

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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4	KENDALL-GRUNDY FS, INC.,)	
)	
5	Petitioner,)	
)	
6	vs.)	No. PCB 99-098
)	
7	ILLINOIS ENVIRONMENTAL)	
)	
8	PROTECTION AGENCY,)	
)	
9	Respondent.)	

10

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13 Proceedings held on July 21, 1999 at 1:00 p.m., at
14 the Illinois Pollution Control Board, 600 South Second
15 Street, Suite 403, Springfield, Illinois, before the
16 Honorable Amy Muran Felton, Hearing Officer.

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A P P E A R A N C E S

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(Hearing exhibits were retained by Hearing Officer Amy Muran Felton.)

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1 PROCEEDINGS
2 (July 21, 1999; 1:00 p.m.)
3 HEARING OFFICER FELTON: Good afternoon and welcome.

4 My name is Amy Muran Felton. I am a Hearing Officer with
5 the Illinois Pollution Control Board. I have been
6 assigned to preside over this hearing today in the matter
7 of Kendall-Grundy FS versus the Illinois Environmental
8 Protection Agency, which is docketed by the Board as PCB
9 99-98. Today is Wednesday, July 21st, 1999, and it is
10 approximately 1:00 p.m. I note for the record that there
11 is at least one member of the public here with us today.

12 This hearing was scheduled and will be governed in
13 accordance with the Illinois Environmental Protection Act
14 and the Board's procedural rules. Specifically Sections
15 101.220 and 101.221 of the Board's procedural rules
16 regarding hearings shall apply to this particular matter.
17 This hearing is intended to develop a record for review of
18 the tax certification appeal by the entire seven member
19 Illinois Pollution Control Board.

20 I remind you that I will not be deciding this case.
21 The Illinois Pollution Control Board will be deciding this
22 matter. They will review the transcript of the
23 proceedings and the remainder of the record and decide
24 this case. My job is to ensure that an orderly hearing

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1 and a clear record is developed so that the Board can have
2 all of the proper information before it when they are
3 deciding the case. After the hearing the parties will
4 have the opportunity to submit post hearing briefs. These
5 too will be considered by the Board. All witnesses will

6 be sworn and subject to cross-examination. Either party
7 may ask a question of any witness. Before we begin, I
8 would just like to introduce again Carol Sudman, who is
9 the Attorney Assistant to Chairman Manning.

10 Right now let's proceed with having the parties
11 identify themselves, starting first with the Petitioner.

12 MR. ROOSEVELT: Good afternoon. Greg Roosevelt for
13 the Petitioner.

14 MS. MORENO: Lisa Moreno for the Respondent, the
15 Illinois EPA.

16 HEARING OFFICER FELTON: To my knowledge there are no
17 outstanding motions pending.

18 MS. MORENO: Well --

19 HEARING OFFICER FELTON: Excuse me. Is there an
20 outstanding motion pending?

21 MS. MORENO: Not a motion pending, but I want to make
22 a stipulation.

23 HEARING OFFICER FELTON: Okay. Let's proceed right
24 now with that.

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1 MS. MORENO: Okay. Thank you. In the Kendall -- as
2 the record and the petition show in the Kendall-Grundy FS
3 matter, the Agency denied certification for not only the
4 roof over the building but the concrete pad that was under
5 the building, and we would like to stipulate now that the
6 concrete pad is approvable, certifiable, and that we will,

7 you know, whatever the outcome of anything else, issue a
8 tax certification for that particular part of the
9 facility.

10 HEARING OFFICER FELTON: Okay. Obviously, the
11 parties have stipulated. Mr. Roosevelt, do you have any
12 objection with that?

13 MR. ROOSEVELT: Certainly not.

14 HEARING OFFICER FELTON: Certainly not. I imagine
15 not. So stipulated, the concrete pad will be considered
16 certified.

17 MS. MORENO: So that will narrow the issue simply to
18 the roof.

19 HEARING OFFICER FELTON: Okay.

20 MR. ROOSEVELT: Thank you.

21 HEARING OFFICER FELTON: All right. Are there any
22 other matters outstanding that we need to discuss at this
23 time? Seeing that there is none, why don't we proceed
24 then with the parties opening statements, beginning first

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1 with Mr. Roosevelt.

2 MR. ROOSEVELT: Thank you, Ms. Hearing Officer, and
3 Ms. Moreno. I want to just briefly comment this
4 afternoon.

5 This hearing is, although not set with the case this
6 morning, Cass County, will certainly be brought together
7 for consideration at perhaps the same time frame. But,
8 again, from -- we are looking at the tax certification of

9 this bulk plant and fuel plant located in northern
10 Illinois, the Kendall County area at Mazon, M-A-Z-O-N, is
11 the name of the community, operated by the Kendall-Grundy
12 FS Company there in the area. And we have a building, a
13 steel building over a bulk plant distribution facility
14 area.

