

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD **RECEIVED**
CLERK'S OFFICE

LOWE TRANSFER, INC. and)
MARSHALL LOWE,)

AUG 5 2003

Co-Petitioners,)

No. PCB 03-221

STATE OF ILLINOIS

vs.)

(Pollution Control Facility Pollution Control Board)

COUNTY BOARD OF McHENRY)

COUNTY, ILLINOIS)

Respondents.)

NOTICE OF FILING

TO: See List Referenced in Proof of Service

PLEASE TAKE NOTICE that on August 5, 2003, we filed with the Illinois Pollution Control Board, the attached Lowe Transfer, Inc. and Marshall Lowe's **MOTION TO STRIKE VILLAGE OF CARY'S RESPONSE TO PETITIONERS' MOTION IN LIMINE AND MOTION FOR SANCTIONS AGAINST THE VILLAGE OF CARY** in the above entitled matter.

LOWE TRANSFER, INC. and
MARSHALL LOWE

By: David W. McArdle

David W. McArdle

PROOF OF SERVICE

I, a non-attorney, on oath state that I served the foregoing Motion on the following parties by depositing same in the U. S. mail on this 5TH day of August, 2003 and via fax on the 5th day of August, 2003:

Attorney for County Board of

McHenry County, Illinois

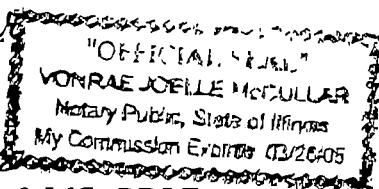
Charles F. Helsten
Hinshaw and Culbertson
100 Park Avenue, P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900; FAX 815/963-9989

Hearing Officer

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601
312-814-8917; FAX 312/814-3669

SUBSCRIBED and SWORN to before
me this 5th day of August, 2003

David W. McArdle
Notary Public



David W. McArdle
Attorney Registration No. 061821

ZUKOWSKI ROGERS FLOOD & MCARDLE

50 Virginia Street
Crystal Lake, Illinois 60014
(815) 459-2050

RECEIVED
CLERK'S OFFICE

AUG 5 2003

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

LOWE TRANSFER, INC. and
MARSHALL LOWE,

Co-Petitioners,

vs.

COUNTY BOARD OF McHENRY
COUNTY, ILLINOIS

Respondent

No. PCB 03-221

(Pollution Control Facility
Siting Appeal)

**CO-PETITIONERS' MOTION TO STRIKE VILLAGE OF
CARY'S RESPONSE TO PETITIONERS' MOTION IN LIMINE
AND MOTION FOR SANCTIONS AGAINST THE VILLAGE OF CARY**

Co-Petitioners, Lowe Transfer, Inc. and Marshall Lowe ("Lowe"), by and through its attorneys, Zukowski Rogers Flood & McArdle, respectfully request the Pollution Control Board strike the Village of Cary's (the "Village") Response to Petitioners' Motion in Limine and issue sanctions against the Village for failure to comply with Board orders issued in this siting appeal.

In support of this Motion, Lowe states as follows:

1. On June 19, 2003, the Village filed a Motion to Intervene in this siting appeal.
2. On July 10, 2003, the Pollution Control Board by a unanimous vote denied the Village's Motion to Intervene. The Board order is attached hereto and incorporated herein as Exhibit A.
3. By its order the Board did not grant the Village "party" status in this siting appeal.
Board Order, p. 2.
4. Instead, the Board found that the Village would be afforded "participant" status under Sections 101.628 and 107.404 of the Board's procedural rules. Board Order at p. 2.
5. On July 28, 2003, Lowe filed a Motion in Limine.

6. On July 28, 2003, the Village filed an Appeal of Hearing Officer Determination and Request for Board Direction in which the Village, solely a participant in this siting appeal, requested that the Board overturn the Hearing Officer's denial of the Village's right to participate in or audit any status conference calls in this matter. A copy of the Village's Appeal of Hearing Officer Determination and Request for Board Direction is attached hereto and incorporated herein as Exhibit B.

7. In its July 28, 2003 Appeal, the Village is requesting "party" status in relation to participation in status conference calls. This request and its appeal were made after the Board had ruled and issued its Order denying the Village "party" status.

8. On August 4, 2003, in direct violation of the Board's order of July 10, 2003, the Village filed a Response to Petitioner's Motion in Limine. A copy of the Village's Response to Petitioners' Motion in Limine is attached hereto and incorporated herein as Exhibit C.

9. Section 101.500(d) of the Board's procedural rules very clearly states that only parties may file a response to a motion.

"Within 14 days after service of a motion, a party may file a response to the motion.
[Emphasis added.]

10. Ms. Percy Angelo, one of the attorneys representing the Village, has extensive experience before the Pollution Control Board going back to at least 1990. A copy of a name search of the PCB website is attached hereto and incorporated herein as Exhibit D.

