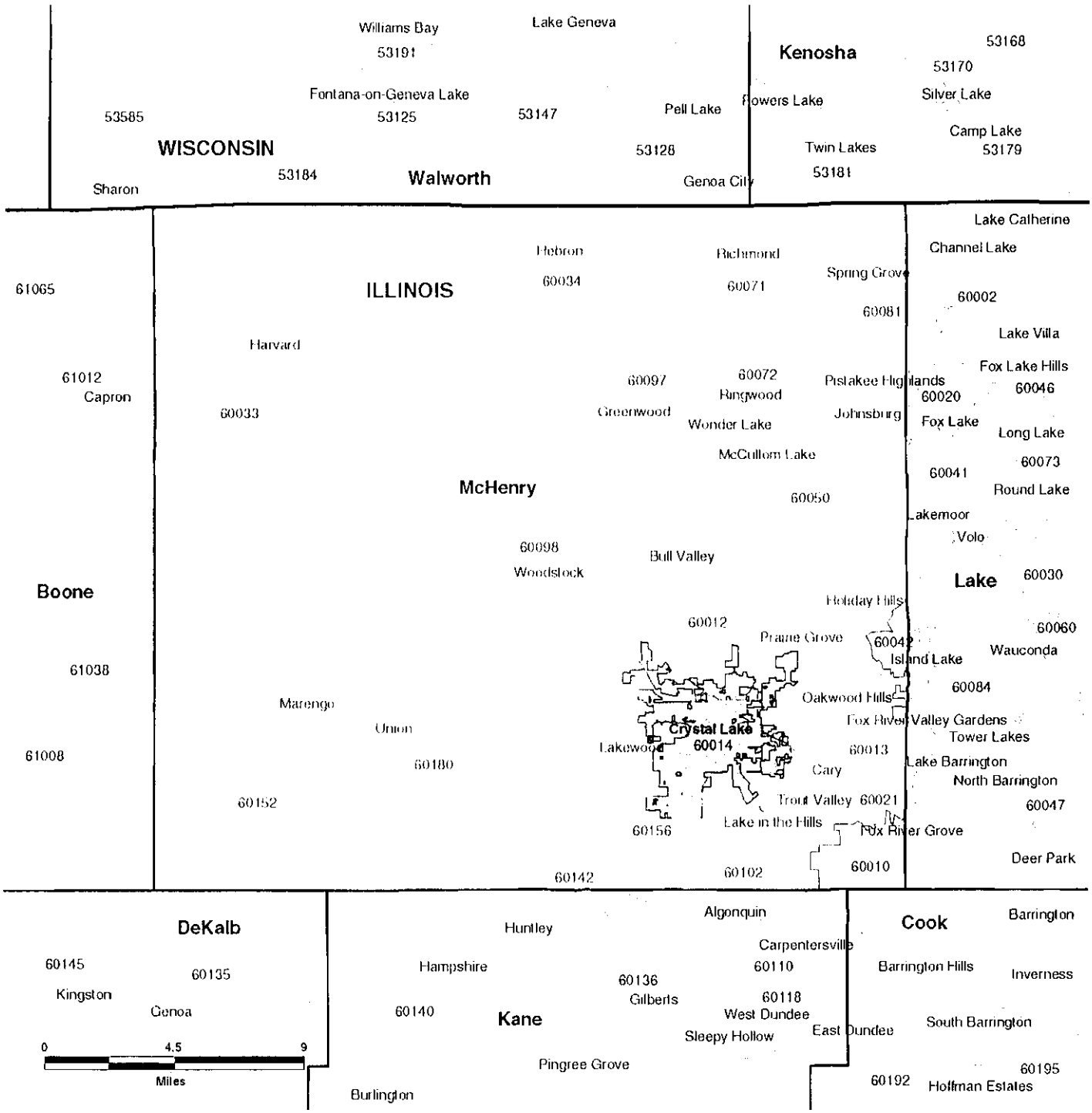
Exhibit H



McHENRY COUNTY

Exhibit I

NEWSPAPER DESIGNATED MARKET / CRYSTAL LAKE, ILLINOIS



LEGEND

- STATE BOUNDARY
- COUNTY BOUNDARY
- ZIP CODE BOUNDARY
- CRYSTAL LAKE CORPORATE LIMITS
- BALANCE OF NEWSPAPER DESIGNATED MARKET

Audit Bureau of Circulations
C977-R01

Circulation in Local Daily Newspaper Markets
(selected markets)

City	DMA	County	Daily Local Newspaper	Weekday Circulation (000s)
Los Angeles CA	002	Los Angeles	Metropolitan News-Enterprise	2
Chicago IL	003	Cook	Chicago Tribune	689
Chicago IL	003	Cook	Chicago Sun-Times	477
Arlington Heights IL	003	Lake	Daily Herald	148
Tinley Park IL	003	Will	The Daily Southtown	57
Joliet IL	003	Will	Herald-News	51
Crystal Lake IL	003	McHenry	Northwest Herald	38
Elgin IL	003	Kane	Courier-News	33
Chicago IL	003	Cook	Chicago Defender	33
Aurora IL	003	Kane	Beacon-News	28
Kankakee IL	003	Kankakee	The Daily Journal	27
Waukegan IL	003	Lake	The News Sun	25
La Salle IL	003	LaSalle	Daily News Tribune	19
Ottawa IL	003	LaSalle	The Daily Times	14
Geneva IL	003	Kane	Kane County Chronicle	14
DeKalb IL	003	DeKalb	Daily Chronicle	12
Morris IL	003	Grundy	Morris Daily Herald	7
Philadelphia PA	004	Philadelphia	Philadelphia Inquirer	381
Philadelphia PA	004	Philadelphia	Philadelphia Daily News	200
Allentown PA	004	LeHigh	Morning Call	126
New Castle DE	004	New Castle	The News Journal	121
Cherry Hill NJ	004	Camden	Courier-Post	83
Pleasantville NJ	004	Atlantic	The Press of Atlantic City	79
Trenton NJ	004	Mercer	The Times	77
Levittown PA	004	Bucks	Bucks County Courier Times	68
Clifton Heights DE	004	Delaware	Delaware County Daily Times	53
Easton PA	004	Northampton	Express-Times	48
Doylestown PA	004	Bucks	Intelligencer Record	45
Willingboro NJ	004	Burlington	Burlington County Times	44
West Chester	004	Chester	Daily Local News	33
Pottstown PA	004	Montgomery	The Mercury	25
Woodbury NJ	004	Gloucestor	Gloucestor County Times	24
Dover DE	004	Kent	The Delaware State News	23
Norristown PA	004	Montgomery	Times Herald	21

Source: Burrelle's Media Directory, 2003; Census Bureau (county). Local daily newspapers. Trade publications not included.