

ILLINOIS POLLUTION CONTROL BOARD

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SEP 15 2003

STATE OF ILLINOIS
Pollution Control Board

LOWE TRANSFER, INC. and MARSHALL)
LOWE,)

Petitioners,)

vs.)

Case No. PCB 03-221

COUNTY BOARD OF MCHENRY COUNTY,)
ILLINOIS)

Respondent.)

NOTICE OF FILING

TO: See Affidavit of Service

PLEASE TAKE NOTICE that on September 10, 2003, we mailed for filing with the Illinois Pollution Control Board, the attached **Respondent County Board of McHenry County, Illinois' Response to Co-Petitioners' Motion to Strike Portions of Respondent's Brief**, a copy of which is attached hereto.

Dated: September 10, 2003

Respectfully Submitted,

On behalf of the County Board of McHenry
County, Illinois

By: Hinshaw & Culbertson

Charles F. Helsten (HKL)
One of its Attorneys

HINSHAW & CULBERTSON
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Rockford, Illinois 61105-1389
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD **RECEIVED**
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LOWE TRANSFER, INC. and MARSHALL)
LOWE,)

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Petitioners,)

STATE OF ILLINOIS
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COUNTY BOARD OF MCHENRY COUNTY,)
ILLINOIS)

Pollution Control Facility Siting Appeal

Respondent.)

**RESPONDENT COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS'
RESPONSE TO CO-PETITIONERS' MOTION TO STRIKE
PORTIONS OF RESPONDENT'S BRIEF**

NOW COMES, Respondent, COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS,
by and through its attorneys, Hinshaw & Culbertson, and in response to Co-Petitioners' Motion
to Strike Portions of Respondent's Brief, states as follows:

1. Co-Petitioners' Motion to Strike is improper.

Co-Petitioners' Motion to Strike is inappropriate as it generally consists of arguments and disagreements with Respondent's brief. Such is not the purpose of a motion to strike. A motion to strike is appropriate when a pleading is insufficient in law or contains immaterial matter. *See* 735 ILCS 5/2-615 (2002); *see also* 35 Ill. Adm. Code 101.500(a) (explaining that the Board may entertain motions permissible under the Illinois Code of Civil Procedure). In this case, the matters attacked by Co-Petitioners are not immaterial matters but, rather, are matters of argument. While Co-Petitioners may have their position, Respondent's disagreement with that position is not a proper basis for a motion strike. Rather, the more appropriate method to make such arguments would be in Co-Petitioner's response brief. As Co-Petitioners' response brief does not raise such issues, those issues should not be raised in this motion and should be disregarded by this Board. To the extent that this Board considers the arguments raised by Co-

Petitioners, Respondent contends that the majority of Co-Petitioners' arguments have no merit, as set out below.

2. Lawrence Thomas has practiced 23 years in the field of hydrogeology and has considerable experience in geology and hydrogeology.

Respondent disagrees that it was incorrect in describing Mr. Thomas as a hydrogeologist after Mr. testified at length and provided his extensive curriculum vitae, which documented his background in "hydrogeology." It is not incorrect to describe someone who practices hydrogeology as a "hydrogeologist." In fact, Mr. Thomas has 23 years of experience in hydrogeology and geology. Specifically describing his background in "hydrogeology," Mr. Thomas explained that he has been involved in locating water supply wells and protecting such wells from contamination since 1980. (C.00188, p. 7). He has also been actively involved in water resource planning and is working with McHenry County on its groundwater management plan. (*Id.* at pp. 7-8). In addition, he has participated in performing a Groundwater Management Study and has been involved in a well monitoring and treatment plan for the Village of Cary. (*Id.* at p. 9). He has also performed groundwater modeling studies of groundwater flow in the vicinity of the Village of Cary. (*Id.* at pp. 10-11). Mr. Thomas' extensive background in hydrogeology is described at length in his curriculum vitae. (C.00316-325). Such testimony and evidence clearly establish that Mr. Thomas had a sound background in hydrogeology, which is "the branch of geology that deals with the occurrence, distribution, and effect of ground water." The American Heritage Dictionary of the English Language, Fourth Edition, 2000.

