

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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AUG 7 2003

LOWE TRANSFER, INC. and)
MARSHALL LOWE,)
)
Co-Petitioners,)
)
v.)
)
COUNTY BOARD OF MCHENRY)
COUNTY, ILLINOIS,)
)
Respondent.)

STATE OF ILLINOIS
Pollution Control Board

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

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on August 6, 2003, we filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing and Public Comment of the Village of Cary With Respect to Lowe's Motion to Strike and Motion for Sanctions, copies of which are attached and hereby served upon you.

Dated: August 6, 2003

VILLAGE OF CARY

By: Percy L. Angelo
One of its Attorneys

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LOWE TRANSFER, INC. and)
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COUNTY BOARD OF MCHENRY)
COUNTY, ILLINOIS,)
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**PUBLIC COMMENT OF THE VILLAGE OF CARY WITH RESPECT TO
LOWE'S MOTION TO STRIKE AND MOTION FOR SANCTIONS**

The Village of Cary by its attorneys furnishes this public comment in opposition to Lowe Transfer, Inc. and Marshall Lowe's ("Lowe") Motion to Strike Village of Cary's Response to Petitioners' Motion in Limine and Motion for Sanctions Against the Village of Cary ("Sanctions Motion"), and in support thereof states as follows:

1. Lowe has filed a motion in limine seeking to significantly limit public participation in this proceeding.
2. The Village of Cary filed a public comment pointing out that it would be improper for the Board or its hearing officer to restrict public comment in the manner requested by Lowe.
3. Lowe has now moved for sanctions against the Village of Cary for pointing out the impropriety of the Lowe request for limitations on public comments, arguing in effect that the public has no right to comment on the degree of public comment allowed.
4. Lowe did not serve the Village of Cary with a copy of its request for sanctions against the Village, apparently assuming that it is appropriate to sanction Cary essentially ex parte.

5. Similarly, Cary has been barred even from auditing status conferences at which the process of the hearing and Lowe's motions have been discussed. Lowe claims Cary sought to participate as a party in such status conferences. Sanction Motion at ¶ 7. This is incorrect. The record is clear that Cary's request included simply the ability to audit, to hear what was being said, so it could prepare itself for public participation. Village of Cary's Appeal of Hearing Officer Determination and Request for Board Directions. (Cary has already identified ambiguities and inaccuracies in the reports of the hearing officer's orders issued following the status conferences. Without hearing the status discussion it has not been possible to understand the status of this case from the Board's website alone.)

6. Between the hearing officer's order barring Cary from hearing status conferences, and Lowe's motion in limine to limit public participation and its motion for sanctions to prevent a public comment on its motion in limine, Lowe would make a mockery of the statutory and regulatory requirements for public participation. Lowe wants to bar the public from hearing what is happening or commenting orally or in writing. Public participation when the public can't hear, see, speak or write is not public participation.

7. There is no Board rule, and Lowe cites none, denying a member of the public the right to file a public comment on an issue which directly affects it, such as a motion to significantly limit public comment.

8. Lowe's ad hominem comments about Cary's attorney are inappropriate – and misdirected.¹ The idea that an amicus curiae should not delay a matter is unexceptional, and not

¹ In fact, Cary's attorney has been participating in Board proceedings since 1972, and has never been involved in a proceeding where the public was barred from hearing what was happening or commenting on the scope of its participation. In fact the Board has always been welcoming of public participation.

in any way inconsistent with the Village's comments in this case. In fact, it is inefficient not to consider public comment on the scope of public participation prior to the hearing.

9. It is unclear what "repeated" and "flagrant" abuses Lowe is referring to in his motion as a basis for sanctions. Cary, pursuant to indication by the hearing officer that his denial of access to hear the status conference could be appealed to the Board, simply did as the hearing officer suggested. It filed a public comment on the scope of public participation. Apparently Lowe will be happy only if the public is kept in the dark about procedures and then muzzled at the hearing on this matter. That may be more efficient for Lowe in trying to overturn McHenry County's denial of his siting, but it is totally contrary to the public participation requirements of the Environmental Protection Act and the Board's rules.

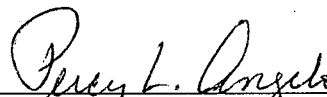
10. Accordingly, Cary believes that Lowe's motion for sanctions and to strike its response to Lowe's motion in limine should be denied.

Respectfully Submitted,

The Village of Cary

Dated: August 6, 2003

By


One of its Attorneys

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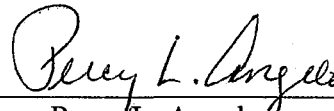
CERTIFICATE OF SERVICE

Percy L. Angelo, an attorney, hereby certifies that a copy of the foregoing Notice of Filing and Village of Cary's Response to Petitioners' Motion in Limine was served on the persons listed below by depositing same in the U.S. Mail at or before 5:00 p.m. on this 6th day of August 2003.

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