15 The question under 35 IL CS 200/100-10 is whether the
16 primary purpose of that steel building is pollution
17 control or abatement. It is our position that it is. We
18 will call Larry Sand, who is an engineer with Growmark
19 which is part of more or less the FS headquarters, who has
20 designed these facilities over a long term of years, who
21 has designed this facility in question, and will comment
22 on why he designed this facility as he did.

23 The parties appear to agree that there are water
24 runoff and pollution concerns under 40 CFR, Part 112, oil

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1 pollution prevention. The steel building is built for the
2 purpose here of avoiding water contamination and flooding,
3 particularly storms, so that we do not have an issue with
4 oil pollution running into our waterways. That is the
5 primary purpose. Mr. Sands will testify to that.

6 Leon Bonneur, the Kendall-Grundy FS manager, will
7 testify also about the practical aspect of the operation
8 of that particular facility and his experience as manager
9 and his perception and belief and knowledge that the

10 primary purpose of the steel building is for the purpose
11 of containment of waters and avoidance of water pollution
12 and runoff.

13 It, in fact, will be presented through the testimony
14 of both gentlemen that through the mid 1980s these bulk
15 facilities were not contained with these buildings
16 overhead. The workers for FS went about making the bulk
17 distributions without the buildings. They certainly can.
18 There is no reason why they could not. The pollution
19 concerns that arose and have heightened in the past
20 several years have led to this being used as a confinement
21 containment device for pollution control. One would not
22 think of a building ordinarily perhaps as that purpose,
23 but given the way it functions here it very definitely has
24 that character and purpose, and that's why it is

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1 constructed. We believe that is what the evidence will
2 show, and that this then should qualify.

3 HEARING OFFICER FELTON: Thank you. Ms. Moreno.

4 MS. MORENO: Yes. As Mr. Roosevelt pointed out, the
5 Kendall-Grundy and Cass County cases, although not being
6 tried together, are related in the sense that they are the
7 same type of facilities. And I would like to reiterate
8 essentially what I said this morning, is that the Agency's
9 position over -- which has been developed over the long
10 period of time that we have been doing tax certifications,
11 is to look at the primary purpose of the particular

12 structure or facility.

13 As we have indicated previously, we believe that in
14 the situation here that the primary purpose of the
15 structure that surrounds the concrete pad is other than
16 pollution prevention. We are certainly aware of the 40
17 CFR, Part 112 oil pollution prevention regulations. These
18 regulations have been around mostly since the 1970s, and
19 while they give general directions as to preventing oil
20 spills, we do not believe that they give specific
21 guidelines that would mandate the use of particular --
22 these particular roofs in this particular situation.

23 I will have testifying Mr. Thomas McSwiggin, who is
24 the Manager of the Permit Section, who will talk about the

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1 tax certification process in general, and I will also have
2 Mr. Blaine Kinsley, who is the permit engineer who
3 actually did the review of the Kendall-Grundy facility.
4 Thank you.

5 HEARING OFFICER FELTON: Thank you. All right. If
6 there is nothing else right now, we will proceed with the
7 Petitioner's case-in-chief.

8 Mr. Roosevelt, you said that you have two witnesses
9 today?

10 MR. ROOSEVELT: Yes, Mr. Sands and Mr. Bonneur.

11 HEARING OFFICER FELTON: All right. Call your first
12 witness.

13 MR. ROOSEVELT: I may also call Mr. Honager (spelled
14 phonetically). I named him earlier as a witness. He may
15 be called very briefly.

16 Mr. Sands, have you been sworn?

17 HEARING OFFICER FELTON: I think we should proceed
18 again to have him sworn in as to this particular matter if
19 that's all right.

20 MR. ROOSEVELT: Yes.

21 HEARING OFFICER FELTON: Would you please swear in
22 the witness.

23 (Whereupon the witness was sworn by the Notary
24 Public.)

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1 L A R R Y S A N D S,
2 having been first duly sworn by the Notary Public, saith
3 as follows:

4 DIRECT EXAMINATION

5 BY MR. ROOSEVELT:

6 Q. Would you state your name, please.

7 A. Larry Sands.

8 Q. And your occupation?

9 A. I am Senior Project Engineer for Growmark.

10 Q. That's in Bloomington?

11 A. Yes.

12 Q. You would be involved, then, with the various FS
13 facilities around the State; is that correct?

14 A. Yes, that is correct. We provide engineering

15 services for member companies, including Kendall-Grundy
16 FS.

17 Q. FS is a farm cooperative service for farmers in
18 the State of Illinois?

19 A. Yes.

20 Q. What is your education?

21 A. I graduated from the University of Illinois in
22 1969 in agricultural engineering with a Bachelor's Degree.

23 Q. Are you certified in any respect as an engineer?

24 A. I am a Registered Professional Engineer.

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1 Q. Can you tell us briefly what you have done for --
2 how long you have been with Growmark and what kind of job
3 functions you have had?