11. In fact, in PCB 95-119, 125 in her client's Objection to Motion for Leave to File Copy of Amicus Brief and Response, Ms. Angelo quite succinctly described the role of a participant posing as an amicus curiae (as the Village has declared itself in this siting appeal). In opposition to a party's amicus brief, Ms. Angelo wrote:

"A person posing as an amicus curiae has no direct interest in the matter at hand and should not be permitted to delay the resolution of the parties' dispute." West Suburban Recycling and Energy Center, L.P.'s Objections to Motion for Leave to File Copy of Amicus Brief and Response at p. 3.

12. It is clear from her own pleadings that Ms. Angelo is aware of the rules and procedures of the Pollution Control Board distinguishing between "parties" and "participants".

13. This Board has already determined that the Village is not a party to this siting appeal.

14. As such, the Village's Response to Petitioners' Motion in Limine should be stricken.

15. These repeated and flagrant refusals by the Village to comply with the Board's Order can not be ignored.

16. Lowe has been forced to spend considerable time and expense in defending against these actions by the Village.

WHEREFORE, Co-Petitioners, Lowe Transfer, Inc. and Marshall Lowe, request that the Village of Cary's Response to Petitioners' Motion in Limine be stricken and that the Board issue sanctions against the Village of Cary for failure to comply with the Board's Order of July 10, 2003.

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

By: 

David W. McArdle

David W. McArdle
Attorney No: 06182127
ZUKOWSKI, ROGERS, FLOOD & MCARDLE
Attorney for Lowe Transfer, Inc, and Marshall Lowe
50 Virginia Street
Crystal Lake, Illinois 60014
815/459-2050; 815/459-9057 (fax)

ILLINOIS POLLUTION CONTROL BOARD

July 10, 2003

LOWE TRANSFER, INC. and MARSHALL)	
LOWE,)	
)	
Petitioners,)	
)	
v)	PCB 03-221
)	(Pollution Control Facility
COUNTY BOARD OF MCHENRY)	Siting Appeal)
COUNTY, ILLINOIS,)	
)	
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 in McHenry County. On June 19, 2003, Village of Cary (Cary) filed a motion to intervene in the siting appeal (Mot.). On July 7, 2003, petitioners filed a response to the motion (Resp.). For the reasons discussed below the Board denies the motion to intervene but will allow Cary to file an *amicus curiae* brief.

Cary argues that pursuant to the Board's rules at 35 Ill. Adm. Code 101.402, the Board may allow intervention in an adjudicatory proceeding before the Board and a siting appeal is an adjudicatory proceeding. Mot. at 3-4. Cary puts forth five reasons why intervention should be allowed. First, Cary asserts that the site of the proposed waste transfer station at issue is located so as to have a significant impact on Cary. Mot. at 1. Second, Cary participated extensively in the proceeding below. Mot. at 2. Third, Cary asserts that a decision by the Board overturning McHenry County's decision would infringe on Cary's rights under Section 22.14 of the Environmental Protection Act (Act) (415 ILCS 5/22.14 (2002)). Fourth, Cary argues that participation by Cary is necessary to insure that McHenry County's decision is "vigorously defended" on appeal. Mot. at 7. And last, Cary maintains that participation by Cary is necessary to preserve Cary's right to appeal any grant of the siting application. *Id.*

In response to the motion to intervene, petitioners cite to Act, the Board's procedural rules, and case law. First, petitioners cite Section 40.1 of the Act arguing that Section 40.1 of the Act allows only a siting applicant to appeal the denial of siting approval. Resp. at 2, citing 415 ILCS 5/40.1 (2002). Section 40.1 of the Act then allows other persons to appeal the decision to grant siting approval, according to petitioners. *Id.* Second, the petitioners cite to 35 Ill. Adm. Code 107.202 of the Board's procedural rules. Petitioners maintain that the Board's procedural rules mirror the Act and allow only for an applicant to appeal a decision denying siting approval and for others to appeal only a grant of siting. *Id.* Third, petitioners cite extensive case law in

EXHIBIT A
to Motion to Strike

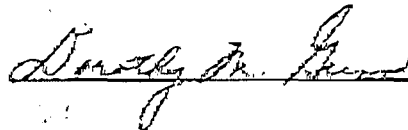
which the Board and courts have consistently denied intervention status to third parties in appeals of siting approval denials. Resp. at 2-3, citing McHenry County Landfill, Inc. v. IEPA, 154 Ill. App. 3d 89, 506 N.E.2d 372 (2nd Dist. 1987); Waste Management of Illinois, Inc. v. IPCB, 160 Ill. App. 3d 434 513 N.E.2d 592 (2nd Dist. 1987); Laidlaw Waste Systems v. McHenry County Board, PCB 88-27 (Mar. 10, 1987); City of Rockford v. Winnebago County Board, PCB 87-92 (Nov. 19, 1987); Clean Quality Resources, Inc. v. Marion County Board, PCB 90-216 (Feb. 28, 1991).

