ILLINOIS POLLUTION CONTROL BOARD
June 2, 1988

RICK MOORE, LEONARD MORRIS and EDITH SIMPSON,	)	
Petitioners,	)	
v.	)	PCB 86-197
WAYNE COUNTY BOARD and DAUBS LANDFILL, INC.,	)	
Respondents.	)	

JAMES YOHO, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF THE PETITIONERS;

C. STEPHEN SWOFFORD, STATE'S ATTORNEY, APPEARED ON BEHALF OF RESPONDENT WAYNE COUNTY BOARD; AND

THOMAS J. IMMEL (IMMEL, ZELLE, OGREN, GERMERAAD & COSTELLO) and DAVID M. WILLIAMS, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF RESPONDENT DAUBS, LANDFILL, INC.

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a November 6, 1986 petition to contest granting of site approval, filed by Rick Moore, Leonard Morris, and Edith Simpson (hereinafter "petitioners"). That petition seeks review of a September 30, 1986 decision of respondent Wayne County Board granting site approval of respondent Daubs Landfill Inc.'s proposed regional pollution control facility. A public hearing on this petition for review was held on December 30, 1986.

This is the second time this petition has been before the Board. On February 19, 1987 the Board vacated the Wayne County Board's siting approval. With two members dissenting, this Board determined that Daubs' published notice of the filing of its petition for siting approval was defective, because the accurate narrative description of the proposed site location did not cure the defect in the legal description of the site. The Board held that the defective legal description predominated, so that the County Board lacked jurisdiction to consider Daubs' application. Moore v. Wayne County Board, PCB 86-197 (February 19, 1987). One year later, the Fifth District Appellate Court reversed that decision and remanded the case to the Board. The court held that the accurate narrative description of the site met the jurisdictional notice requirements of Section 39.2(b) of the Environmental Protection Act (Act). Ill. Rev. Stat. 1985,

ch. 111½, par. 1039.2(b). Those notice provisions do not specifically require the inclusion of a legal description of the site. Daubs Landfill, Inc. v. Pollution Control Board, ____ Ill. App. 3d____, 117 Ill. Dec. 626, 520 N.E.2d 977 (5th Dist. 1988). Since the jurisdictional issue in this case has been disposed of, the Board will proceed to the remaining issues raised by petitioners.

Background

On April 8, 1986 Daubs submitted its application for siting approval of a non-hazardous solid waste landfill to be located in Wayne County, Illinois. Daubs proposed construction of a 180 acre landfill located approximately 2½ miles from Fairfield, Illinois. The proposed facility is commonly referred to as the Boyleston landfill. The Wayne County Board held public hearings on the application on July 15, 16, 17, and 18, 1986, at which Daubs presented four witnesses. A group of citizens who objected to the proposal, including the individuals who are petitioners before this Board, were represented by counsel and presented four witnesses. These citizen objectors were loosely organized into a group called People Against Landfills, or P.A.L.S.

The County Board first voted on the application at its September 9, 1986 meeting. A motion to approve the site location resulted in a 7-7 tie vote, and no further action was taken at that time. (PCB Pet. Ex. 1.)[1] At a special meeting on September 30, 1986, the County Board again voted on a motion to approve the site location of the proposed facility. The motion carried by a vote of 10-4, and site approval was granted. (PCB Pet. Ex. 2.)

Statutory Framework

At the local level, the site location suitability approval process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider six criteria when reviewing an application.[2] The six criteria are:

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[1]Exhibits admitted at the Board hearing on this petition for review are identified as "PCB Ex._____", while exhibits from the County Board hearings are cited as "Ex._____". Portions of the county record are designated "C-_____", citations from the transcript taken at the County Board hearings are identified as "R._____", and references to the transcript taken at the Board hearing are cited as "Tr._____."

[2]Section 39.2 of the Act has been amended since the time of the instant proceedings.

1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;

2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

3. the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

4. the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation or the site is floodproofed to meet the standards and requirements of the Illinois Department of Transportation and is approved by that Department;

5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents; and

6. the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.