4 A. I have been with Growmark, or formerly known as FS
5 Services, for 30 years. I worked in an area called farm
6 automation to begin with for the first year. I was gone
7 in the Service for two years. Then I was in the
8 engineering area for four years, and then into an area
9 called facility equipment, which is equipment like
10 including petroleum equipment, pumps and meters, for 13
11 years, and then the last ten years back in engineering
12 again.

13 Q. We are talking about a fuel bulk plant in Mazon,
14 Kendall County, Illinois. Are you familiar with that?

15 A. Yes, I designed the bulk petroleum plant at Mazon.

16 Q. Describe for us what this plant does?

17 A. The bulk petroleum facility in Mazon contains
18 eight 19,000 gallon vertical storage tanks, a concrete
19 dike area, and the transfer area is a 36 foot by 40 foot
20 concrete spill pad covered by a 40 foot by 60 foot steel
21 building. The purpose of the bulk plant is to provide
22 storage and transfer facilities for bringing petroleum in
23 by bulk transport and then sending it out by smaller
24 delivery trucks to the service company patrons.

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1 Q. You have a loading area there then where the fuel
2 is loaded into the distribution trucks?

3 A. Yes, that is correct.

4 Q. Describe that for us, please.

5 A. The transfer area includes both a loading area for
6 the transports to load into the bulk plants and a load out
7 area for their delivery trucks to load out, and inside
8 this area are the necessary pumps and meters and loading
9 arms and loading dock.

10 Q. This operates throughout the year?

11 A. Yes.

12 Q. As a registered engineer and based upon your
13 experience, are you aware and cognizant of federal
14 regulations and state on the issue of water pollution
15 control here as it might affect the bulk plant?

16 A. Yes. It was designed to comply to 40 CFR 112.

17 Q. Let me show you Exhibit 15. Is that similar to --

18 is the facility there similar to in appearance the
19 facility at Mazon?

20 HEARING OFFICER FELTON: Mr. Roosevelt, which exhibit
21 is that, what number?

22 MR. ROOSEVELT: Exhibit Number 15.

23 HEARING OFFICER FELTON: All right.

24 MR. ROOSEVELT: Those were not introduced this

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1 morning.

2 HEARING OFFICER FELTON: Okay. That's fine.

3 THE WITNESS: Yes, the structure, the building and
4 loading area is identical to the one at Mazon.

5 Q. (By Mr. Roosevelt) As to Exhibit 14 on the
6 interior, would that facility be identical to that in
7 Mazon?

8 A. Yes, the inside structure that, again, is
9 identical to the one that is at Mazon.

10 MR. ROOSEVELT: I move for the introduction of 14 and
11 15.

12 HEARING OFFICER FELTON: Ms. Moreno, do you have any
13 objection to the admittance of those two exhibits?

14 MS. MORENO: No problem.

15 HEARING OFFICER FELTON: Okay. Both exhibits
16 identified as 14 and 15 are admitted into the record.

17 (Whereupon said documents were admitted into evidence
18 as Exhibits 14 and 15 as of this date.)

19 Q. (By Mr. Roosevelt) I show you what has been marked
20 as Exhibit Number 7. Will you look at that and tell us
21 about that photograph.

22 A. This is a photograph of the facility that was
23 built around 1988, somewhere in that area, in Wisconsin, I
24 believe Wautoma. It is a containment facility for bulk

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1 petroleum and has a steel building over a concrete loading
2 pad. This is one of the earlier designs, and the end is
3 completely open. It just has a roof and side walls.

4 Q. How does Exhibit 7 and the appearance of it and
5 the design of it differ from the design of the one in
6 Mazon?

7 A. The structure at Mazon is considerably larger,
8 longer than this one. I don't remember the width on this
9 one, but I know the length is probably closer to three
10 times as long, 40 by 60 foot, and there are doorways -- 14
11 by 14 foot doorways to get the vehicles in and out, but it
12 is very much more closed than this one is.

13 Q. The facility here in Wisconsin in Exhibit 7 is
14 open on both ends; is that correct?

15 A. That's correct.

16 Q. Why have you chosen the facility at Mazon to later
17 close the ends of the building?

18 A. In an attempt to keep water off the containment
19 structure.

20 Q. All right. I show you what has been marked as

21 Exhibit Number 6.

22 HEARING OFFICER FELTON: Mr. Roosevelt, could you
23 just move the first one in?

24 MR. ROOSEVELT: Yes. Thank you. I move for the

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1 introduction of Exhibit Number 7.

2 HEARING OFFICER FELTON: Okay. Ms. Moreno, do you
3 have any objection to that?

4 MS. MORENO: No, no problem.

5 HEARING OFFICER FELTON: All right. This particular
6 exhibit currently you do not have an original copy for
7 this case, is that correct, Mr. Roosevelt?

8 MR. ROOSEVELT: That is correct.

9 HEARING OFFICER FELTON: I am going to direct you to
10 provide an original copy of this one and any of the others
11 that are used from the earlier proceeding in Cass County
12 to provide originals with the Board at the time that you
13 submit your post hearing brief.

