

ILLINOIS POLLUTION CONTROL BOARD
January 20, 2000

CASS COUNTY SERVICE COMPANY,)
)
Petitioner,)
)
v.) PCB 99-31
) (Tax Certification - Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

GREG ROOSEVELT, OF THE ROOSEVELT LAW OFFICE, APPEARED ON BEHALF OF PETITIONER; and

LISA MORENO, OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

Petitioner Cass County Service Company (Cass) is an agricultural service cooperative that owns and operates a bulk petroleum storage and transfer facility in Virginia, Cass County, Illinois. The facility contains eight steel tanks, a concrete dike, and a concrete spill pad, all of which are covered by a steel building. Petroleum product is shipped to the facility in bulk to store in the steel tanks. Cass transfers the petroleum from the tanks to trucks for delivery to customers.

In 1998, Cass applied to the Illinois Environmental Protection Agency (Agency) to receive property tax certification of the dike, spill pad, and steel building as pollution control facilities. While the Agency granted tax certification status for the dike and spill pad, the Agency denied that status for the steel building. Cass now asks the Board to review the Agency's decision to deny tax certification status for the steel building.

Based on the record before it, the Board disagrees with the Agency's decision to deny the tax certification. The Board finds that Cass has proved that the steel building is a "pollution control facility" as defined in the Property Tax Code (35 ILCS 200/11-10 (1998)). The Board therefore certifies that the steel building is a pollution control facility. The Board directs the Agency to timely provide any additional documentation of this tax certification that the Department of Revenue may require.

PROCEDURAL MATTERS

On August 17, 1998, Cass filed an appeal of the Agency's July 16, 1998 partial denial of Cass' tax certification application. On August 20, 1998, the Board accepted this matter for

hearing. The Agency filed the administrative record of the tax certification application on March 8, 1999.¹

Hearing Officer Amy Muran Felton held a hearing in this matter on July 21, 1999. Two witnesses appeared for Cass and two witnesses appeared for the Agency. Cass offered 13 exhibits, all of which were admitted. The Agency offered one exhibit, which was admitted.²

Cass filed a posthearing brief on August 18, 1999. On November 16, 1999, the Agency filed a response brief, accompanied by a motion for leave to file the brief *instanter*. On December 30, 1999, Cass moved the Board to strike the Agency's brief because the Agency filed it late. The Board denies Cass' motion to strike and accepts the Agency's brief. Cass filed a reply brief on January 7, 2000.³

Finally, on August 30, 1999, Hancock Service Company (Hancock) filed an *amicus curiae* brief, accompanied by a motion for leave to file the brief. Hancock is the petitioner in a similar tax certification proceeding currently pending before the Board. See Hancock Service Company v. Illinois Environmental Protection Agency, PCB 99-138. The Board grants Hancock's motion.

STANDARD OF REVIEW

The Board's authority in this matter arises from the Property Tax Code, under which the Board has sole authority to certify pollution control facilities for property tax purposes. The Board's review here therefore is *de novo*. Accordingly, the Board will consider the Agency's record of Cass' tax certification application as well as the evidence presented at the July 21, 1999 hearing. See Reed-Custer Community Unit School District No. 255-U v. Commonwealth Edison Co. and the Illinois Environmental Protection Agency (August 30, 1990), PCB 87-209 (Board considered tax certification application and evidence introduced at hearing in arriving at its determination), *aff'd sub nom. Reed-Custer Community Unit School District No. 255-U v. Pollution Control Board, Commonwealth Edison Co., and the Illinois Environmental Protection Agency*, 232 Ill. App.3d 571, 597 N.E.2d 802 (1st Dist. 1992).

APPLICABLE STATUTORY PROVISIONS

Persons who obtain a tax certification receive preferential property tax treatment for certain facilities. Specifically, under the Property Tax Code, "pollution control facilities" are valued at 33 1/3% of the fair cash value of their economic productivity to their owners. See 35 ILCS 200/11-5 (1998).

¹ The administrative record is cited as "R. at _."

² The transcript of the hearing is cited as "Tr. at _." Cass' hearing exhibits are cited as "Pet. Exh. _;" the Agency's hearing exhibits are cited as "Resp. Exh. _."

³ Cass' first brief is cited as "Pet. Br. at _;" the Agency's response brief is cited as "Resp. Br. at _;" Cass' reply brief is cited as "Reply Br. at _."

