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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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 Siting Appeal)

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

TO: See Proof of Service

PLEASE TAKE NOTICE that on September 2, 2003, we filed with the Illinois Pollution Control Board, the attached Lowe Transfer, Inc. and Marshall Lowe's **MOTION TO STRIKE PORTIONS OF COUNTY BOARD OF McHENRY COUNTY'S BRIEF IN SUPPORT OF ITS DECISION TO DENY SITING APPROVAL TO LOWE TRANSFER, INC.** 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 party, by hand delivery to on this 2nd day of September, 2003:

Hearing Officer

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

SUBSCRIBED and SWORN to before
me this 2nd day of September, 2003

Sharon Pippin
Notary Public



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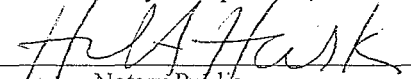
PROOF OF SERVICE

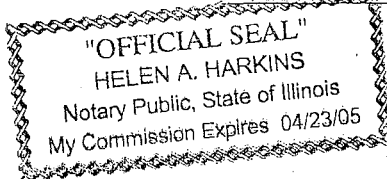
I, a non-attorney, on oath state that I served the foregoing Motion on the following party, by hand delivery on this 2nd day of September, 2003:

Attorney for County Board of McHenry County, Illinois

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

SUBSCRIBED and SWORN to before
me this 2nd day of September, 2003


Notary Public



David W. McArdle
Attorney Registration No. 06182127
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50 Virginia Street
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
STATE OF ILLINOIS
Pollution Control Board

LOWE TRANSFER, INC. and)	
MARSHALL LOWE,)	
Co-Petitioners,)	No. PCB 03-221
vs.)	(Pollution Control Facility
)	Siting Appeal)
COUNTY BOARD OF McHENRY)	
COUNTY, ILLINOIS)	
Respondent)	

**CO-PETITIONERS' MOTION TO STRIKE PORTIONS OF RESPONDENT
COUNTY BOARD OF MCHENRY COUNTY'S BRIEF IN SUPPORT OF
ITS DECISION TO DENY SITING APPROVAL TO LOWE TRANSFER, INC.**

Co-Petitioners, Lowe Transfer, Inc. and Marshall Lowe ("Lowe"), by Zukowski, Rogers, Flood & McArdle, its attorneys, respectfully request the Pollution Control Board strike certain portions of Respondent, County Board of McHenry County's ("County") Brief in Support of its Decision to Deny Siting Approval to Lowe filed on August 22, 2003. In support of this Motion, Lowe states as follows:

A. **Lawrence Thomas is not a Geologist or a Hydrogeologist**

1. On page 5 of its brief, the County states Lawrence Thomas, a witness for the objectors, was a "professional engineer and **hydrogeologist**" [Emphasis added.]
2. Again on page 12 of its brief, the County states, "Mr. Lawrence Thomas, a professional engineer, who has worked in the area of **hydrogeology since 1980**". [Emphasis added.]
3. However, the resume of Mr. Thomas indicates his background as a civil engineer with no training or education in the fields of either geology or hydrogeology. (C00316).

4. Mr. Thomas testified he is neither a licensed geologist or hydrogeologist. (C00189, p. 50).

5. Once again, the County possessed knowledge that Mr. Thomas is not a licensed hydrogeologist as the record amply demonstrates. The only possible explanation for the County's misrepresentation of Mr. Thomas' credentials would be in an attempt to bolster the defense of their decision by presenting the Board with an inaccurate representation of his qualifications.

6. The inclusion of this misstatement of credentials and Mr. Thomas' statements in the County's brief based on his "supposed" background as a hydrogeologist will mislead the Board and unduly prejudice Lowe.

7. The County's misrepresentation of Mr. Thomas' credentials as a hydrogeologist should be stricken.

B. Nickodem was not "involved with 50 Transfer Stations"

1. In a further attempt to bolster the credentials of the objectors' witnesses and, thus, the defense of their decision to deny Lowe's application, the County, on page 8 of its brief, makes the following statement:

Mr. Nickodem testified that in his 15 years of experience and involvement with **50 transfer stations**. [Emphasis added.]

2. However, a review of Mr. Nickodem actual testimony reveals he was "involved with more than **50 solid waste landfills and transfer stations**". (C00214, p. 17). [Emphasis added.]

3. Under cross examination, Mr. Nickodem testified his resume submitted into the record actually included only 6 transfer stations. (C00215, pp. 98-103).

4. Of those 6 transfer stations, he was the engineer of record for only two(2): the Woodland Transfer Station in Kane County and the Fox Valley Transfer Station in DuPage County. *Id.*

5. Once again, the County possessed knowledge that, in reality, Mr. Nickodem has limited experience with transfer station design as the record amply demonstrates. The only possible explanation for the County's misrepresentation of Mr. Nickodem's credentials would be in an attempt to bolster the defense of their decision by presenting the Board with an inaccurate representation his qualifications.

