ILLINOIS POLLUTION CONTROL BOARD
December 3, 1998

ESG WATTS, INC., an Iowa corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 98-2
	)	(Pollution Control Facility Siting Appeal)
SANGAMON COUNTY BOARD,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by K.M. Hennessey):

Petitioner ESG Watts, Inc. (ESG Watts) has appealed the decision of respondent Sangamon County (Sangamon) to deny ESG Watts' application for local siting approval for an overfilled portion of its Sangamon Valley Landfill in Sangamon County, Illinois. This matter comes before the Board on ESG Watts' motions to set aside certain hearing officer orders on discovery issues. The Board denies the motions.

BACKGROUND

ESG Watts operates the Sangamon Valley Landfill in Sangamon County, Illinois. Section 39.2 of the Illinois Environmental Protection Act (Act), 415 ILCS 5/39.2 (1996), requires landfill operators to obtain siting approval from the county board (or governing body of the municipality, if one exists) in which the landfill is located. Landfill operators must obtain siting approval when they initially site a landfill and when they expand a landfill. *Id.*

On December 2, 1996, ESG Watts filed an application for local siting approval of an overfilled portion of the Sangamon Valley Landfill. Section 39.2 requires that a hearing be held on siting applications, and the Regional Pollution Control Facility Application Review Committee (Review Committee) of the Sangamon County Board (County Board) held a hearing on ESG Watts' application on April 19, 1997. See Resolution 1-1 Disapproving an Application for Site Location Approval of the Sangamon County Board (Res. 1-1) at 1. The Sangamon County Board also hired a technical consultant, Hanson Engineers, to advise it on the application. Motion to Set Aside Hearing Officer Order (Mot.) at 1-2.

The Office of State's Attorney for Sangamon County (OSA) filed an appearance on ESG Watts' application and appeared at the hearing. Res. 1-1 at 1. During closing argument, Robert Smith of the OSA stated:

> We cannot as a County Board, approve this siting application. That is what it is going to be. Transcript of April 19, 1997 hearing (Tr.) at 236.

> Those are things that you need to look at in determining whether Criteria One has been met, and it's the position of the State's Attorney's Office that when you look at this application and the evidence that was represented by the application, they have failed to meet Criteria Number One. Tr. at 244.
>
> If you decide against the County, the people at the State's Attorney Office – I have got a right to file an appeal, or some of the citizens of the county can file, if they don't agree with what occurred here. Tr. at 291.

ESG Watts was given an opportunity to respond to Smith's comments and did respond on the record. Tr. at 293-299.

The County Board rejected the siting application on May 30, 1997. ESG Watts appealed that decision to the Board on July 2, 1997.

The Board's hearing officer established a schedule for discovery by order dated April 3, 1998. The hearing officer stayed discovery by order dated May 29, 1998, and extended the stay to August 7, 1998, by order dated July 20, 1998.

On September 9, 1998, ESG Watts served a notice of deposition (which the parties have also referred to as a subpoena) on Robert Smith, Assistant State's Attorney for Sangamon County. On September 14, 1998, the County Board moved to quash the notice. After a telephonic hearing, the hearing officer granted that motion. ESG Watts now seeks to set that order aside.

ESG Watts also moves to set aside a similar hearing officer order dated September 29, 1998. See Motion to Set Aside Hearing Officer Order Regarding George Jamison and James Stone (Mot. Jamison/Stone). That order denied ESG Watts' motion to compel answers to deposition questions posed to George Jamison of Hanson Engineers and James Stone, Director, Sangamon County Department of Public Health. The deposition questions that ESG Watts seeks to compel Jamison to answer are as follows:

> Q. Based upon your professional judgment, what kind of alternatives are out there in a situation like this when you've got an overfill? Deposition Transcript of May 11, 1998 (Jamison Tr.) at 38.
>
> Q. Okay. Would the provision of a fire safety plan be something that would have been an appropriate condition to attach to a siting application assuming that everything else was in compliance? Jamison Tr. at 47.
>
> Q. In your professional judgment, would landfill mining be appropriate in this case? Jamison Tr. at 48.