The Property Tax Code provides that “the Pollution Control Board, acting through its Chairman or his or her specifically authorized delegate” may certify that a facility is a “pollution control facility.” 35 ILCS 200/11-25 (1998). On January 11, 1982, the Chairman of the Board delegated to the Agency the authority to issue or deny tax certifications. Resp. Br., Exh. A. The Agency’s final decision may be appealed to the Board. See CGE Ford Heights, L.L.C. v. Illinois Environmental Protection Agency (February 1, 1996), PCB 96-164, slip op. at 1.

The Property Tax Code defines “pollution control facilities” in pertinent part as follows:

[A]ny system, method, construction, device or appliance appurtenant thereto, or any portion of any building or equipment, that is designed, constructed, installed or operated for the primary purpose of:

- a) eliminating, preventing, or reducing air or water pollution, as the terms “air” and “water pollution” are defined in the Environmental Protection Act 35 ILCS 200/11-10 (1998).

The Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.*, defines “water pollution” as follows:

[S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.55 (1998).

As used in the definition of “water pollution,” the Act also defines “contaminant” and “waters” as follows:

“Contaminant” is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

“Waters” means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State. 415 ILCS 5/3.06, 3.56 (1998).

FINDINGS OF FACT

Cass owns and operates a bulk petroleum storage and transfer facility in Virginia, Cass County, Illinois. Tr. at 13. Petroleum product is shipped to the facility in bulk to store in tanks. Tr. at 13. Cass transfers the petroleum from the tanks to trucks for delivery to customers. Tr. at 13.

The facility contains eight steel tanks (four 19,000 gallon tanks and four 50,000 gallon tanks) to store the petroleum product. Tr. at 15. All eight tanks are located inside a concrete dike. A 40 feet by 40 feet steel building covers the steel tanks, the concrete dike, and the facility's 36 feet by 36 feet concrete spill pad. The steel building has a roof, sidewalls, and an entrance door. Tr. at 15, 34; Pet. Exh. 1-5, 8, 9.

The concrete dike and spill pad are secondary containment structures. The dike is located around and underneath the petroleum storage tanks. Cass installed the spill pad to contain spillage incident to transferring petroleum product to and from the tanks. Tr. at 14. The steel building was part of the overall design to control pollution at the facility. Specifically, Cass designed the steel building to reduce the amount of rainwater coming into contact with spilled petroleum in the area of the tanks, dike, and spill pad. Tr. at 14-15, 19, 38.

Spilled petroleum product and rainwater in this area accumulate in a concrete trench. The trench contains a sump pump that Cass uses to pump the material from the trench. If petroleum and rainwater commingle, Cass cannot return the material to the tanks. Cass has incurred additional expense to dispose of such material at an offsite facility. Tr. at 19-20, 28-29; Pet. Exh. 12.

In the past, Cass' engineers designed bulk petroleum facilities without steel buildings to cover loading and unloading operations. Tr. at 24. These bulk petroleum facilities were capable of operating in an open environment. Tr. at 24-25. Before 1992, when Cass built the steel building at issue, the facility did not have any structure to cover its petroleum loading and unloading activities. Tr. at 38. Before Cass constructed the steel building, it paid 90 cents per gallon to dispose of an estimated 400 to 500 gallons of commingled petroleum and rainwater during periods of heavy rain. Tr. at 34-35; Pet. Exh. 12.

Cass constructed the steel building to reduce the amount of this commingled material that it disposed of offsite and in an effort to comply with federal requirements for a Spill Prevention Control and Countermeasures (SPCC) plan.⁴ The steel building is part of the facility's SPCC plan. By covering Cass' loading and unloading operations, the steel building reduces the amount of rainwater entering the area, thereby reducing the amount of commingled petroleum and rainwater. Tr. at 37.

On April 16, 1998, the Agency received Cass' application for property tax certification of the dike, spill pad, and steel building as pollution control facilities. R. at 1. On July 16, 1998, the Agency granted tax certification status for the dike and spill pad, but denied that status for the steel building. R. at 10.

⁴ Under Section 311(j)(1)(c) of the federal Clean Water Act (33 U.S.C. § 1251(j)(1)(c)), the United States Environmental Protection Agency established the SPCC program to protect surface water from petroleum contamination. Facilities subject to the regulations must prepare and maintain an SPCC plan, which includes provisions for appropriate containment or diversionary structures to prevent discharged petroleum from contacting surface waters. See 40 C.F.R. 112.

