

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD **RECEIVED**

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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)

STATE OF ILLINOIS
Pollution Control Board

**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

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