On each of these questions, Jamison's counsel objected to the questions as irrelevant. Mot. Jamison/Stone at 2. Jamison refused to answer on the advice of counsel. *Id.*

The deposition questions that ESG Watts seeks to compel Stone to answer are:

Q. Did the State's Attorney's Office ever take a formal position as to the merits of Watts' siting application?

Q. Are you aware of any informal position taken by the State's Attorney's Office with respect to the application?

Mot. Jamison/Stone at 3. Stone's counsel objected to the first question on the grounds that the answer would violate attorney-client privilege. Mot. Jamison/Stone at 3. Stone refused to answer both questions on the advice of counsel. *Id.*

In denying the motions to compel and granting the motion to quash, the hearing officer stated:

> The OSA was not the decisionmaker in this proceeding, so that any position the OSA may have taken was irrelevant to the decision made by the County itself. Additionally, in its representation of the County in the siting proceeding (which it did not itself conduct), as an elected public official the OSA should be considered to act without bias. See E & E Hauling v. Pollution Control Board, 107 Ill. 2d 33, 42, 481 N.E.2d 664, 668 (1985). Hearing Officer Order of September 14, 1998; Hearing Officer Order of September 29, 1998.

As noted above, ESG Watts has moved to set aside both orders. The County Board opposes both motions. See Response to Motion to Set Aside Hearing Officer Order Regarding George Jamison and James Stone (Resp. Jamison/Stone) and Response to Motion to Set Aside Hearing Officer Order (Resp. Mot.). On November 18, 1998, ESG Watts filed a Motion to File Reply to Respondent's Responses to Motions to Set Aside Hearing Officer Orders. The Board grants that motion.

DISCUSSION

Subpoenas in contested cases such as this case are governed by 35 Ill. Adm. Code 101.260, which provides in relevant part:

> The hearing officer or the Board, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance, may quash or modify the subpoena if it is unreasonable, oppressive, or irrelevant. The hearing officer or the Board will rule upon motions to quash or modify material requested in the subpoena . . . in accordance with the standards articulated in Section 101.261. 35 Ill. Adm. Code 101.260(e).

Section 101.261, which also authorizes the hearing officer to limit discovery through means other than subpoenas, provides:

> The hearing officer may at any time on his or her own motion, or on the motion of any participant, or at the direction of the Board, order the production of information which is relevant to the matter under consideration. The hearing officer will deny, limit, or condition the production of information when

> necessary to prevent undue delay, undue expense, harassment, or oppression or to protect materials from disclosure consistent with the provisions of Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 101.261 and 120. 35 Ill. Adm. Code 101.261.

The question of whether discovery is "unreasonable, oppressive, or irrelevant," or will cause "undue delay, undue expense, harassment, or oppression," depends on the issues that the Board may consider on this appeal.

The issues that the Board may consider on this appeal are set forth in Section 40.1 of the Act, under which ESG has appealed, and which provides in part as follows:

> If the county board . . . refuses to grant approval under Section 39.2 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the county board . . . . The county board . . . shall appear as respondent in such hearing, and such hearing shall be based exclusively on the record before the county board . . . . At such hearing the rules prescribed in Sections 32 and 33(a) of this Act shall apply, and the burden of proof shall be on the petitioner; however, no new or additional evidence in support of or in opposition to any finding, order, determination or decision of the appropriate county board . . . shall be heard by the Board. In making its orders and determinations under this Section, the Board shall include in its consideration the written decision and reasons for the decision of the county board . . ., the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board . . . in reaching its decision. 415 ILCS 5/40.1(a) (1996).

As this section requires, the Board must confine its review to the record before the County Board, and may not consider any new or additional evidence in support of or in opposition of the County Board. The Board may consider, however, the fundamental fairness of the procedures that the County Board used. The manner in which the hearing is conducted, the opportunity to be heard, and the existence of *ex parte* contacts, conflicts of interest, or bias are important, but not rigid, elements in assessing fundamental fairness. See Hediger v. D & L Landfill (December 20, 1990), PCB 90-163, slip op. at 5.

With these standards in mind, the Board considers ESG Watts' motions to compel.

Motion to Compel the Testimony of Robert Smith

In seeking to set aside the hearing officer orders, ESG Watts asserts that the OSA's role as an advisor to the Sangamon County Board, and as an opponent of the application at the hearing on the application, created a conflict of interest that violated fundamental fairness. Mot. at 2-3.ESG Watts argues that it should be allowed to inquire into the position of the OSA and its relationship to the County Board in the siting proceeding. Mot. at 4-5.