As petitioners point out, it is well established that third-party objectors are precluded from intervention in an appeal from a denial of siting approval. See Waste Management v. County Board of Kane County, PCB 03-104, slip op. at 3 (Feb. 20, 2003); Land and Lakes Co., et al. v. Village of Romeoville, PCB 94-195, slip op. at 4 (Sept. 1, 1994); citing Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987); McHenry County Landfill, Inc. v. IEPA, 154 Ill. App. 3d 89, 506 N.E.2d 372 (2nd Dist. 1987). A third party may intervene only when the third party is a state's attorney or the Attorney General's Office intervening to represent the public interest. See, e.g., Land and Lakes, slip op. at 3.

Cary is a third-party objector without the special intervention rights of a state's attorney or the Attorney General's Office representing the public interest. Accordingly, the petition to intervene is denied. Cary may, however, contribute oral or written statements at hearing in this matter in accordance with Sections 101.628 and 107.404 of the Board's procedural rules, but may not examine or cross-examine witnesses. 35 Ill. Adm. Code 101.628(a), (b); 35 Ill. Adm. Code 107.404. Cary may also participate through public comments or *amicus curiae* briefs pursuant to Section 101.110(c), and in accordance with Section 101.628(c). 35 Ill. Adm. Code 101.110(c); 35 Ill. Adm. Code 101.628(c).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and
MARSHALL LOWE.

Co-Petitioners,

YS.

COUNTY BOARD OF MCHENRY
COUNTY, ILLINOIS.

Respondent.

PCB 03-221
(Pollution Control Board
Siting Appeal)

**VILLAGE OF CARY'S APPEAL OF HEARING OFFICER
DETERMINATIONS AND REQUEST FOR BOARD DIRECTION**

The Village of Cary ("Village") on behalf of the Village and its residents, by and through its attorneys, hereby appeals the determinations of the Hearing Officer in this matter limiting the ability of the Village and its citizens to participate in and be informed regarding the status of this action, requests that the Board clarify, and review, if necessary, the Hearing Officer's order permitting withdrawal of the record, and requests that the Board provide direction regarding future opportunities for citizen participation. In furtherance of its motion, the Village states as follows:

FACTUAL BACKGROUND

1. In order to allow the Village and its citizens to remain fully informed of the status of this matter so as to facilitate their effective participation therein, on July 1, 2003, and then again on July 7, as further described in the attached affidavits of Patricia Sharkey and Percy Angelo, the Village of Cary requested that the Hearing Officer allow the Village to participate in, or at least listen to, status conferences in this matter, which have been conducted by telephone and are not otherwise publicly accessible. Attorneys for the Village offered to come to the Board offices to listen to status conferences if that would facilitate matters.

EXHIBIT B
to Motion to Strike

2. The Hearing Officer denied the Village's request, allowing neither participation in nor auditing of status conferences. He explained that attorney-client privileged material or other private matters might be discussed at such conferences, even though the attorney for the Village protested that matters discussed should be publicly available, and that it wasn't clear how there could be any attorney-client privilege in discussions between opposing parties before the Hearing Officer for the Board. The Hearing Officer further stated that the Village could appeal the Hearing Officer's ruling to the Board.

3. The Hearing Officer also informed the Village that it was not allowed to receive copies of Hearing Officer orders, but could purchase copies thereof from the Clerk's Office if the Village so desired. The Hearing Officer orders are also not available on the Board's website.

4. To date, two status conferences have been held in this matter: one on July 7, 2003 and one on July 14, 2003. The Village was not permitted to participate in either status conference.

5. On July 15, 2003, the Hearing Officer issued a Notice scheduling a public hearing in this matter. Despite numerous public comments expressing interest in the proceeding and requesting that the proceedings be held after business hours so as to allow participation by those who must work during the day, the notice did not address opportunities for public comment or establish an evening public comment period.

6. At the July 14, 2003 status conference, the Village understands that Petitioner made an oral motion "withdrawing" a pending motion requesting that it be allowed to "withdraw" the exhibits and records which constitute the record of the McHenry County Board's decision for its personal use. While a written order was eventually issued indicating that "the motion" was granted, it was unclear which motion was in fact granted, and whether Petitioner

was permitted to remove the record. Because the Village was not permitted to audit the status conference, it has no background from which to understand this unclear order.

ARGUMENT

7. The Hearing Officer's rulings have denied the Village of Cary the right to participate in or audit the status conferences, have compromised the Village's and its citizens' ability to remain informed regarding the status of the proceeding, and have inappropriately limited public information regarding and opportunities for participation in this proceeding. For the reasons set forth below, the Village hereby appeals the Hearing Officer's rulings, and requests that the Board direct the Hearing Officer to allow the Village to participate in or audit the status conferences in this matter. Further, given the demonstrated extensive public interest in this proceeding, the Village requests that the Board direct the Hearing Officer to schedule an evening public comment period so as to provide appropriate opportunities for public participation in the Board hearing.