14 MR. ROOSEVELT: Okay.

15 HEARING OFFICER FELTON: Exhibit 7 is admitted, by
16 the way.

17 (Whereupon said document was admitted into evidence
18 as Exhibit 7 as of this date.)

19 MR. ROOSEVELT: Thank you.

20 Q. (By Mr. Roosevelt) On Number 6, what is pictured
21 there?

22 A. Number 6 is a picture of the facility -- I am not
23 sure of the exact location. I believe it is in Macoupin
24 County. But it is typical of earlier designs where we put

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1 in small loading pads, approximately 20 foot by 24 foot
2 long with a 24 by 30 foot -- well, maybe 36, but a smaller
3 building over it in our earlier design work.

4 MR. ROOSEVELT: I move the introduction of Exhibit
5 Number 6.

6 HEARING OFFICER FELTON: Ms. Moreno, do you have any
7 objection to that?

8 MS. MORENO: No.

9 HEARING OFFICER FELTON: No objections. This Exhibit
10 6 will also be admitted. Again, I instruct you to provide
11 an original with the Board when submitting your post
12 hearing brief.

13 (Whereupon said document was admitted into evidence
14 as Exhibit 6 as of this date.)

15 MR. ROOSEVELT: Thank you.

16 Q. (By Mr. Roosevelt) How did Exhibit 6 in its design
17 vary from the one in Mazon?

18 A. The structure was much smaller. The attainment
19 area was much less, and the building was considerably
20 smaller. In the early design work in the late 1980s this
21 would be typical of that type of construction. We were
22 not allowing for as much storage as we are now. We were
23 not putting the buildings up big enough to keep out rain

24 adequately, it turns out in the long run.

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1 Q. In the history of these facilities, have they
2 always had containment building structures such as are
3 described in 6 and 7 and in 15?

4 A. To the best of my knowledge in the earlier years
5 petroleum bulk plants typical in our three-state system
6 had no spill pads or buildings over them. It would be a
7 loading dock out in the open and maybe a small roof area
8 to protect the driver a little bit maybe as he is trying
9 to load, but very small and just really a roof.

10 Q. Over just the valve area or the pump area?

11 A. The roof would just be over the loading dock area.
12 A lot of times it didn't even extend out over the truck.

13 Q. The advent of building a whole building containing
14 the entire operation, what was that in response to?

15 A. This was in response to a recognition of 40 CFR
16 112 and the need to have containment, secondary
17 containment facilities where we are transferring product.
18 We recognized that in the 1980s, the late 1980s, and the
19 need for that, so we started building structures to do
20 that. And our design changed through the years.

21 Q. Okay. The Illinois EPA has said, in denying the
22 application, that it appears that the primary purpose of
23 the steel building is to shelter fueling activity workers
24 from adverse weather conditions. Do you agree or disagree

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1 with that, as the designer of the building?

2 A. I disagree with that. The primary reason for the
3 steel building over the concrete loading pad was to try to
4 eliminate as much water as possible, rainwater, so we did
5 not have to handle -- do something with that water that
6 has gotten into the spill pad area.

7 Q. At Mazon let's assume that we take the building
8 away, just disassemble it and remove it. What
9 implications does this have in terms of being able to
10 handle rain water and the contamination with the fuels?

11 A. At Mazon the structure is -- the containment
12 structure, to the best of my recollection, even though a
13 larger spill pad, as far as surface area, is not as deep
14 in containment. There it was designed for 3,800 gallons
15 of product, which by 1995, when that was put in, it was
16 our understanding the EPA was now interpreting the
17 regulations such that we needed to be able to contain the
18 largest compartment of any truck loading or unloading at
19 the site. So we reduced the amount of storage available,
20 which made it easier for the drivers to come in and out,
21 because they wouldn't have such steep ramps. But if we
22 didn't have the building there, we would have to redesign
23 that, because it would not be adequate storage to also
24 handle rain falls that could happen, when we could have a

1 situation where the pad would overflow.

2 Q. There may be alternatives to the steel building;
3 is that correct?

4 A. Yes.

5 Q. As a confinement? As I understand it, you could
6 use an oil-water separator, but you would have to
7 dramatically enlarge your storage; is that correct?

8 A. Yes.

9 Q. But your choice has been to build a steel building
10 as water prevention to prevent the water from --

11 A. Yes, that's correct.

12 Q. Let me ask you this. In the fueling activity
13 here, that can be accomplished in the open air, can it
14 not?

15 A. Yes. The building is not required to load or
16 transfer product.

17 Q. Is there any rule or regulation or contract of FS
18 with its employees that requires that they have to work
19 indoors?

20 A. No, none that I am aware of.

21 Q. Okay. I understand that you had enforcement
22 action by the U.S. EPA at least at one of your facilities,
23 particularly in Hancock County, Illinois; is that correct?

24 A. That's correct.

1 Q. And that regarded the 40 CFR 112 oil and water
2 pollution problem, did it not?

3 A. Yes.

4 Q. And you are mindful of that action here and have
5 been mindful of it in your designing these steel
6 buildings; is that correct?