Section 40.1 of the Act charges this Board with reviewing the County Board's decision. Specifically, this Board must determine whether the County Board's decision was contrary to the manifest weight of the evidence, and whether the procedures used at the local level were fundamentally fair. E&E Hauling, Inc. v. Illinois Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E. 2d 555 (2nd Dist. 1983), aff'd in part 107 Ill. 2d 33, 481 N.E.2d 664 (1985); City of Rockford v. IPCB, 125 Ill .App. 3d 384, 386, 465 N.E.2d 996 (1984); Waste Management of Illinois, Inc., v. IPCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (1984). The standard of manifest weight of the evidence is:

> A verdict is ... against the manifest weight of the evidence where it is palpably erroneous, wholly unwarranted, clearly the result of passion or prejudice, or appears to be arbitrary, unreasonable, and not based upon the evidence. A verdict cannot be set aside merely because the jury [County Board] could have drawn different inferences and conclusions from conflicting testimony or because a reviewing court [IPCB] would have reached a different conclusion ... when considering whether a verdict was contrary to the manifest weight of the evidence, a reviewing court [IPCB] must view the evidence in the light most favorable to the appellee.

Steinberg v. Petra, 139 Ill. App. 3d 503, 508 (1986).

Consequently, if after reviewing the record, this Board finds that the County Board could have reasonably reached its conclusion, the County Board's decision must be affirmed. That a different conclusion might also be reasonable is insufficient; the opposite conclusion must be evident. (See Willowbrook Motel v. IPCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

Petitioners raise one challenge to the fundamental fairness of the County Board's decision. Petitioners also challenge the County Board's finding that criteria two through six were met. No challenge is made regarding criterion one, which deals with the need for the facility.

Fundamental Fairness

Petitioners contend that the decision of the County Board was not fundamentally fair. Petitioners point out that several County Board members who initially voted to deny the siting request subsequently voted in favor of the request 27 days later. Petitioners contend that two County Board members, Mr. Weaver and Mr. Cable, indicated at the September 30 meeting that they had been pressured into changing their votes. In support of this claim, petitioners submitted an audio tape of the September 30 meeting made by petitioner Rick Moore. (PCB Pet. Ex. 3.) Petitioners allege that on this tape, Mr. Weaver stated that he had taken a poll in his district and was voting what he believed to be the views of his constituents. Petitioners further maintain that Mr. Cable said that he had been pressured to approve the siting request. Thus, petitioners allege that the votes of at least two County Board members were based on considerations other than the six statutory criteria of Section 39.2, and that therefore the County Board improperly considered the matter. Petitioners admit that even if Mr. Weaver and Mr. Cable had not changed their votes, the vote would have been 8-6 in favor of approval of the siting request. However, petitioners assert that having provided clear evidence of inappropriate considerations and pressures on two County Board members, and given the fact that the County Board's position changed in 27 days, they (petitioners) should not be required to prove that other members who voted to approve the siting request also did so due to inappropriate considerations. Petitioners submit that the remedy for this alleged lack of fundamental fairness in the decision-making process is a remand with instructions that the County Board vote again, considering only the six statutory criteria.

In response, Daubs first notes that it objected to the entry of the audio tape into evidence at the December 30, 1986 Board hearing, and points out that it has never heard the tape or the statements attributed to Mr. Weaver and Mr. Cable by

petitioners. Nevertheless, Daubs contends that even considering the tape and the minutes of the County Board meetings in the aggregate, these exhibits merely show that during the County Board's deliberative process, there were debates, arguments, tentative votes, and the general processes of local government at work. Daubs suggests that such occurrences are not unusual in a deliberative body, and maintains that all appellate tribunals, including this Board, take tentative votes and attempt to achieve consensus on issues pending before them. Daubs states that the only difference in this case is that the County Board's discussions were held at a public meeting at which one citizen made an unofficial tape of the proceedings. Daubs argues that accepting petitioner's claim, the votes of Mr. Weaver and Mr. Cable could be discounted, and the motion for approval of the siting request would have carried 8-4. However, Daubs insists that this result is not fair to the County Board or to the deliberative process. Daubs states that no County Board member ever alleged that he had received any pressure from Daubs, and contends that petitioner's arguments at least implies that the pressure came from within the County Board itself. Daubs submits that such internal persuasion is permitted, and is indeed the nature of democratic government. In sum, Daubs contends that there is no real fundamental fairness issue in this case, and alleges that the County Board's deliberations and decision were proper.