8. Hearing Notice. It is apparent that scheduling issues regarding the proposed hearing before this Board were addressed at the July 14, 2003 status conference from which the Village was excluded. On July 15, 2003, the Hearing Officer issued a Notice of Hearing in this matter, setting forth the proposed hearing schedule. The notice contains a barebones statement merely identifying the hearing date, time, and location (10:30 a.m. on August 14, 2003, at the Cary Junior High Gymnasium.) While the information provided in the notice is unremarkable, what is significant is the information which the notice fails to provide. The Notice of Hearing provides no information regarding hearing procedures, no information regarding the proposed order of proceedings, and no direction or guidance regarding the time for public comment or participation. Although Section 107.404 of the Board's regulations governing these hearings

requires that "Participants may offer comment at a specifically determined time in the proceeding....," 35 Ill. Admin. Code 107.404; the Hearing Notice fails to specify when public comment will be heard. Furthermore, the notice does not address or provide for evening hours to accommodate working members of the public who wish to attend and participate in the hearing.

9. Section 101.110 of the Board's regulations states "The Board encourages public participation in all of its proceedings." In keeping with this stated goal, in the past, where a strong public interest has been demonstrated, particularly in siting appeals, the Board has accommodated public participation by holding proceedings in the evening to allow participation by those who must work during business hours. Clearly, a different approach has been followed here. In the present matter, at least *forty-two* public comments have already been filed (both from residents of Cary and others), demonstrating significant public interest in the proposed hearing. In many of these, commenters specifically request evening hours to facilitate their participation. Yet the Hearing Officer's order does not address or even acknowledge the citizens' concerns, provides no instruction regarding public participation, and makes no arrangements for an after-hours comment period. Apparently, it leaves citizens with no option but to show up at 10:30 a.m. or potentially miss the opportunity to participate. This approach flies in the face of the General Assembly's stated intent that the Environmental Protection Act "increase public participation in the task of protecting the environment," 415 ILCS 5/2(a)(v), as well as the Board's stated goals and past efforts to encourage public participation in its proceedings.

10. Status Conferences. The Village has been informed that the Petitioner has used the status conference as a forum to attack and impugn the motives of the Village of Cary. These attacks include unfounded assertions that the Village will seek to inappropriately supplement the record with new facts not properly before the Board. In fact, quite to the contrary, the Village

believes that the record in this matter is exceptionally strong and fully supports the McHenry County Board's decision denying siting approval. The strength of the record is due in large part to the Village's participation in the proceeding below, including the presentation of a number of expert witnesses. In contrast to Petitioner's unfounded assertions regarding the Village's intentions, the Village intends to focus its efforts in this proceeding on demonstrating the strength of the existing record.

11. The Village's participation has been limited by the Hearing Officer's rulings excluding it from status conferences, only to have its positions and motives distorted by Petitioner's misrepresentations in its absence. Exclusion of the public from status conferences is being used by Petitioner to attack the credibility of the objectors. Opening such proceedings to the public is essential to protecting them from misuse.

12. Public Access to the Record. As set forth in the Village's July 11, 2003 Objection to Plaintiff's Motion, allowing Plaintiff's removal of exhibits and records from the Board Office could significantly impact public participation by making portions of the record unavailable for review by others, particularly since a prior Hearing Officer ruling at the July 7, 2003 status conference granted respondent McHenry County's motion to file limited copies of the record, resulting in only a single copy of some exhibits being filed with the Board. Therefore, if the record is withdrawn, these materials will be unavailable for review by the Board, the Village or its citizens, and other members of the public, significantly hampering their ability to participate in the proceedings. Such removal of exhibits and records from the Board's offices would specifically contravene Section 7(a) of the Act which requires that "all files, records, and data of ...the Board shall be open to reasonable public inspection..." 415 ILCS 5/7(a)

PRAYER FOR RELIEF

WHEREFORE, the Village of Cary requests that the Board reverse the Hearing Officer's determination denying the Village the right to participate in or audit status conferences, and direct the Hearing Officer allow the Village to participate in or audit future status conferences in this matter. The Village further requests that the Board direct the Hearing Officer to establish a public comment period outside of normal business hours as part of the proposed hearing, preferably in the evening, so as to facilitate public participation by members of the public who cannot attend during normal business hours. Finally, it is requested that the Hearing Officer be requested to clarify his order regarding withdrawal of the record, and, to the extent such clarification allows the record to be withdrawn, to overrule such order to the extent necessary to ensure that a full set of record documents remains available at the Board's offices.