6. This misrepresentation by the County is particularly egregious since the County's main argument for supporting their decision is reliance on the "experts with considerable experience". County Brief at page 7.

7. The inclusion of this misstatement of credentials and Mr. Nickodem's statements in the County's brief based on his "supposed" background with 50 transfer stations will mislead the Board and unduly prejudice Lowe.

8. The County's misrepresentation of Mr. Nickodem's credentials as someone with involvement with 50 transfer stations should be stricken.

C. County Made No Findings on Credibility of Witnesses

1. The County maintains in its brief on page 6:

Clearly, the McHenry County Board found the objector's witnesses to be *credible* and persuasive.

2. Again on page 26 of its brief the County states as follows:

it is the sole province of the County Board to assess the credibility of the experts and weigh conflicting evidence. See *Tate*, 188 Ill. App. 3d at 1022, 544 N. E. 2d at 1195. Here, the McHenry County Board clearly did so and determined that criterion (v) was not met based upon the evidence presented.

3. In neither the transcripts from the County Siting Committee meeting or the County Board meeting nor in the County's Resolution is there any finding assessing the credibility of the witnesses. (C07237: C07444: C07245-C07250).

4. The County's attempt to produce findings of credibility for the first time in its brief on appeal is contrary to the standard of review for an appeal based solely on the manifest weight of the record.

5. The inclusion of these "supposed" statements of finding by the County will mislead the Board and unduly prejudice Lowe.

6. All references to the County's finding of credibility of witnesses should be stricken.

D. Lack of Experience Not a Siting Criterion

1. The County in its brief argues erroneously that Lowe's lack of experience would "negate the Applicant's ability to satisfy criteria (ii) and (iv)[sic]". County Brief at p. 36.

2. While the County correctly repeats the language of Section 39.2(a) of the Act, the argument the County presents in its brief includes only a discussion of "lack of experience".

3. "Lack of experience" is not contained in Section 39.2(a).

4. Moreover, neither the Siting Committee in the discussion of its Resolution nor the County Board in the discussion of its Resolution make any reference at all to “lack of experience” as a basis for their decisions. (C07237; C07244).

5. In fact, the County’s Resolution states as follows:

Unnumbered Criterion: The Board has considered as evidence the **previous operating experience** of the applicant and **past record** of convictions or admissions of violations of the applicant when considering Criteria (ii) and (v) of 415 ILCS 5/39.2(a.)

6. Neither the transcripts from the County Siting Committee meeting or the County Board meeting nor the County’s Resolution contain any mention of “lack of experience” as the basis for the County’s decision.

7. The County’s attempt to introduce this evidence for the first time in its brief on appeal is contrary to the standard of review for an appeal based solely on the manifest weight of the record.

8. The inclusion of this new evidence will mislead the Board and unduly prejudice Lowe.

9. All references to Lowe’s lack of experience should be stricken from the County’s brief.

E. McHenry County Defenders were not “Objectors”

1. In the Introduction on page 1 of the brief, the County states:

Registered Objectors to the Application included...and **the McHenry County Defenders**. [Emphasis added.]

2. The sign-up sheet used by the hearing officer for the public hearings made no distinction between an objector and a participant. (C00041). The sign-up sheet is attached as Exhibit A.

3. The McHenry County Defenders ("Defenders"), a county-wide non-profit organization providing advocacy and education on environmental issues for over 33 years, did not register as an objector but as a participant. (C00178, p. 12).

4. As Lenore Beyer-Clow, the Executive Director of the Defenders stated on the first day of the hearing, "We are here as participants." *Id.* A letter from the McHenry County Defenders to the Clerk of the Board is attached as Exhibit B.

5. Since the County cites both of these documents at the bottom of page 1 of its brief and, therefore, possessed knowledge of the Defenders' appearance at the hearings solely as a participant, the only possible explanation for this misstatement of fact would appear to be in an attempt by the County to bolster the defense of their decision by stating the leading environmental group in McHenry County was opposed to the Lowe application.

6. The Defenders appeared at the public hearings solely as a participant as the record clearly discloses.

7. The inclusion of this misstatement of the Defenders' position will mislead the Board and unduly prejudice Lowe.

8. The County's misrepresentation of the Defenders as objectors should be stricken.

WHEREFORE, Co-Petitioners, Lowe Transfer, Inc. and Marshall Lowe, request that the PCB strike the County's misrepresentation of:

- A. the McHenry County Defenders as objectors;
- B. Mr. Thomas' credentials as a hydrogeologist;
- C. Mr. Nickodem's credentials as someone with involvement with 50 transfer stations;
- D. all references to the County's finding of credibility of witnesses; and
- E. all references to Lowe's lack of experience.