7 A. That's correct.

8 Q. Are your designs here of these building responsive
9 to those EPA concerns of your own?

10 A. Yes.

11 MR. ROOSEVELT: That completes my questions. Thank
12 you.

13 HEARING OFFICER FELTON: Thank you. Ms. Moreno?

14 MS. MORENO: Thank you.

15 CROSS EXAMINATION

16 BY MS. MORENO:

17 Q. Drawing your attention to Exhibits 14 and 15, I
18 believe you testified that these are facilities that would
19 be identical to the Mazon facility?

20 A. Yes, I did.

21 Q. They are not the Mazon facility?

22 A. No. Actually, in looking at the pictures, I
23 believe they are the Yorkville facility, which I believe
24 is another facility of Kendall-Grundy, and it was

1 constructed approximately two years later. I believe
2 Mazon was built in 1995. I believe this was built in
3 1997.

4 Q. So Mazon was built in 1995 --

5 A. Yes.

6 Q. -- you just said? Okay. Since we have heard a
7 little bit about Hancock, when was Hancock built?

8 A. I believe Hancock was built in either 1996 or
9 1997.

10 Q. Okay.

11 A. Maybe 1996. I am not sure.

12 Q. As we did this morning, I would like to go over a
13 little bit of how these things operate, so I would like to
14 show you Exhibit 14.

15 A. Yes, ma'am.

16 Q. What we are looking at is the top of the pad.
17 Now, this -- I understand that this concrete pad is part
18 of a containment type of system. Could you explain how
19 that works?

20 A. Yes. The concrete pad is there to try to contain
21 any spills that may occur when we are transferring product
22 either from the transport truck into the bulk plant or
23 loading out. There are also pumps and meters and valves
24 and load out arms there, and so there is always the

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1 potential for a seal going or some leak being caused. The

2 purpose is secondary containment to contain the product,
3 in other words, not to contaminate the ground around it.

4 Q. So if you have a leak or a spill, what happens to
5 the product that spills out, how is it contained?

6 A. Within this spill pad there is a piping trench and
7 a sump within that trench that is at a lower elevation
8 where the product would drain to, and that product would
9 need to be pumped out and disposed of in a proper manner.

10 Q. So you wouldn't just recycle the product there?
11 You would send it off or have somebody remove it for you?

12 A. If the product actually spilled on the pad, it
13 would probably be contaminated with the dirt and the dust
14 that is tracked in from the trucks that would be hard to
15 filter out unless it was a large amount. If it is a large
16 spill, the volume would be more, so you may be able to
17 filter it out more since it would be diluted, the dirt.

18 Q. But generally someone would come and pick it up?

19 A. Yes, a proper disposal company would come.

20 Q. All right. Now, let's assume that at the same
21 time there was a spill there was rain in the building,
22 rainwater coming into the building. How would the mixture
23 of the rain and products be disposed of then?

24 A. It would be disposed of in the same manner, just a

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1 larger volume, and the cost would be anywhere from 80
2 cents to a dollar usually per gallon to dispose of the
3 products. So if you had 100,000 gallons of rain and 500

4 gallons of products, you are paying \$1,000.00, in round
5 figures.

6 Q. So the same way as with the regular oil that
7 somebody would -- you would have a company that would come
8 and pump out?

9 A. Yes.

10 Q. And take it off and do whatever they do with it?

11 A. Right. That's correct.

12 Q. Okay. Let's see. Now, the Wisconsin facility
13 that you referred to -- do we have a picture?

14 HEARING OFFICER FELTON: It is Exhibit Number 7, I
15 believe.

16 Q. (By Ms. Moreno) Yes, the open facility. This was
17 a Growmark facility?

18 A. Yes, a company facility. The company is in
19 Wisconsin. I believe it is in Wautoma.

20 Q. Do you know whether or not this facility complies
21 with the federal oil pollution prevention regulations, the
22 spill plan, the SPCC?

23 A. To the best of my knowledge it would comply in
24 general with the plan. As you know, the plan is pretty

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1 broad.

2 Q. Have there been any -- let's see. Mazon was built
3 in 1995. Was the facility upgraded then or was this just
4 a new facility?

5 A. The facility -- an existing bulk plant was in the
6 town of Mazon, and this new structure is built on property
7 that the service company had west of Mazon, as I remember
8 now. It is seven miles west, if I remember right.

9 Q. This was a replacement?

10 A. This was a replacement.

11 Q. Can you describe what the previous plant looked
12 like?

13 A. The previous plant, I am not sure of the number of
14 tanks but, again, approximately eight tanks, and it was --
15 I am trying to remember if it was an earthen dike. That
16 would have been typical in the older plants, to have an
17 earthen dike around them with an open loading dock. There
18 may have been -- I am having trouble remembering. There
19 may have been a roof or part of a roof at least over the
20 loading dock itself to kind of shelter the worker that was
21 loading fuel. The transport fitting would have been off
22 to the side and would not have had any covering over it.