Respectfully Submitted,

The Village of Cary

Dated: July 28, 2003

By Percy L. Angelo
One of its Attorneys

Percy L. Angelo
Patricia F. Sharkey
Kevin G. Deshamais
Mayer, Brown, Rowe & Maw
190 S. LaSalle Street
Chicago, IL 60603-3441
(312) 782-0600

STATE OF ILLINOIS)
)
COUNTY OF COOK) SS:

AFFIDAVIT OF PERCY L. ANGELO

Percy L. Angelo, being duly sworn on oath, deposes and states:

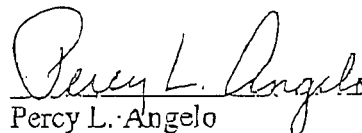
1. I am an attorney representing the Village of Cary in Illinois Pollution Control Board matter PCB 03-221. I previously represented the Village of Cary in the underlying Pollution Control Facility Siting hearings held by the McHenry County Board.

2. On July 7, 2003 I contacted Bradley Halloran, the Hearing Office in this matter, to request that the Village of Cary be permitted to listen to status conferences scheduled in this matter. I offered to come to the Board offices to listen to those status conferences if that would facilitate matters.

3. Mr. Halloran refused to allow the Village of Cary to listen to the status conferences and told me that such auditing was inappropriate, as private matters and attorney-client privileged matters could be discussed. I questioned how an attorney-client privileged matter could be discussed between opposing parties before the hearing officer, and stated that the matters discussed should be publicly available.

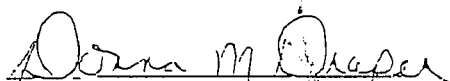
4. Mr. Halloran said it was his decision that the Village of Cary could not listen to status conferences, and if the Village wanted, it could appeal its decision to the Board.

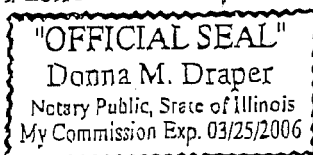
Further Affiant Sayeth Naught.


Percy L. Angelo

Dated:

Subscribed and sworn to
before me this 28th day
of July, 2003.


Notary Public



County of Cook)

SS.

State of Illinois)

AFFIDAVIT OF PATRICIA F. SHARKEY

I, Patricia F. Sharkey, an attorney licensed to practice law in Illinois and under oath, state as follows:

1. I am an attorney representing the Village of Cary in Illinois Pollution Control Board matter PCB 03-221. I previously represented the Village of Cary in the underlying Pollution Control Facility Siting hearings held by the McHenry County Board.

2. On behalf of my client, the Village of Cary, I had a telephone conversation with Mr. Bradley Halloran, the assigned Hearing Officer in PCB 03-221, on July 1, 2003. In that telephone conversation, I requested that the Village of Cary be allowed to participate in the telephonic status conference scheduled for July 7, 2003. Mr. Halloran denied that request stating that only persons representing parties in the appeal are allowed to participate in status conferences in Pollution Control Facility Siting appeal cases. He further stated that telephonic status calls are not open to members of the public.

~~3. Based on the Hearing Officer's ruling, both I and my co-counsel representing the Village of Cary have been excluded from telephonic status conferences in which the procedures for the handling of the Board record and the date, time, place and order of the Board hearings in PCB 03-221 have been discussed and decided.~~

3. On July 11, 2003, I filed an original and nine copies of the Village of Cary's Objection to the Petitioner's Motion to Withdraw Exhibits and Records from the Board Offices with the Pollution Control Board. The Village's Objection was based in large part on the fact that the County filed with the Board only one copy of twenty two over-sized exhibits.

4. On or about July 17, 2003, I read the Board's Clerk's Office On-Line ("COOL") web postings for PCB 03-221, and learned from the description of the Hearing Officer's July 15, 2003 Order posted on the web page that Petitioner's Motion to Withdraw Exhibits and Records from the Board's Office had been granted. As the order itself was not posted on the web, I called the Clerk's office to verify this and to obtain a copy and learn the substance of the ruling. I requested that the Hearing Officer's order be faxed to me. I was told that under Board policy the Clerk's Office could not fax it to me. I then requested that the Clerk post the order on the web page, as are orders of the Board itself and every other filing in Board cases. The Clerk's staff agreed to review this request with Board counsel, and thereafter called me back and stated that the Board, as a policy, did not post Hearing Officer's orders and would not do so in this case even in light of the significant public interest already expressed. Finally, I was told that the Clerk's staff had been instructed, under Board policy, that the Village of Cary would be charged 25 cents per page for copies of Hearing Officer orders.

5. Subsequently, I did receive a copy of the Hearing Officer's July 15, 2003 order which, on the subject of the Petitioner's motion to withdraw the record, states :

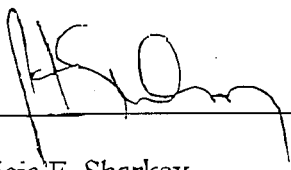
"On July 9, 2003, petitioners filed a motion to withdraw exhibits and records. On July 15, 2003, the petitioners made an oral motion that the motion filed July 9, 2003, be withdrawn. Petitioners' motion is granted."