Mr. Thomas also testified about his experience in geology. Mr. Thomas explained that since 1980, when he started designing water supply wells in the area, he has had to deal with geology, and while not a geologist, he has experience in geology. (C.00188, pp. 15-16.) He explained that in designing wells, it is necessary to consider the types of formations and geology

in and around the proposed well location. (*Id.* at p. 16). Mr. Thomas also explained that his background in geology is based on 23 years of experience in developing water supply wells. *Id.*

The hearing officer specifically found that Mr. Thomas had adequate experience in the areas of geology and hydrogeology to allow him to testify with respect to groundwater issues. (*Id.* at p. 18-19). The hearing officer specifically noted that "this committee can weigh the evidence in terms of Mr. Thomas' geographic experience and education as it relates to his ability to testify in the hydrogeological area." (*Id.* at p. 19). Consequently, Respondent was correct in asserting that Mr. Thomas did have experience with respect to geology and hydrogeology based on Mr. Thomas' own testimony of his experience in those areas.

Therefore, Respondent requests that this Board not strike Respondent's reference to Mr. Thomas as a "hydrogeologist," as Mr. Thomas' 23 years of practice in that field warrants that description. Furthermore, Respondent requests that this Board not strike any other portion of Respondent's brief that refers to Mr. Thomas' experience in geology or hydrogeology because such statements are amply supported by the record.

3. Mr. Nickodem has been involved with at least 50 landfills and transfer stations, including at least eight transfer stations.

Respondent admits that it incorrectly asserted that Mr. Nickodem has been involved with 50 waste transfer stations. That statement should have read: "Mr. Nickodem has been involved with at least 50 solid waste landfills and transfer stations." Despite this minor error, Mr. Nickodem's testimony squarely indicates that he has wide experience with a number of transfer stations.

Co-Petitioners misstate the evidence by suggesting that Mr. Nickodem has only been involved with six transfer stations based on the list attached to Mr. Nickodem's resume. Co-Petitioners' contention is unfounded because Mr. Nickodem explained that the list included in his

resume was not complete. (C.00215, p. 100). Mr. Nickodem testified that he had worked on the design and operations of other transfer stations not listed, and specifically identified two such other transfer stations. (*Id.*) Co-Petitioners also erroneously state that Mr. Nickodem was only the engineer on two facilities; however, he specifically testified that there were at least two other transfer stations that he designed in Wisconsin. (*Id.*; *see also* C.00214, p. 5). Moreover, Mr. Nickodem testified that as an engineer for three waste companies operating waste transfer stations, he had a unique perspective on the actual operation of such stations. (C.00214, pp. 5-6).

Therefore, Respondent requests that instead of striking the statement that Mr. Nickodem was involved with 50 transfer stations, Respondent requests that this tribunal amend that statement to indicate that Mr. Nickodem had "involvement with 50 pollution control facilities, including landfills and transfer stations."

4. The McHenry County Board clearly found the objectors' witnesses more credible.

Co-Petitioners erroneously suggest that the McHenry County Board made no credibility determinations simply because the Board did not specifically state which witnesses it believed and disbelieved. However, there was no need for the McHenry County Board to do so because it was sufficient for the County Board to find that the criteria set forth in section 39.2(a) of the Act had not been met. *See E & E Hauling, Inc. v. Pollution Control Board*, 451 N.E.2d 555, 577-578 (2d Dist. 1983) (explaining that a local hearing body does not have to indicate specific facts upon which it made its decision).

By finding that the Applicant failed to satisfy criteria (ii), (iii), and (v), the County Board must have determined that the Applicant's witnesses were not credible with respect to their opinions as to those criteria, as the Applicant's experts specifically testified that those particular criteria had been met. (C.00179, pp. 14, 42; C.00183, pp. 47-48, 67-68; C.00179, p. 43. On the

other hand, the objectors' witnesses specifically testified that those criteria had not been met. (C.00188, pp. 50-51, C.00189, p. 61, C.00215, p. 54, C.00218, p. 79; C.00205, p. 65, C.00208, p. 89 C.00189, pp. 9-10; C.00215, p. 55; C.00218, p. 80.) Consequently, it is logical to assume that because the County Board came to the same conclusions as the objectors' witnesses, the County Board found those witnesses to be more credible and more persuasive than the Applicant's witnesses.