23 Q. Okay. To your knowledge, was that facility
24 subject to the 40 CFR, Part 112 rules?

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1 A. Yes.

2 Q. And to your knowledge, did it comply with the SPCC
3 rules?

4 A. It would have been difficult for the old plant to
5 comply, as constructed.

6 Q. Okay. Well, let me rephrase that. Do you recall
7 if there were any citations received by the plant?

8 A. I have no knowledge of that.

9 Q. Okay. Thank you. There is just one more thing I
10 wanted to clarify. You said that this building was
11 designed to contain 38,000?

12 A. No, 3,800.

13 Q. Oh, 3,800. Thank you. And that is -- that
14 represents the largest compartment, single compartment
15 that any trucks --

16 A. To the best of my knowledge, the largest
17 compartment of a truck either delivering, bringing it in
18 or taking it out would be 3,000 gallons.

19 Q. And the design, in terms of the containment, the
20 contained volume, is that a question of engineering
21 judgment?

22 A. The volume that is required?

23 Q. The volume that you would design it for? I mean,
24 what is the basis of the design, is what I am asking?

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1 A. The basis of the design for the spill pad area was
2 to try to comply, to the best of our knowledge, with the
3 40 CFR 112, which is substantially containing the product
4 that you are transferring or that might spill in that
5 area.

6 MS. MORENO: Okay. Thank you very much.

7 HEARING OFFICER FELTON: Mr. Roosevelt, do you have
8 anything further?

9 MR. ROOSEVELT: Just briefly.

10 HEARING OFFICER FELTON: All right.

11 REDIRECT EXAMINATION

12 BY MR. ROOSEVELT:

13 Q. If we take away the building, the steel structure
14 around the --

15 HEARING OFFICER FELTON: Which exhibit are you
16 referring to right now?

17 MR. ROOSEVELT: It is Number 14. It is showing the
18 interior picture of the loading area.

19 HEARING OFFICER FELTON: Okay. Thank you.

20 Q. (By Mr. Roosevelt) If we take away the steel
21 building, are we going to be able to handle rain storms
22 and avoid runoff, given the equipment that is there?

23 A. At this particular site with a spill pad capacity
24 as designed, we would have to make modifications at the

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1 site to try to hold more product. With a typical rain --
2 with a larger rain there, it would easily over spill the
3 pad.

4 Q. So there would be other strategies that we
5 discussed? You could install other types of equipment to
6 try to recycle the rain water that came in; is that
7 correct?

8 A. That's correct.

9 Q. But your strategy has been to enclose it and avoid
10 the rainwater involvement entirely; is that correct?

11 A. That's correct.

12 Q. But clearly, that, as it is equipped, the steel
13 structure, is a key component to avoiding rain
14 contamination; is that correct?

15 A. That's correct.

16 MR. ROOSEVELT: All right. That completes my
17 questions.

18 HEARING OFFICER FELTON: Ms. Moreno, do you have
19 anything further?

20 MS. MORENO: Yes. I want to explore this a little
21 bit.

22 RECROSS EXAMINATION

23 BY MS. MORENO:

24 Q. Let's assume that you had two days of rain, and

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1 there was a spill on the floor on day one. Is it fair to
2 say that at some point that oil and water would be washed
3 into the sump and into -- and down into the piping?

4 A. Yes.

5 Q. Now, it is just going to stay there until someone
6 come and pumps it out? How does that work?

7 A. Yes, that's correct.

8 Q. If you were to have a situation where the piping
9 and the sump started to back up, for example, what would

10 you do? I mean, what would be the types of contingency
11 plans that you would have to prevent what is in the sump
12 from coming back up on to the pad?

13 A. Timely pumping out of the pad into a vessel to
14 haul off to be processed.

15 Q. So you would pump out at the other end so it would
16 flow through?

17 A. Yes.

18 MS. MORENO: All right. Thank you very much.

19 FURTHER REDIRECT EXAMINATION

20 BY MR. ROOSEVELT:

21 Q. Let me ask you, though, the pumping into another
22 vessel involves calling a service to come out and finding
23 somebody that does that; isn't that correct?

24 A. That would be correct.

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1 Q. So you are going to have to call a pumping service
2 that can recycle and handle that oil at 80 cents or a
3 dollar a gallon; is that correct?

4 A. That's correct.

5 Q. That is going to be dependent upon their
6 availability; is that right?

7 A. That's correct.

8 Q. If they can't be there on your time frame or God's
9 time frame with the rains, you are just out of luck; is
10 that right?

11 A. That's correct.

12 Q. That's why you put the steel building up?
13 A. That's correct.
14 MR. ROOSEVELT: Okay. Thank you.
15 HEARING OFFICER FELTON: Any further questions for
16 this witness?
17 MS. MORENO: No.
18 HEARING OFFICER FELTON: All right. Thank you.
19 (The witness left the stand.)
20 HEARING OFFICER FELTON: Mr. Roosevelt, who is your
21 next witness?
22 MR. ROOSEVELT: Mr. Bonneur.
23 (Whereupon the witness was sworn by the Notary
24 Public.)