This Order leaves unclear which motion had been granted, the July 9, 2003 motion to remove the record or the July 15, 2003 oral motion withdrawing the prior motion. Because I and my co-counsel representing the Village were excluded from the Status Conference and thus were unable to hear the discussion of these motions or the Hearing Officer's ruling, I have no background information with which to clarify this ruling and advise our client.

6. On Monday, July 21, 2003 I checked the Board's web page and found the description of the Hearing Officer's July 15, 2003 order had been changed. It now reads: "...granted petitioners' oral motion to withdraw their July 9, 2003 motion to withdraw exhibits and records;...."

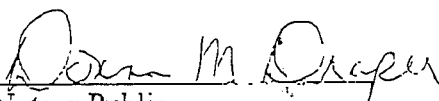
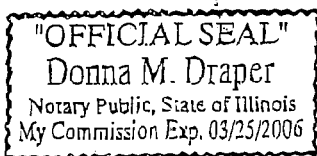
7. Based on the above series of events and what I have been told is Board policy, I and my co-counsel and our client, the Village of Cary, remain uncertain as to :1) the content of the Hearing Officer's July 15, 2003 ruling on the removal of the record ; 2) when there will be an opportunity for public comment at the August 14, 2003 hearing; 3) whether the hearing will include evening hours; and 4) whether the Petitioner or Respondent will be presenting witnesses or new evidence. As a result, I and my co-counsel have been hampered in our ability to prepare for the August 14, 2003 hearing.

Further Affiant Sayeth Not.



Patricia F. Sharkey

Signed and sworn before me
this 28th day of July, 2003.

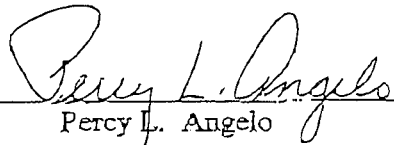

Notary Public

CERTIFICATE OF SERVICE

Percy L. Angelo, an attorney, hereby certifies that a copy of the foregoing Notice of Filing and Village of Cary's Appeal of Hearing Officer Determination and Request for Board Direction was served on the persons listed below by UPS Next Day Delivery on this 28th day of July, 2003:

David W. McArdle
Zukowski, Rogers, Flood & McArdle
50 Virginia Street
Crystal Lake, IL 60014

Charles F. Helsten
Hinshaw and Culbertson
100 Park Avenue, P.O. Box 1389
Rockford, IL 61105-1389


Percy L. Angelo

Percy L. Angelo, Esq.
Patricia F. Sharkey, Esq.
Kevin G. Desharnais, Esq.
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, Illinois 60603
312-782-0600

COPY

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and
MARSHALL LOWE,

Co-Petitioners,

v.

COUNTY BOARD OF MCHENRY
COUNTY, ILLINOIS,

Respondent.

PCB No. 03-221
(Pollution Control Board
Siting Appeal)

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on July 28, 2003, we filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing and Village of Cary's Appeal of Hearing Officer Determinations and Request for Board Direction, copies of which are attached and hereby served upon you.

Dated: July 28, 2003

VILLAGE OF CARY

By: Wiley L. L.
One of its Attorneys

Percy L. Angelo, Esq.
Patricia F. Sharkey, Esq.
Kevin G. Desharnais, Esq.
MAYER, BROWN, ROWE & MAW LLP
190 S. LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

the Board's regulations states "The Board encourages public participation in all of its proceedings." 35 Ill. Admin. Code 101.110) In the face of this statutory and regulatory mandate encouraging public participation, as well as the Board's own order in this case and scores of other siting cases, Petitioner points to no statutes, regulations or case law which give him a right to this unprecedented exclusion and/or time limitations on oral statements by the public.

3. In addition to offering no legal support for this unprecedented request, Petitioner offers no evidence suggesting there is a need to handle this hearing any differently than any of the scores of other siting hearings the Board has held under Section 40.1. There is no factual basis for believing that the citizens attending this hearing will comment on matters outside the record. On the contrary, the record in this case demonstrates that the citizens in large part made the record before the County Board - including the testimony in the record of numerous highly pertinent expert witnesses presented by the Village and other citizens. Citizens who actively participated in the County Board proceeding have no need or reason to go outside the record in this case to find support for the County Board's decision. These citizens are well versed in the record and have every right to highlight for the Board the portions of the record that support the County's decision - as surely the Petitioner has a right to highlight any portions of the record he believes the Board should focus on.

4. While portraying this motion as based on a concern that the Board will be confused in the application of the manifest weight standard if citizens are allowed to make oral comments or speak too long, the Petitioner's motion requests relief that goes far beyond admonishing citizens (and anyone else) to limit their comments to the existing record. Rather, Petitioner requests that the Board exclude oral comments by the public *altogether* - in a blanket

ruling. Petitioner also attempts to limit even the reading of written statements to five minutes - on the assumption that a hundred citizens will want to comment. But there is no evidence that a hundred of citizens will want to make oral statements at this hearing. Furthermore, given the fact that the record below is voluminous, limiting comment on it to five minutes would be counter productive. To do so will force members of the public to make only general comments, rather than provide specific comments tied to the record. The Village of Cary intends to provide focused, record-oriented comments which will necessarily take more than five minutes. These detailed comments may allow others to shorten their comments. But to arbitrarily limit the Village's or any other citizen's comments to five minutes could jeopardize the record in this proceeding.