The Agency acknowledged that the steel building helps to keep rainwater away from spilled petroleum. Tr. at 53. The Agency denied tax certification status for the steel building, however, because it determined that its primary purpose appeared to be to allow Cass to continue operating the facility during adverse weather. Tr. at 50; R. at 10. Agency representatives did not inspect Cass' facility, interview Cass' employees, or review design plans for the steel building. Tr. at 56. In other tax certification matters, the Agency has approved structures that cover fertilizer and pesticide operations. Tr. at 51-52.

DISCUSSION

The issue presented to the Board is whether the steel building that covers Cass' petroleum loading and unloading area was designed and constructed for the primary purpose of eliminating, preventing, or reducing water pollution.

Initially, the Board finds that petroleum-impacted rainwater accumulated at Cass' facility constitutes "water pollution" as defined in the Act. See *Supra* 3. The parties do not dispute this. Nor do the parties dispute that the steel building reduces the commingling of rainwater and spilled petroleum. Nevertheless, before the Board can decide whether it agrees with the Agency's decision to not certify the steel building as a "pollution control facility" for preferential tax treatment under the Property Tax Code, the Board must decide whether the record demonstrates that the steel building's "primary purpose" is to eliminate, prevent, or reduce such water pollution. See Reed-Custer, PCB 87-209, slip op. at 7-10. For the reasons set forth below, the Board finds that the steel building was designed and constructed for the primary purpose of preventing or reducing water pollution.

The Agency denied tax certification status for the steel building because it found that the primary purpose of the structure appeared to be to allow Cass to continue operating the facility during adverse weather, rather than to control pollution. Cass argues that the steel building was designed and constructed primarily to control water pollution. Larry Sands (Sands), Cass' design engineer, testified as follows:

The building over the spill pad is designed to keep – as much as possible to keep water off the structure If things are not picked up right away, with water on it then you have a real problem, and you have a mixture of oil and water, and so you try to keep water off the pad.

* * *

The structure over the spill pad, the steel building, was there to try to cut down on the amount of rainwater coming in. That's the primary purpose. Tr. at 15, 23-24.

Additionally, Sands testified that if rainwater comes into contact with petroleum on the concrete pad, Cass pumps out the mixture and disposes it offsite at cost. Tr. at 19.

The Board finds Sands' testimony persuasive and uncontradicted by any evidence in the record. No evidence in the record supports the Agency's assertion that the steel building's primary purpose is to allow Cass to continue operating in inclement weather. In fact, the evidence shows that such facilities can operate in an open environment. It is undisputed that rainwater can enter the petroleum handling area at Cass' facility and commingle with spilled petroleum. If this happens, Cass pays to dispose of the accumulation of petroleum-impacted water at an offsite facility. The record shows that Cass designed and built the steel building to prevent or reduce this water pollution.

Cass also contends that the steel building's design takes into account the federal SPCC requirements at 40 C.F.R. 112. These regulations require certain petroleum storage facilities to prepare SPCC plans and install drainage and containment systems for tank car and truck loading and unloading areas. See 40 C.F.R. § 112.7(c).

The Agency argues that these federal regulations are not determinative of whether the steel building meets the definition of "pollution control facility" under the Property Tax Code. The Board agrees. Merely because Cass built the steel building in an effort to comply with federal SPCC requirements does not, in itself, mean that the structure is entitled to tax certification status. It does, however, provide additional evidence in support of Cass' position.

The Agency further suggests that finding the steel building to be a pollution control facility "makes every commercial and private garage in the State of Illinois a pollution control facility." Resp. Br. at 10. The Board disagrees. Like Cass, each individual taxpayer must carry the burden of proving that its particular facility meets the "primary purpose" test. See XL Disposal Corp. v. Zehnder, 304 Ill. App. 3d 202, 709 N.E.2d 293 (4th Dist. 1999) (taxpayer failed to satisfy primary purpose test when the evidence showed that pollution control benefits are ancillary to the facility's primary purpose). The Board's decision in this case is not determinative of the issue in every situation without regard to the facts.