ESG Watts argues that in municipal law, "it is appropriate to prevent a real or apparent conflict of interest of having an attorney who represents the interests of the decision making body, and who advises the decision making body on the law, also act as the attorney who presents the case against a party." Mot. at 3. ESG Watts relies upon O'Malley v. Board of Fire & Police Commissioners, 182 Ill. App. 3d 1019, 538 N.E.2d 888 (1st Dist. 1989) for this proposition. In that case, a police officer (O'Malley) challenged the decision of the Board of Police and Fire Commission of Rolling Meadows (Commission) to demote him. In the proceeding that led to that decision, the complainant was Rolling Meadows Police Chief Evans, whose own attorney presented the case against O'Malley to the Commission. O'Malley argued that the Illinois Municipal Code required the village attorney, not Evans' attorney, to present the case against O'Malley.

The Illinois Municipal Code stated, in relevant part, that "The municipal attorney, in the event there is a separate attorney designated as a prosecutor for such municipality, shall represent the [commission] unless the [commission] is authorized by the municipality to employ its own attorney, and such attorney shall handle prosecutions before the [commission] . . . ." Section 10-2.1-25. The O'Malley court noted that "The statute seeks to avoid real or apparent conflicts of interest, where the attorney who represents the interests of the [commission], and advises the [commission] on the law, is the same person who presents the case against the respondent; the statute seeks to prevent having the judge be the prosecutor." O'Malley, 182 Ill. App. 3d at 1022-1023, 538 N.E.2d at 890. The court found, however, that the Commission complied with the statute when it was represented by a municipal attorney and allowed a separate attorney – *i.e.*, Evans' attorney – to present the case against O'Malley. O'Malley, 182 Ill. App. 3d at 1023, 538 N.E.2d at 891. ESG Watts argues that the conflict of interest discussed in O'Malley occurred in this case when the OSA both presented the case against the siting application and advised the County Board on the application. Mot. at 3.

ESG Watts also argues that a similar principle applies in environmental cases, citing Waste Management v. Pollution Control Board, 175 Ill. App. 3d 1023, 530 N.E.2d 682 (2d Dist. 1988). In that case, Waste Management of Illinois, Inc. (Waste Management) appealed a decision of the Board to uphold the decision of the Lake County Board for an incinerator and landfill. Waste Management argued, in part, that the local hearings were fundamentally unfair because one Lake County assistant State's Attorney represented an objector and another appeared on behalf of Lake County. The court rejected that claim on the grounds that Waste Management waived its objections by not objecting to the appearance of the assistant State's Attorneys at the local hearing. Waste Management, 175 Ill. App. 3d at 1039, 530 N.E.2d at 695. The court also stated that even if Waste Management had not waived its objection:

> It is proper to have some blend of judicial and prosecutorial function in an administrative proceeding provided that the person performing the quasi-prosecutorial function is not a member of the decision-making body. In this case, one assistant State's Attorney appeared for Lake County, which was not an objector, and the other appeared on behalf of an objector, . . . an agency consisting of elected officials from Lake County municipalities and Lake County, other than county board members. Neither attorney acted in an advisory capacity for the [Lake County Board] or in any way participated in the

> ultimate decision-making process of the [Lake County Board]. Thus, their participation did not result in a fundamentally unfair hearing. Waste Management, 175 Ill. App. 3d at 1039, 530 N.E.2d at 694-695.

ESG Watts argues that Waste Management prohibited the OSA from both filing an appearance and objecting to the application in this case. Mot. at 4.

The County Board has several responses to these arguments. First, it argues that ESG Watts waived its objection by failing to adequately raise it in its petition for hearing. Resp. at 1. ESG Watts counters that it did raise its objection to the OSA's role at the hearing, and submits a portion of the transcript from the hearing in which it raised the objection. Reply at 1-2, citing Tr. at 121. The Board agrees that ESG Watts did not waive this objection.

Second, the County Board argues that O'Malley does not apply because O'Malley involved a provision of the Illinois Municipal Code that is limited to employment cases before Boards of Fire and Police Commissions. Resp. at 2. The Board agrees that O'Malley does not apply to siting cases.

Third, the County Board argues that ESG Watts misconstrues Waste Management. In that case, the court held that it is proper to have some blend of judicial and prosecutorial function in an administrative proceeding, provided that the person performing the prosecutorial function is not a member of the decisionmaking body. Resp. at 2. Here, the County Board argues, Smith was not a decisionmaker and did not participate in the ultimate decisionmaking process of the County Board. *Id.* As a result, any formal or informal position that the OSA may have taken is irrelevant. *Id.* Furthermore, the County Board argues, the OSA did not take any position on the application until the close of the hearing. At that time, the OSA "advised the County Board during closing arguments that the application should be denied." *Id.* at 3. ESG Watts was given time to respond to that argument. *Id.*