The Board agrees with Daubs that the Wayne County Board's decision was fundamentally fair. As a threshold issue, the Board does not believe that the audio tape of the September 30 meeting, admitted as petitioners' exhibit 3 at the Board hearing, is competent evidence. This Board has previously expressed its discomfort with audio tapes submitted as evidence of what was said or done at a public hearing or meeting. McLean County Disposal Company, Inc. v. County of McLean, PCB 87-133, slip op. at 9-10 (January 21, 1988); see also concurring opinion of J. Marlin, slip op. at 3-4 (January 21, 1988). Although the tapes in McLean County Disposal were offered for the use of the county board members after the public hearings at the local level, the Board believes that its concerns about the use of audio tapes apply equally in this case, where the tape is offered as evidence to this Board as proof of what was said at the September 30 meeting of the Wayne County Board. The instant tape was made by petitioner Rick Moore, and not by a certified court reporter. Except during the roll call vote on the motion to approve the site, the speakers are not identified by name, so that it is impossible for a listener to know to whom to attribute statements. Additionally, despite Mr. Moore's testimony to the contrary (Tr. at 24), parts of the tape, including Mr. Cable's comments during the vote, are inaudible. The Board is also bothered by the fact that Daubs, and apparently the Wayne County Board, were not given an opportunity to hear the tape. In sum, the Board believes that this tape is not competent evidence of

what was said at the September 30 meeting. The Board can think of very few, if any, instances where audio tapes would be competent evidence, either before a county board or this Board.

Even if the tape were acceptable, the Board does not believe that the County Board's decision was fundamentally unfair. The Board rejects petitioners' claim that because they have allegedly presented "clear" evidence of inappropriate considerations and pressures upon Mr. Weaver and Mr. Cable, they (petitioners) need not prove that other members who voted to approve the siting request also did so due to inappropriate considerations. The County Board members should be presumed to have based their votes upon the statutory criteria, and this Board finds nothing in this record upon which to base any assumptions to the contrary. Simply because Mr. Weaver and Mr. Cable are alleged to have based their votes upon inappropriate issues, and even if such a finding were to be made (which the Board does not do), those "improper" votes do not necessarily taint the votes of the other members voting in favor of the siting request. See Waste Management of Illinois v. Lake County Board, PCB 87-75, slip op. at 21 (December 17, 1987). Any challenge to the propriety of a county board member's vote must be accompanied by evidence of the alleged impropriety. In this case, the mere fact that the County Board had previously reached no decision on the siting request provides absolutely no proof that the later decision was improper. Because there is no evidence in support of petitioners' claim that any other votes in favor of the siting request were improper, even the voiding of Mr. Weaver's and Mr. Cable's votes would result in a 8-4 vote in favor of approval. The Board stresses, however, that it does not find that Mr. Weaver and/or Mr. Cable based their votes on improper considerations.

STATUTORY CRITERIA

As previously noted, petitioners do not contest the County Board's finding that criterion one had been met - that the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve. Petitioners do challenge the County Board's findings on the other five criteria of Section 39.2.