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1 L E O N B O N N E U R ,
2 having been first duly sworn by the Notary Public, saith
3 as follows:
4 DIRECT EXAMINATION
5 BY MR. ROOSEVELT:
6 Q. Would you state your name, sir.
7 A. Yes. I am Leon Bonneur.
8 Q. What is your occupation?
9 A. Presently I am assistant manager of Kendall-Grundy
10 FS, which is now doing business as Grain-Co FS. We had a
11 name change as of June 1st.
12 Q. How long have you been with Kendall-Grundy FS?

13 A. I have been there 20 years.

14 Q. You are familiar with the site, the facility at
15 Mazon?

16 A. Yes, I was general manager of the company when it
17 was built.

18 Q. All right. Well, you have heard that you put in a
19 new fuel bulk plant in approximately 1995?

20 A. It was 1995, yes.

21 Q. And prior to that can you tell us how that
22 facility was configured?

23 A. Previously this facility was, as Mr. Sands said,
24 in the town of Mazon. It was our feeling that we did wish

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1 to remodel the plant. The concern being in town, of
2 pollution, just concerns of that type of thing, and so
3 this was a new plant that was moved to another facility
4 that we had west of Mazon.

5 Q. Did you have a steel building over the
6 distribution area of the fuel?

7 A. No. In town it was an open loading dock. The
8 dock maybe looked similar to what is in the picture here,
9 but it was just open and there was no covering or such
10 over it.

11 Q. You expected your workers to perform the
12 distribution work in the open, and did they do so for many
13 years?

14 A. The company has been in the petroleum business for

15 over 50 years, and that's the way it was done up until
16 that time.

17 Q. It is your understanding that the steel structure
18 was put up for pollution containment concerns; is that
19 right?

20 A. Yes. One of the concerns in any part of our
21 business was the water part, because with any type of rain
22 it can be very -- it is just burdensome to take care of
23 anything like that, and so the building was not even a
24 question in our mind.

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1 Q. Let me ask you about other distribution facilities
2 that --

3 A. At that facility, the petroleum distribution that
4 we are looking at here, we do have an LP distribution
5 there also, and an ag-chemical transfer facility where we
6 bring in ag-chemicals and transfer them to either our
7 spreaders or sprayers, and that is also a containment type
8 of thing with the building.

9 Q. The ag-chemical bulk, is that bulk products?

10 A. Yes, it will be handled in bulk.

11 Q. By bulk, what do you mean?

12 A. Well, what we mean is that we bring in 220 gallons
13 or 250 gallon containers and pump those over into a
14 sprayer or a smaller container that we then would use for
15 spraying purposes or sale to the farmers.

16 Q. How is that transfer accomplished?

17 A. It is through pumps. It would be a pump that
18 would sit on top of the tank. It is a transfer operation.
19 Well, both operations are similar. It is a transfer from
20 one container to another.

21 Q. Do you have a steel building over it?

22 A. Yes, it does have, with a pad and curbing around
23 the building for containment.

24 Q. And that steel building, is it approved?

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1 A. Yes, it has been. And I would mention that this
2 particular building is not all steel, because it did not
3 necessarily need to be fireproof, the way the petroleum
4 is. It is a very similar building, but it is not all
5 steel.

6 Q. Was it certified by the Illinois EPA --

7 A. To my understanding it is.

8 Q. -- as an abatement facility?

9 A. My understanding it was, yes.

10 Q. The Illinois EPA has said the steel building over
11 the fuel bulk distribution area, that the primary purpose
12 of the steel building is to shelter fueling workers from
13 adverse weather conditions. Is that, in your opinion, its
14 primary purpose?

15 A. No. The building was put up to prevent the water
16 contamination. The spills that take place, and there is
17 not many, but there are in that kind of operation always a

18 drip or two here or so that needs to be contained. It
19 would just be burdensome to put up with any rain during
20 the season.

21 MR. ROOSEVELT: Thank you. That completes my
22 questions.

23 HEARING OFFICER FELTON: All right. Ms. Moreno?

24 MS. MORENO: Thank you.

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1 CROSS EXAMINATION

2 BY MS. MORENO:

3 Q. Mr. Bonneur, I have a couple of questions. The
4 ag-chem transfer facility that you were just referring to,
5 is that part of the facility that we are talking about
6 today?

7 A. Yes, yes. There is a ten acre site there, and it
8 is part of that facility.

9 Q. And you said you receive a tax certification?

10 A. To my understanding, yes.

11 Q. Do you recall when that might have been?

12 A. No, I do not. I do not have those records with
13 me.

14 MS. MORENO: Excuse me a moment.

15 (Ms. Moreno and Mr. McSwiggin confer briefly.)