The Board's reasoning here is consistent with appellate court case law. For example, in Beelman Truck Co. v. Cosentino, 253 Ill. App. 3d 420, 624 N.E.2d 454 (5th Dist. 1993), a hazardous waste transporter sought tax certification status for its dump truck liners and certain "escort trucks." Beelman lined its dump truck beds with a plastic liner to prevent contaminated soil from leaking during transport. Additionally, the dump trucks were accompanied by pickup trucks referred to as "escort trucks," which carried emergency response equipment. *Id.* at 421. When Beelman sought and was denied tax certification status, it sued the State Treasurer and the Director of Revenue in circuit court seeking a declaratory judgment that the plastic liners and escort trucks were tax-exempt pollution control facilities under the Use Tax Act.⁵ The

⁵ The "primary purpose" language in the definition of "pollution control facilities" in the Use Tax Act, 35 ILCS 105/2a (1998), is nearly identical to the language at issue here from the Property Tax Code, 35 ILCS 200/11-10 (1998). Thus, a construction of either definition operates as an interpretation of both. See Van's Material Co. v. Department of Revenue, 131 Ill. 2d 196, 200-01, 545 N.E.2d 695, 698-99 (1989) (court's analysis of Use Tax Act

circuit court found that the plastic liners and escort trucks were tax-exempt pollution control facilities. *Id.* at 422, 424. In affirming the circuit court’s decision, the appellate court stated:

Beelman submitted and the trial court considered uncontradicted evidence that the primary purpose of the plastic liner was to prevent hazardous waste from escaping from the dump trucks. Under section 2a [definition of “pollution control facilities”], a business is entitled to an exemption for *any* system, method, or device or appliance whose primary purpose is to eliminate, prevent, or reduce pollution. *Id.* at 424 (emphasis in original).

The appellate court in Beelman also stated that the broad terms of the definition of “pollution control facilities” must not be construed as “limiting its application based on the type or nature of the component part.” *Id.* at 424 (quoting Wesko Plating, Inc. v. Department of Revenue, 222 Ill. App. 3d 422, 426, 584 N.E.2d 162, 164 (1st Dist. 1991)). The Beelman court determined that the pollution control facility encompasses the entire “system” or “method” of eliminating, reducing, or preventing pollution. Beelman, 253 Ill. App. 3d at 424, 624 N.E.2d at 458.

Similarly, the appellate court in Wesko affirmed the circuit court’s determination that the use of chemicals in a system for eliminating pollutants in an electroplating process was tax exempt. See Wesko, 222 Ill. App. 3d at 426, 584 N.E.2d at 163. In its review of the definition of “pollution control facilities” in Section 2a of the Use Tax Act, the appellate court found:

[P]recluding application of the exemption to systems, such as Wesko’s, where chemicals are the integral components for eliminating pollutants, . . . imposes an improper limitation on the terms method and system. That constraint is contrary to the purpose of section 2a to encourage efforts to control pollution by providing a tax exemption for the employment of pollution control facilities. *Id.* at 426.

The facts of the instant case are analogous to those of Beelman and Wesko. Cass uses the building, dike area, and spill pad as its system for controlling water pollution. Like the plastic liners in Beelman and the chemicals in Wesko, the steel building is a component of Cass’ system to control water pollution.

CONCLUSION

The Board disagrees with the Agency’s decision to deny tax certification status for Cass’ steel building. The record in this case demonstrates that the steel building was designed and constructed for the primary purpose of preventing or reducing water pollution. Accordingly,

applicable to Retailers’ Occupation Tax Act because of noted similarities between the definitions of “pollution control facilities” in the respective statutes).

the Board certifies that the steel building is a "pollution control facility" under the Property Tax Code.

Under Section 11-25 of the Property Tax Code, the effective date of this certification is "the date of application for the certificate or the date of the construction of the facility, which ever is later." 35 ILCS 200/11-25 (1998). Cass built the steel building in 1992 and the Agency received Cass' tax certification application on April 16, 1998. The effective date of the Board's certification therefore is April 16, 1998. The Agency must timely provide any additional documentation of this tax certification that the Department of Revenue may require.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

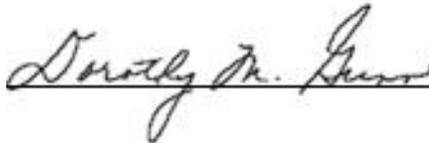
ORDER

1. The Board certifies that Cass' steel building is a pollution control facility under the Property Tax Code, 35 ILCS 200/11-10 (1998). The effective date of this certification is April 16, 1998.
2. The Board directs the Agency to timely provide any additional documentation of the tax certification set forth in paragraph one of this order that the Department of Revenue may require.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 20th day of January 2000 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board