Criterion 2

The second criterion to be considered by the County Board is whether the proposed facility is so designed, located, and proposed to be operated that the public health, safety and welfare will be protected. Petitioners contend that this criterion was not met, and maintain that: (1) Daubs did not submit a sufficiently detailed design, what details were offered showed that the design was substandard, and that Daubs' own technical witnesses admitted that further work needed to be done

on the design; (2) the location is not suitable because the proposed facility is located near a surface waterway, which may also cause a sub-surface problem in terms of groundwater movement; (3) minimal details were presented as to the proposed operation of the facility and Daubs' witnesses admitted that those details were not sufficient to constitute a basis for final approval; (4) the proposed facility will require expensive post-closure care which Daubs does not plan to provide; and (5) the roads to and from the proposed facility have seasonal weight limits, and the increased traffic generated by the facility will greatly increase the costs of maintaining those roads. Petitioners submit that there are other locations for a regional pollution control facility which would satisfy some of these problems, but argue that the proposed facility does not satisfy criterion two.

Daubs responds by first pointing out that petitioners do not provide any citations to the record in support of their claims, especially for the assertions that Daubs' technical witnesses admitted that further work needed to be done on the design and that the operational details submitted were not sufficient to be a basis for approval of the site. Daubs points to the testimony of its two technical witnesses and a corporate officer, and maintains that that testimony, coupled with the exhibits submitted at the local hearings, clearly provided the County Board with a basis upon which it could reasonably conclude that criterion two had been met.

The Board's review of the claims made above has been difficult, in large part because petitioners failed to provide a single citation to the record, statute or case law. This Board has previously stated that "[w]here a [p]etitioner fails to make a significant or detailed showing that a county board determination is in error, the Board can determine that petitioner has failed to carry the burden of demonstrating that the determination is in error." Valessares v. The County Board of Kane County, 79 PCB 106, 125 (PCB 87-36; July 16, 1987). Nevertheless, the Board has reviewed the arguments of both parties and the record. Based upon the review, the Board does not believe that the County Board's decision on criterion two was against the manifest weight of the evidence. Daubs submitted several exhibits which included maps, diagrams, charts, and logs. (C-48 - C-83; C-107 - C-214.) Daubs presented testimony from Michael Rapps, a consulting engineer, who designed the landfill. Mr. Rapps testified that he had made an extensive evaluation of the subsurface geology, including a water budget and modeling, and concluded that the site was suitable for a landfill. Mr. Rapps testified about the daily operations of the proposed facility (R. at 87-92), and specifically stated three times that he believed that the facility was designed, located, and proposed to be operated so that the public health, safety, and welfare will be protected. (R. at 77, 107, 111.) Daubs also

presented testimony from Tim Holcomb, a professional engineer who operates the soil testing service which was involved in the design of the facility (R. at 21-60), and testimony from Rex Daubs, who is vice-president of the applicant, Daubs Landfill, Inc. (R. at 180-205.) Mr. Daubs testified about the operations of the facility, the roadways in the area, the traffic generated by the proposed facility, and post-closure care of the facility. In regard to post-closure care, Mr. Daubs specifically stated that the applicant would comply with all requirements of the regulations of this Board. (R. at 192.) Petitioners did present three witnesses who, to at least some extent, challenged some of the conclusions made by Daubs' witnesses. However, this Board finds that the Wayne County Board could have reasonably concluded, based on the evidence before it, that the proposed facility is designed, located, and proposed to be operated so as to protect the public health, safety, and welfare. Thus, the County Board's decision on criterion two must be upheld.

The Board does wish to note that the designs of this and other proposed landfills differ in several respects from the requirements of the Board's new proposed landfill regulations. Also, the Illinois Environmental Protection Agency (Agency) may require changes in or additions to the design before any developmental or operational permits would be issued.

Criterion 3

The third criterion set forth in Section 39.2 is whether the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property. Petitioners argue that the proposed facility does not meet this criterion. Petitioners contend that the area surrounding the proposed site is agricultural and residential in nature and is devoid of industrial influences. Petitioners maintain that the impact of the proposed facility should have been minimized by choosing a location where industrial influences have already been felt.

In response, Daubs contends that petitioners' characterization of the area as "residential" is not supported by the record, because all of the maps, drawings, and testimony of the witnesses demonstrate that the facility is proposed to be located in a rural area of a rural county. Daubs states that its expert real estate appraiser, Galen Wells, testified that the location of the facility would not have an adverse impact on surrounding property values. Daubs insists that petitioners have not offered any evidence to controvert that testimony.