The Board finds that the OSA's alleged conflict of interest is irrelevant to fundamental fairness because Smith was not a decisionmaker. As Waste Management suggests, an administrative proceeding is not fundamentally unfair if the person performing the prosecutorial function is not a member of the decisionmaking body. See also, Citizens Against Regional Landfill v. PCB, 255 Ill. App. 3d 903, 907-908, 627 N.E.2d 682, 685 (3d Dist. 1994) (finding that the role of a hearing officer in a siting hearing was irrelevant because "he did not have a vote on whether the site application was to be granted."); Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill. App. 3d 541, 548, 555 N.E.2d 1178, 1182 (3d Dist. 1990) (expert's bias irrelevant because he did not vote on the siting application).[1]

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[1] In Southwest Energy Corporation v. Pollution Control Board, 275 Ill. App. 3d 84, 655 N.E.2d 304 (4th Dist. 1995), the Board found that the role of the hearing officer rendered the proceedings fundamentally unfair even though the hearing officer did not vote on the application. In that case, however, the applicant paid the hearing officer's fees directly, in

ESG Watts appears to argue that Smith did advise the Board and that advice created a conflict of interest that could give rise to fundamental unfairness. While the Waste Management court does note that none of the State's Attorneys that appeared at the hearing advised the Lake County Board, the Board believes that this observation merely corroborates the Waste Management court's finding that there was no conflict of interest; it does not create a separate basis for a finding of fundamental unfairness. The Board notes that courts considering fundamental fairness claims have focused on the alleged bias or conflict of interest of the decisionmakers or hearing officers, not their advisors. See, *e.g.*, Concerned Adjoining Owners v. Pollution Control Board, 288 Ill. App. 3d 565, 680 N.E.2d 810 (5th Dist. 1997) (considering alleged bias on the part of the village board); Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill. App. 3d 541, 555 N.E.2d 1178 (3d Dist. 1990) (considering alleged bias of city council and mayor); A.R.F. Landfill v. Pollution Control Board, 174 Ill. App. 3d 82, 528 N.E.2d 390 (2d Dist. 1988) (considering alleged bias of county board members).

Here, Smith was not a decisionmaker or the hearing officer. He stated his position on the application on the record, and ESG Watts was able to respond to his arguments. Accordingly, the information that ESG Watts seeks from Smith is not relevant and the notice to take his deposition is unreasonable. The Board therefore affirms the hearing officer's order quashing the notice of Smith's deposition.

The Board cautions that it is not holding that the OSA is free to act as a conduit for *ex parte* communications with decisionmakers. That role would be improper. See, *e.g.*, Residents Against a Polluted Environment v. County of LaSalle (September 19, 1996), PCB 96-243, slip op. at 12 (finding fundamental unfairness when a lengthy dialogue took place between the applicant's expert and the county's expert and such contacts were not included in the record). But ESG Watts does not make that claim, and seeks discovery merely because the OSA both appeared at the hearing and advised the County Board. As explained, the Board does not find that discovery relevant or reasonable in this case.

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violation of Section 39.2(k), and the hearing officer may have considered the applicant her client. These factors rendered the proceedings inherently biased. In this case, by contrast, the OSA is not alleged to have acted in such a role, and certainly did not determine what evidence would go into the record. Therefore, Southwest Energy does not compel a different result.

Motion to Compel the Testimony of Jamison and Stone

The Board also affirms the hearing officer's order on ESG Watts' motion to compel the testimony of Stone and Jamison.

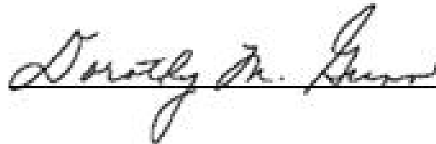
ESG Watts wishes to compel Stone to answer whether the OSA took a formal or informal position on ESG Watts' application. As noted above, whether the OSA took such a position is irrelevant.

The questions that ESG Watts wishes to compel Jamison to answer relate to the application. While ESG Watts claims that these questions are relevant to the OSA's alleged bias, the questions appear to be designed to elicit testimony regarding the application and the County Board's decision on the application. Under Section 40.1 of the Act, however, the Board may consider only the evidence that the County Board considered, not opinions rendered after the County Board made its decision. Accordingly, the answers to these questions are irrelevant.

Even if ESG Watts' questions to Jamison were relevant to the OSA's alleged bias, the OSA's position is irrelevant, as explained above. Accordingly, the Board affirms the hearing officer's order on ESG Watts' motion to compel the testimony of Jamison and Stone and directs the parties to proceed to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 3rd day of December 1998 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board