

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SEP 02 2003

LOWE TRANSFER, INC. and)
MARSHALL LOWE,)
Co-Petitioners,)
vs.)
COUNTY BOARD OF McHENRY)
COUNTY, ILLINOIS)
Respondents.)

No. PCB 03-221

(Pollution Control Facility Site 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
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 28TH day of August, 2003:

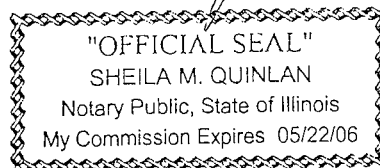
Charles F. Helsten
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Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

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

SUBSCRIBED and SWORN to before
me this 28th day of August, 2003

Sheila M. Quinlan
Notary Public



David W. McArdle
Attorney Registration No. 06182127
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LOWE TRANSFER, INC. and)
MARSHALL LOWE,)

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Co-Petitioners,)

No. PCB 03-221

STATE OF ILLINOIS
Pollution Control Board

vs.)

(Pollution Control Facility
Siting Appeal)

COUNTY BOARD OF McHENRY)
COUNTY, ILLINOIS)

Respondent)

**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 10th 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.

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.

“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.

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

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