Again, the Board's review of this issue has been complicated by the lack of citations to the record in support of petitioners' and Daubs' positions. However, it is apparent that Mr. Wells did testify that he believed that the proposed facility would not

have an adverse impact on property values in the area (R. at 11), and that any impact the facility might have on property values would be negligible (R. at 14). Mr. Wells' conclusions were based on a review of the plans for the facility, his understanding of the proposed operation of the facility, and visits to an existing landfill and a closed landfill in Wayne County. (R. at 14-17.) Mr. Wells stated that a number of newer homes had been built close to those sites, and that this fact led him to believe that those landfills had not had much effect on property values. (R. at 9-11.) On the other hand, the Board has been unable to locate any evidence or testimony presented by petitioners which would even rebut Mr. Well's testimony. The Board cannot find that the County Board's decision on criterion three was against the manifest weight of the evidence. Simply put, there was no evidence against Daubs' position for the County Board to even consider. The Board also points out that the statute requires that the location of the facility minimize incompatibility and effect on property values. That language should not be read to ask whether there is a "better" location for the facility. Section 39.2 provides for a determination of whether a given site is acceptable, not whether a facility should be located somewhere else.

Criterion 4

At the time of the instant request for site approval, the fourth criterion established by Section 39.2 was whether the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation (IDOT) or the site is floodproofed to meet the standards and requirements of IDOT and approved by it. Petitioners allege that the proposed facility does not meet this criterion because IDOT has not found that the facility is outside the 100 year flood plain and Daubs did not submit any flood-proofing plans to IDOT. Petitioners submit that under the statute, only IDOT can make these determinations, and maintain that no finding was made on either issue.

Daubs responds by pointing to Exhibit 127, which is a May 28, 1986 letter from IDOT to Daubs' attorney. That letter states in part:

> Inasmuch as the site is located in a rural area and on a stream with a drainage area of less than ten square miles, an Illinois Department of Transportation, Division of Water Resources permit will not be required for the landfill.
>
> With regard to Section 39.2 of the Illinois Environmental Protection Act, this letter constitutes Illinois Department of Transportation approval upon your

> receipt of all appropriate Illinois Environmental Protection Agency approvals. (C-355.)

Daubs contends that this letter demonstrates that IDOT has approved the site as to flood plain, and that IDOT has not prepared a flood plain map for the area because it is a rural area on a stream with a drainage area of less than ten square miles. Daubs submits that the May 28, 1986 letter from IDOT establishes compliance with criterion four.

The statutory mandate of reliance on IDOT determinations to satisfy criterion four has been a difficult issue, and the legislature recently amended Section 39.2 so as to remove IDOT from the statutory language. (P.A. 85-654, effective September 20, 1987.) However, the statute as it existed at the relevant time gave IDOT the sole power to make determinations on the flood plain issue. This Board has previously held that criterion four has been solely delegated by the legislature to IDOT, and that a county board is required to accept IDOT's determination. Board of Trustees of Casner Township v. County of Jefferson, 63 PCB 297 (PCB 84-175; April 4, 1985); see also Concerned Neighbors for a Better Environment v. County of Rock Island, 67 PCB 427 (PCB 85-124; January 9, 1986). The letter sent to Daubs' attorney is the same type which IDOT has repeatedly issued in landfill siting cases, and does indeed constitute IDOT's findings on the statutory issues. The Wayne County Board was required to accept IDOT's determination; thus, it cannot be said that the County Board's decision on criterion four was against the manifest weight of the evidence.

Criterion 5

Criterion five of Section 39.2 requires that the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. Petitioners argue that the County Board could not have reasonably concluded that this criterion was met because Daubs did not present any details of their plan of operations. On the other hand, Daubs contends that it presented sufficient information for the County Board to find that criterion five had been satisfied.