5. As a plethora of Board siting opinions demonstrate, manifest weight of the evidence is a standard of review regularly applied by the Board. The Board has been conducting hearings under this standard since Section 40.1 was enacted. Contrary to Petitioner's apparent assumption, the Board is perfectly capable of assigning appropriate weight to information in the record and information presented at hearing. It need not be shielded from public comment in order to do its job.

6. Petitioner points to a few cases, and only one recent case, in which the Appellate Court over turned the Board's decision in a siting case as against the manifest weight. But none of these Appellate Court reversals were based on a finding that the Board gave improper weight to a public comment made in a Section 40.1 hearing. The fact that the Appellate Court has disagreed with the Board in a handful of cases on where to draw the line using the manifest weight standard does not support the conclusion that the Board must stop accepting public comment at its hearings. Furthermore, should the Petitioner believe that a public comment is

outside the record, he has every opportunity to point that out to the Board in his brief. There is simply no support for the proposition that the Board cannot appropriately apply the standard or review or that allowing public comment will somehow taint the record.

7 The Board encourages public participation in its proceedings, and has always allowed public comment at hearings on siting appeals. Typically, members of the public are given significant leeway in presenting their comments. In our review of Board siting cases, we found no case in which the Board entered a blanket order excluding public comment in Board siting appeal hearings – and Petitioner has pointed to none. We also found no case in which the Board limited public comment to the “fundamental fairness” issue -- and again Petitioner has pointed to none. Finally, contrary to Petitioner’s assertion, the Board’s taking of public comment on whether the record supports the local siting body’s decision has never been construed as reversible error – and Petitioner has pointed to no case in which it has.

8. In fact, there is very good reason the Hearing Officer should *not* attempt to limit public comment in the hearing process. The far greater risk of reversible error is that the Hearing Officer does as Petitioner requests and cuts-off public comment in contravention of the statute and regulations, or, at hearing, from the bench, without the benefit of eleven days of County Board hearing transcripts before him, cuts-off valid public comment actually highlighting the record or providing legal argument on facts in the record. This would be reversible error. The record in this case is extensive and the Village and individual citizens from both Cary and other neighboring communities participated in every day of the eleven County Board hearings. We submit that the likelihood that the Hearing Officer will mistakenly cut-off pertinent public comment is greater than the risk that the Board will be misled in the application of its standard of review because a member of the public strays from the record.

9. Finally, the Village fully agrees that the standard of review here is manifest weight and that the Board is limited to the record presented to the County Board. The Village would welcome an instruction from the hearing officer at hearing to *both* the parties and the public regarding the Board's application of the standard of review and the need to focus on information contained in the record.


WHEREFORE, Petitioner's assertions are without merit and its Motion should be denied.

Respectfully Submitted,

The Village of Cary

Dated: August 4, 2003

By


One of its Attorneys

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Patricia F. Sharkey
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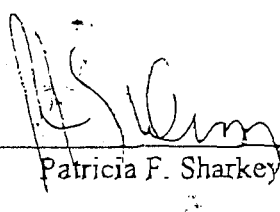
CERTIFICATE OF SERVICE

Patricia F. Sharkey, an attorney, hereby certifies that a copy of the foregoing Notice of Filing and Village of Cary's Response to Petitioners' Motion in Limine was served on the persons listed below by facsimile and by depositing same in the U.S. Mail at or before 5:00 p.m. on this 4th day of August 2003.

David W. McArdie
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Illinois Pollution Control Board

Red R. Blagojevich, Governor

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PCB 98-060 12/19/97 Transcript Transcript	12/24/1997	Transcript of hearing held December 19, 1997	PCB 1998-060	CDT Landfill Corporation v. City of Joliet
Public Comment	6/1/2000	Public Comments from Mayer Brown & Platt, Submitted by Percy L. Angelo (P.C. #4)	R2000-020	In the Matter of Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130
PCB 95-119 03/05/96 Transcript				
Brief	7/28/2003	Village of Cary's Appeal of Hearing Officer Determinations and Request for Board Direction	PCB 2003-221	Lowe Transfer, Inc. and Marshall Lowe v. County Board of McHenry County, Illinois
PCB 76-186 02/17/77 Opinion and Order				
PCB 72-321 10/24/72 Opinion and Order				
PCB 76-171 10/28/76 Opinion and Order				
R 88-007 03/01/90 Opinion Opinion and Order	3/1/1990	Proposed Rule, Second First Notice, Proposed Opinion and	R1988-007	In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills (Entire record in R84-17 Incorporated)
R 88-007 05/07/90 Anderson Proposed Opinion				
RegDocket	5/7/1992	Opinion and Order of the Board by M. Nardulli: Proceeding is dismissed and docket is closed	R1990-008	In the Matter of: Amendments to 35 Ill. Adm. Code 105.102; Repeal of De Novo Hearing for Appeals of NPDES Permits
R 88-007 08/17/90 Opinion Opinion and Order	8/17/1990	Adopted Rule, Final Opinion and Order of the Board by	R1988-007	In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills (Entire record in R84-17 Incorporated)

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EXHIBIT D
to Motion to Strike

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)
Respondents.)