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

By: _____
David W. McArdle

David W. McArdle, Attorney No: 06182127
ZUKOWSKI, ROGERS, FLOOD & MCARDLE
Attorney for Lowe Transfer, Inc, and Marshall Lowe
50 Virginia Street
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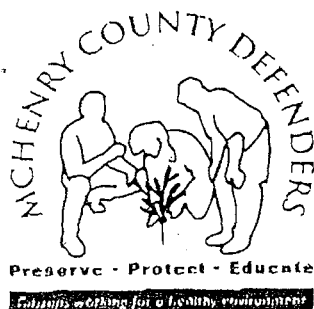
SIGN-UP SHEET FOR OBJECTORS AND OTHER PARTICIPANTS

All objectors and other participants who wish participate in the hearing by questioning witnesses, presenting witnesses or other factual evidence, or making an opening statement or closing argument to the Committee, must register with the Hearing Officer no later than 10:00 a.m. on Saturday, March 1, 2003. If an objector or other participant has not registered with the Hearing Officer by that time, that objector or other participant will not be allowed to question any witnesses, to present witnesses or other factual evidence in his or her behalf, or to make an opening or closing argument. If an objector or other participant is not sure whether they wish to participate in the hearing, they should, nevertheless, register as an objector or other participant because this will be the only opportunity to register to participate in the hearing. If the registered objector or other participant does not wish to question a particular witness, to present a witness or other factual evidence, or to make an opening statement or closing argument, they can simply pass when called by the Hearing Officer.

PLEASE PRINT

	<u>Name</u>	<u>Address</u>	<u>Telephone No.</u>
1.	McHenry County Defenders	LENORE BEYER-CLOW, EXECUTIVE DIRECTOR 124 CASS ST. WOODSTOCK	815 338-0393
2.	McHenry County Defenders	DWIGHT DALTON CRYSTAL LAKE 573 TAMARISK LN. IL.	815-459-6069
3.	Dave Hanson	2903 Killarney Dr Cary IL 60013	847 639 3224
4.	Nancy S. Harbottle	2800 W. Higgins Rd #425 Hoffman Estates, IL 60195	847/843-2900
5.			
6.			
7.			
8.			
9.			
10.			

EXHIBIT A
to Motion
to Strike



124 Cass Street
Woodstock, IL 60098
(815) 338-0393
www.mcdef.org
email: mcdef@owc.net
fax: (815) 338-0394

August 25, 2003

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601

Sent Via FAX: 312 814-3669

RE: Case No. PCB 03-221 Lowe Transfer Inc. and Marshall
Lowe vs. County Board of McHenry County, IL.

Dear Ms. Gunn:

It has come to my attention that in the brief by the County Board of McHenry County in support of its decision to deny siting approval to Lowe Transfer Inc, that the McHenry County Defenders has been **incorrectly listed as an objector** to the application. The McHenry County Defenders actively attended the hearings, provided opening and closing statements and questioned some of the witnesses but as a **participant**, not an objector.

The McHenry County Defenders is the local environmental organization in McHenry County. We have over 1000 members and have been providing advocacy and education on environmental issues for 33 years. Since the 1980s we have supported a solid waste disposal policy that encourages volume reduction, recycling programs, composting and waste transfer stations to facilitate the exchange of processed and raw waste. In addition we have a waste transfer station policy which supports the development of a waste transfer station in McHenry County as long as the appropriate environmental concerns such as recycling, water quality impacts and public input have been addressed.

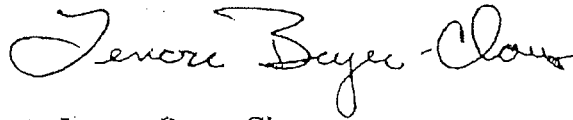
Throughout the testimony and in the Defenders' opening and closing statements, these issues were addressed through questions and statements. The Defenders did not draw the conclusion that the Lowe Transfer Station should be accepted or rejected. Our final statement listed a number of environmental concerns about the station.

EXHIBIT B
to Motion
to Strike

It is important that the position of the McHenry County Defenders is not misrepresented by either side in the decision to site the Lowe Transfer Station. We actively participated in the hearings but did not register as an objector to the siting of this waste transfer station. I believe this is clearly noted in the transcripts of the hearing on page 12 and in our closing statement.

If you need any more information or clarification please do not hesitate to contact me at 815 338-0393.

Sincerely,

A handwritten signature in cursive script that reads "Lenore Beyer-Clow". The signature is written in dark ink and is positioned above the printed name and title.

Lenore Beyer-Clow
Executive Director