Daubs presented testimony from Mr. Rapps on this criterion. Mr. Rapps stated that the facility would guard against fire by covering the trash with the required daily cover and by refusing to accept any "hot" loads, and further noted that city water is available along the road to the east of the facility. Mr. Rapps stated that he was recommending that Daubs confer with the local fire protection district and install a fire hydrant where recommended. (R. at 110.) As to spills, Mr. Rapps testified that because the facility will not accept liquid waste, there would be no danger of spills. (R. at 110-111.) Mr. Rapps

then specifically stated that he believed that the plan of operation will minimize the danger to the surrounding area from fire, spills and other operational accidents. (R. at 111-112.) Petitioners did not present any testimony to rebut Mr. Rapps' testimony: indeed their challenge on criterion five is based upon an alleged lack of "meaningful detail" in the plan of operations and not upon any claim that Mr. Rapps' testimony was unbelievable or flawed. Based upon a review of the record, the Board finds that the Wayne County Board could reasonably have accepted Mr. Rapps' testimony and found that criterion five was satisfied.

Criterion 6

The final criterion applicable to this case is whether the traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flows. Petitioners maintain that this criterion was not met because Daubs did not place a traffic plan into evidence. Petitioners contend that Daubs' witness simply gave a prediction of the route which traffic would travel. Petitioners assert that the legislature clearly intended that an applicant would require that traffic use the route with the least impact on existing traffic flows. In response, Daubs submits that any suggestion that a problem exists due to seasonal weight limits is a bogus issue.

Rex Daubs testified as to the traffic in the area. He stated that there are two roads leading to the site: one from Route 45 and one from Route 15. The access road to the landfill itself will be off the north-south road that connects with route 15. (R. at 186, 188.) Mr. Daubs testified that these roads are traveled by oil field equipment, tank trucks, farm machinery, and personal trucks and cars. (R. at 187.) Mr. Daubs further testified that he felt that the two roads to the site are adequate to minimize the impact on existing traffic flows; that the north-south road off which the access road to the landfill will be built is not heavily traveled; and that a truck pulling onto or off of that north-south road would not cause any hazard to other traffic. (R. at 187-188.) Petitioners presented testimony from the township road commissioner, who stated that the north-south road has an oil surface, has a five ton weight limit from January through April, and that trucks over that weight would tear up the road. (R. at 257-260.)

It is true that the evidence presented by Daubs on this criterion is a bit sketchy. However, given the manifest weight standard of review, the Board cannot say that the County Board could not have reasonably decided that criteria six had been satisfied. The record contains evidence on both sides of the issue, and the County Board apparently chose to give Mr. Daubs' testimony greater weight.

Exhibits

Finally, the Board notes that Daubs raised objections to the admission of all of petitioners' exhibits, admitted at the December 30, 1986 Board hearing. The Board has previously discussed exhibit 3, which is the tape of the September 30 County Board meeting. The other contested exhibits (Pet. Ex. 1, 2, 4, 5) are minutes of four separate County Board meetings which deal with the County Board's tie vote on September 9, 1986, the vote of approval on September 30, and the approval of the minutes of those meetings. Daubs argues that those minutes are merely the notes of the deliberative process and have no probative value. The Board disagrees, and finds that those exhibits were properly admitted. The minutes are a part of the record of the County Board proceedings which are being reviewed by this Board. In addition, it is clear that a petitioner for review of a local siting decision may introduce evidence relevant to his or her claim of fundamental unfairness. The minutes relate to petitioners' claim that the County Board's decision was fundamentally unfair. Thus, the minutes were properly admitted.

Because there was no fundamental unfairness in this proceeding and because the County Board's decisions on the statutory criteria are not against the weight of the evidence, the Wayne County Board's decision is affirmed. This Opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The September 30, 1986 decision of the Wayne County Board granting site location suitability approval to Daubs Landfill Inc. is hereby affirmed.

IT IS SO ORDERED.

B. Forcade abstained, and J. Anderson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 2nd day of June, 1988, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board