NOTICE OF FILING

TO: See List Referenced in Proof of Service

PLEASE TAKE NOTICE that on August 5, 2003, we filed with the Illinois Pollution Control Board, the attached Lowe Transfer, Inc. and Marshall Lowe's **REPLY TO THE COUNTY BOARD OF MCHENRY'S RESPONSE TO MOTION IN LIMINE** in the above entitled matter.

LOWE TRANSFER, INC. and
MARSHALL LOWE

By: David W. McArdle
David W. McArdle

PROOF OF SERVICE

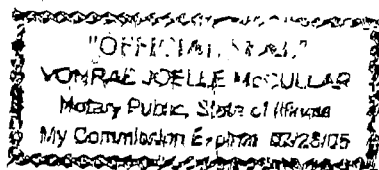
I, a non-attorney, on oath state that I served the foregoing Reply on the following parties by depositing same in the U. S. mail on this 5TH day of August, 2003 and via fax on the 5th day of August, 2003:

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SUBSCRIBED and SWORN to before
me this 5th day of August, 2003

Y. Joelle McCullar
Notary Public



David W. McArdle
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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' REPLY TO THE
COUNTY BOARD OF MCHENRY'S
RESPONSE TO MOTION IN LIMINE**

Co-Petitioners, Lowe Transfer, Inc. and Marshall Lowe ("Lowe"), by and through its attorneys, Zukowski, Rogers, Flood & McArdle, respectfully request the Pollution Control Board deny the County Board of McHenry's-(the "County Board") Response to Motion in Limine in this siting appeal. In support of its reply, Lowe states as follows:

1. On July 28, 2003, Lowe filed a Motion in Limine in this siting appeal.
2. The Motion in Limine requested the Pollution Control Board enter an order, in limine, restricting the scope of the hearing to be conducted on August 14, 2003, to preclude Section 101.628(a) oral statements or, in the alternative, to limit the time for Section 101.628(a) oral statements, if allowed, to five minutes per participant in the event the total number of participants is 25 or more and, additionally, limit all Section 101.628 statements by parties and participants to the record generated in the proceeding before the County Board.
3. The County Board, in its response, misreads the Board's rules of procedure. The County Board argues that the Board rules "explicitly provides that participants who wish to make

comments will be allowed the opportunity to do so". County's Response to Motion in Limine, p.

3.

4. Yet what Section 107.404 really states is:

"Persons who are not parties as set forth in Section 107.202 of this Part are considered participants and will have hearing participation rights as determined by the hearing officer in accordance with 35 Ill. Adm. Code 101.628. (Emphasis added.)

5. Section 101.628(a) in pertinent part states:

"Oral Statements. The hearing officer may permit a participant to make oral statements on the record when time, facilities, and concerns for a clear and concise hearing record so allow. (Emphasis added.)

6. Section 101.628(c)(2) states:

"All public comments must present arguments or comments based on the evidence contained in the record."

7. Lowe's siting appeal is based solely on the manifest weight of the evidence in the record regarding Criteria 2, 3 and 5.

8. The County Board asserts, in its response, that the "proposition that the Pollution Control Board must review the record developed at the local siting hearing under a manifest weight of the evidence standard is simply irrelevant". County's Response to Motion in Limine, p. 4.

9. Not only is the as to the manifest weight of the evidence standard relevant to statements made at the public hearing, it is the only standard that can be applied in this siting appeal.

10. The record in this siting approval application is voluminous. "Unlimited public comment", as proposed by the County Board, is contrary to the Board's rules "for a clear and concise hearing record."

11. Lowe's Motion in Limine was a simple request given the nature of this siting appeal to restrict oral arguments to the parties or limit public comment to a reasonable time frame and to confine the public comment to the record and prevent the presentation of evidence outside of the record.

WHEREFORE, Co-Petitioners, Lowe Transfer, Inc. and Marshall Lowe, request that the County Board of McHenry's Response to Motion in Limine be denied.

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

By:

David W. McArdle

David W. McArdle
Attorney No: 06182127
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FAX MESSAGE

RECEIVED
CLERK'S OFFICE

AUG 5 2003

STATE OF ILLINOIS
Pollution Control Board

DATE: August 5, 2003
TO: Charles F. Helsten 815/963-9989
TO: Bradley P. Halloran 312/814-3669
FROM: David W. McArdle

NOTE:

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