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DAVID W. McARDLE

September 2, 2003

RECEIVED  
CLERK'S OFFICE

AUG 28 2003

CHICAGO OFFICE  
STATE OF ILLINOIS  
Pollution Control Board  
ONE NORTH LASALLE STREET  
CHICAGO, ILLINOIS 60602  
(312) 377-4450  
FAX: (312) 332-1901

**VIA FACSIMILE & U.S. MAIL**

Illinois Pollution Control Board  
Attention: Ms. Dorothy Gunn, Clerk  
James R. Thompson Center  
100 West Randolph Street, Ste. 11-500  
Chicago, Illinois 60601-3218

Re: Lowe Transfer, Inc. and Marshall Lowe v.  
County Board of McHenry County, Illinois  
PCB 03-221

Dear Ms. Gunn:

Enclosed is an original and ten copies of Co-Petitioners' *Motion to Strike the Village's Response Filed on August 27, 2003, and the Village's Revised Brief and Motion for Sanctions.*, along with Notice of Filing thereof.

Please return a file-stamped copy of the above-referenced document to the undersigned, an envelope has been provided.

Thank you.

Very truly yours,



David W. McArdle

DWM:cma

Enclosure

cc: Mr. Bradley P. Halloran  
Mr. Charles F. Helsten  
Ms. Percy Angelo

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
CLERK'S OFFICE

AUG 28 2003

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)

STATE OF ILLINOIS  
Pollution Control Board

NOTICE OF FILING

TO: See List Referenced in Proof of Service

PLEASE TAKE NOTICE that on August 28, 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 FILED ON AUGUST 27, 2003, AND THE VILLAGE'S REVISED BRIEF AND MOTION FOR SANCTIONS** in the above entitled matter.

LOWE TRANSFER, INC. and  
MARSHALL LOWE

By: David W. McArdle

PROOF OF SERVICE

I, a non-attorney, on oath state that I served the foregoing Motion on the following parties by depositing same in the U. S. mail on this 28<sup>th</sup> day of August, 2003:

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

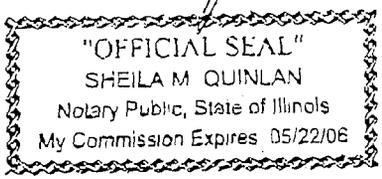
Bradley P. Halloran  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 West Randolph Street  
Chicago, IL 60601

Ms. Percy L. Angelo  
Mayer Brown Rowe & Maw  
190 South LaSalle Street  
Chicago, Illinois 60603-3441

Sheila M. Quinlan

SUBSCRIBED and SWORN to before  
me this 28<sup>th</sup> day of August, 2003

Sheila M. Quinlan  
Notary Public



David W. McArdle  
Attorney Registration No. 06182127  
ZUKOWSKI ROGERS FLOOD & MCARDLE  
50 Virginia Street, Crystal Lake, Illinois 60014  
(815) 459-2050

FROM ZUKOWSKI ROGERS FLOOD MCARDLE 8154599057 (TJU)08.28.03 14:13/ST.14:17.NO.350000844 P 3

AUG 28 2003

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 THE VILLAGE'S RESPONSE  
FILED ON AUGUST 27, 2003 AND THE VILLAGE'S  
REVISED BRIEF AND MOTION FOR SANCTIONS**

Co-Petitioners Lowe Transfer, Inc. and Marshall Lowe ("Lowe"), by Zukowski Rogers Flood & McArdle, its attorneys, respectfully request the Pollution Control Board to strike both the Village of Cary's (the "Village") Response filed on August 27, 2003, and its Revised Amicus Brief and issue sanctions against the Village for failure to comply with Board rules and Board and Hearing Officer orders. In support of this Motion, Lowe states as follows:

**Background**

1. By orders issued July 10 and August 7, 2003, this Board determined the Village is not a party in this siting approval appeal but afforded the Village "participant" status under Sections 101.628 and 107.404 of the Board's procedural rules. The order of July 10<sup>th</sup> granted the Village permission to file an Amicus Brief.

2. On August 14, 2003, Hearing Officer Bradley Halloran issued a written order outlining the post-hearing briefing schedule for this appeal.

THIS FILING PRINTED ON RECYCLED PAPER

3. The order required parties to simultaneously file their briefs on August 22, 2003 and the Village to file its Amicus Brief on August 25, 2003. Additionally, the public comment period was ordered closed on August 25, 2003.

4. In compliance with the Hearing Officer's order, Lowe and the County filed its briefs on August 22, 2003. Both briefs complied with the page limitation provisions contained in Section 101.302(k) of the Board's rules.

5. On August 25, 2003, the Village filed its 56-page Amicus Brief in direct violation of Section 101.302(k).

6. On August 26, 2003, Lowe filed a Motion to Strike Village of Cary's Brief and a Motion for Sanctions. This Motion is still pending before the Board.

#### **Filings by the Village Post Closing**

7. On August 27, 2003, the Village filed a "Response of the Village of Cary With Respect to Co-Petitioners' Motion to Strike Village of Cary's Brief and Motion for Sanctions Submitted as a Public Comment to the Extent Required by the Board". In addition, the Village submitted a 32-page Brief in support of its amicus position as an alternate to its 56-page brief.