Discussions of credibility, as the other matters described above, are matters of argument, which are improper to strike. In any event, Respondent requests that no statements regarding the credibility of witnesses be stricken from Respondent's Brief, as those statements are supported by the record as well as the County Board's conclusion to deny siting approval.

5. The McHenry County Board appropriately considered Lowe's lack of operating experience.

Co-Petitioners assert that the McHenry County Board was not able to consider Lowe's lack of operating experience in determining if criteria (ii) and (v) were fulfilled. However, section 39.2(a) specifically allows the County Board to consider Lowe's lack of experience, as the unnumbered criterion allows the Board to consider as evidence "the previous operating experience of the applicant." 415 ILCS 5/29.2(a). Clearly, the fact that the Applicant had no previous operating experience could be considered by the McHenry County Board.

Furthermore, Co-Petitioners incorrectly assert that there is no evidence that the County Board considered Co-Petitioners lack of experience in reaching its conclusions with respect to criteria (ii) and (v). This argument, however, is nonsensical, as every member of the County Board agreed that it "considered as evidence the previous operating experience of the applicant and the past record of convictions or admissions of violations of the applicant when considering Criteria (ii) and (v) of 415 ILCS 5/39.2(a). (C.07244, pp.47-50). Because Lowe had never

operated a landfill or transfer station before, the County Board must, therefore, have considered Lowe's "lack of operating experience," a factor which could appropriately be considered under the unnumbered criterion.

Finally, Co-Petitioners disingenuously assert that Respondent introduced evidence of Lowe's lack of experience "for the first time in its brief on appeal." This is clearly not the case, as all of the evidence of Lowe's lack of experience was directly contained in the record and the transcripts of the local siting hearing. Therefore, Respondent did not present evidence for the first time in its brief to this Court, as improperly argued by Co-Petitioners.

Accordingly, Respondent requests that no statements regarding Lowe's lack of experience be stricken from Respondent's Brief, as those statements are amply supported by the record.

6. Respondent incorrectly labeled McHenry County Defenders as an objector.

Respondent admits that it erroneously listed the McHenry County Defenders as an objector and submits that it did not do so to mislead this Board. Rather, it was purely a mistake. As pointed out by Co-Petitioners, there was no distinction between objectors and petitioners when the parties signed up to participate in the hearing, and Respondent admits that it erroneously labeled the McHenry County Defenders as an objector when, in fact, that group should have been labeled a participant.

Therefore, Respondent ~~does not object to the Board striking the McHenry County~~
Defenders from the list of objectors named.

WHEREFORE, Respondent, County Board of McHenry County, Illinois, respectfully requests that this Board deny Co-Petitioners Motion to Strike as it contains inappropriate argument. In the event that this Board does not deny Co-Petitioners' Motion outright, Respondent requests that this Board:

1. Not strike any portion of Respondent's brief that refers to Mr. Thomas' experience in geology or hydrogeology;
2. Amend Respondent's statement regarding Mr. Nickodem's experience with transfer stations to say that Mr. Nickodem had "involvement with 50 pollution control facilities, including landfills and transfer stations.";
3. Not strike any statements regarding the credibility of witnesses contained in Respondent's brief; and
4. Not strike any references regarding Lowe's lack of experience contained in Respondent's brief.

Dated: September 9, 2003

Respectfully Submitted,
RESPONDENT COUNTY BOARD
OF MCHENRY COUNTY, ILLINOIS

By: 

One of its Attorneys

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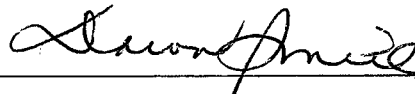
AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on 9/10, 2003, a copy of the **Respondent County Board of McHenry County, Illinois' Response to Co-Petitioners' Motion to Strike Portions of Respondent's Brief**, served upon:

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

Dorothy M. Gunn
Bradley Halloran
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, IL 60601

By depositing a copy thereof, enclosed in an envelope in the United States Mail at Chicago, Illinois, proper postage prepaid, before the hour of 5:00 P.M., addressed as above.



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