8. The Village's Response and Revised Amicus Brief were filed after the public comment period had closed.

#### **Board Order and Rule Violations**

9. The Response filed by the Village is in violation of both orders issued by this Board and the Board's written procedural rules.

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

THIS FILING PRINTED ON RECYCLED PAPER

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

11. The issue of who are parties to this proceeding was resolved by this Board’s July 10 and August 7, 2003 orders.

12. However, even with the Board’s orders and the extensive experience before the Pollution Control Board of Ms. Percy Angelo, the Village’s attorney, Lowe and this Board are once again forced to respond to another unauthorized filing from the Village.

13. In its latest unauthorized filing with the Board, there even appears to be an attempt to blame the Hearing Officer for the Village’s inability to follow the Board’s procedures.

14. In paragraph 4 of the Village’s response, regarding the discussions conducted by the Hearing Officer to establish the post-hearing briefing schedule, the Village states:

“There was no discussion of the required length of the briefs. After the proceedings went back on the record, the Hearing Officer announced the briefing and public comment process. Again there was no discussion of the required length of briefs or public comments.”

15. The Village goes on to say in paragraph 10 of its response that it “had no intention of violating the Board’s requirements or the instructions of the Hearing Officer, but simply did not understand that in light of the record and issues presented, that its post-hearing filing was to be limited to 20 pages.”

16. Lowe finds these self-serving representations from the Village and its attorney incredible in light of Ms. Angelo’s extensive experience in front of this Board. A fact Ms. Angelo proudly presented in filings with this Board in this appeal.

17. From the actions of the Village, it would appear the Village believes that orders of this Board and its Hearing Officer and the Board's rules and procedures apply to everyone but the Village.

18. With its Response, the Village filed a 32- page revised Brief and asks leave for its admission into this appeal. Even the length of this brief exceeds the 20-page limitation imposed by Section 101.302(k). Village Response on page 4.

19. This is nothing more than an attempt by the Village to file a second brief after the Hearing Officer's deadline and the public comment period has closed .

20. Ms. Angelo, herself, has vigorously objected to such attempts in other proceedings in front of this Board.

21. In PCB 95-119, 125 in her client's Objection to Motion for Leave to File Copy of Amicus Brief and Response, Ms. Angelo in opposition to a party's amicus brief, wrote:

"This attempt by the Agency and USEPA to cram the briefs attached to the Motion into the Board's record constitute nothing more than the Agency's attempt to file a second post-hearing brief – at a time designed to afford WSREC no meaningful opportunity to respond – a flagrant contravention of the Board's Rules, the order of the Hearing Officer and fundamental principles of due process." West Suburban Recycling and Energy Center, L.P.'s Objections to Motion for Leave to File Copy of Amicus Brief and Response at p. 6.

22. As in its previous Motion to Intervene, the Village seems to assert that its participation is necessary to insure the county's decision is vigorously defended. Apparently, the Village is still assuming either the incompetence or incapability of the County and its counsel to defend its decision.

THIS FILING PRINTED ON RECYCLED PAPER

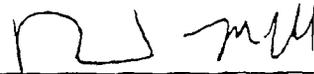
23. The County, as the local siting authority, is capable of presenting the issues in defense of its decision. With both its initial brief and its reply brief, the County has 100 pages allowed by Board rules. Since there are only three (3) criteria on appeal in this case, the County and, therefore, the objectors through the County, have ample opportunity to present their case.

24. There will be no prejudice to the objectors by the actions requested by Lowe as the decision by this Board must be made solely on the record.

25. However, the continual and flagrant violations of Board and Hearing Officer orders and Board rules cannot be allowed to continue without undermining the authority and integrity of both the Board and the statutory appeal process.

WHEREFORE, Co-Petitioners, Lowe TRANSFER, INC. and MARSHALL Lowe, request that request the Pollution Control Board (1) strike the Village's Response to Co-Petitioners' Motion to Strike, (2) strike the Village's Revised Amicus Brief, and (3) issue sanctions, including reimbursement of attorneys fees incurred by Co-Petitioners, against the Village for failure to comply with Board rules and Board and Hearing Officer orders in this siting appeal.

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



David W. McArdle, one of their attorneys

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)  
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LAW OFFICES  
ZUKOWSKI, ROGERS, FLOOD & McARDLE

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

DATE: August 28, 2003

TO: Bradley P. Halloran 312/814-3669

TO: Illinois Pollution Control  
Attention: Clerk 312/814-3669

FROM: David W. McArdle

NOTE:

THIS TRANSMISSION CONTAINS 8 PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL OF THE ABOVE, OR IF THE QUALITY OF THE TRANSMISSION IS POOR, PLEASE TELEPHONE CINDIE AT (815) 459-2050. **IMPORTANT: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, AND/OR EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW.** IF YOU ARE NOT THE INTENDED RECIPIENT, OR AN AGENT OF THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS UNAUTHORIZED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS BY U.S. MAIL.

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