16 Q. (By Ms. Moreno) Mr. Bonneur, you receive and ship
17 out fuel year round?

18 A. Yes, it is about three and a half million gallons

19 that go through that facility.

20 Q. And this happens in the winter and summer?

21 A. Oh, yes.

22 Q. So would you agree that the building does provide
23 some protection for workers from the elements?

24 A. Oh, sure, sure.

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1 MS. MORENO: Okay. Thank you.

2 HEARING OFFICER FELTON: Mr. Roosevelt, anything
3 further?

4 MR. ROOSEVELT: Yes. Thank you.

5 REDIRECT EXAMINATION

6 BY MR. ROOSEVELT:

7 Q. Although it does provide some protection, you for
8 many years did without it --

9 A. Yes.

10 Q. -- and you are certainly capable of doing without
11 it?

12 A. That's right.

13 MR. ROOSEVELT: Thank you.

14 HEARING OFFICER FELTON: Anything further for this
15 witness?

16 MS. MORENO: No thank you.

17 MR. ROOSEVELT: Nothing further.

18 HEARING OFFICER FELTON: Thank you.

19 (The witness left the stand.)

20 HEARING OFFICER FELTON: Mr. Roosevelt, do you have

21 anyone else you want to call today?

22 MR. ROOSEVELT: If I may have just a moment, please.

23 HEARING OFFICER FELTON: Sure. Let's go off the
24 record for a moment, please.

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1 (Discussion off the record.)

2 MR. ROOSEVELT: I think we moved for introduction of
3 our exhibits. And I did want to ask that 40 CFR, Part
4 112, be introduced and made part of the record. I
5 previously supplied a copy and I have another copy for
6 this file.

7 HEARING OFFICER FELTON: Okay. Is there any
8 objection to admitting the 40 CFR 112?

9 MS. MORENO: No.

10 HEARING OFFICER FELTON: All right. It will be
11 admitted into evidence as Exhibit Number 16.

12 MR. ROOSEVELT: Thank you.

13 (Whereupon said document was admitted into evidence
14 as Exhibit 16 as of this date.)

15 HEARING OFFICER FELTON: Is there anything further
16 for you, Mr. Roosevelt?

17 MR. ROOSEVELT: I want to hand back to you the
18 exhibits that we utilized this morning, but which were not
19 utilized here this afternoon while I am thinking of it.

20 HEARING OFFICER FELTON: When you submit your initial
21 post hearing brief you will submit original copies of

22 exhibits --

23 MR. ROOSEVELT: Of Numbers 6 and 7.

24 HEARING OFFICER FELTON: Yes, Exhibits 6 and 7.

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1 MR. ROOSEVELT: Yes. Thank you.

2 HEARING OFFICER FELTON: And that is 6 and 7 from the
3 Cass County record, just so we are clear. All right.
4 Anything else, Mr. Roosevelt?

5 MR. ROOSEVELT: No, Your Honor. Thank you.

6 HEARING OFFICER FELTON: All right. We will proceed
7 with Ms. Moreno's case.

8 MS. MORENO: Thank you. I will call Mr. Thomas
9 McSwiggin.

10 (Whereupon the witness was sworn by the Notary
11 Public.)

12 T H O M A S G. M C S W I G G I N,
13 having been first duly sworn by the Notary Public, saith
14 as follows:

15 DIRECT EXAMINATION

16 BY MS. MORENO:

17 Q. Could you state your name for the record, please.

18 A. My name is Thomas G. McSwiggin.

19 Q. And where do you reside, Mr. McSwiggin?

20 A. I reside here in Springfield, Illinois.

21 Q. And what is your occupation?

22 A. I am Manager of Water Pollution Permit for the
23 Division of Water Pollution Control, the Illinois

24 Environmental Protection Agency.

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1 Q. How long have you been so employed?

2 A. I have been manager of that section since August
3 1, 1977.

4 Q. And could you tell us what your educational
5 background is?

6 A. I have a degree in civil engineering, 1961. I
7 have a Master's in sanitary engineering, which is today
8 known as environmental engineering, 1962.

9 Q. Now, in your position as manager of the permit
10 section, have you had occasion to deal with tax
11 certifications?

12 A. Yes, I have.

13 Q. Could you explain the circumstances of that?

14 A. The procedure basically is established by the
15 Illinois Revenue Code, which provides for facilities that
16 qualify as a pollution control facility, a break in their
17 property tax. The pollution control device definition is
18 provided in the statute, and is basically any device that
19 controls, as its main purpose, air or water pollution, or
20 prevents, for that matter. Normally we are looking at a
21 device that collects, in the case of water pollution
22 control, wastewaters, brings them to a treatment facility
23 and, of course, the treatment facility itself would be
24 part of that pollution control device, and actually treats

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1 the waste for discharge to a surface water or, for that
2 matter, to a public sewer system.

3 The prevention part of this program would be those
4 facilities which prevents a contaminant from gaining
5 access to water, such as we are dealing with here with the
6 secondary containment structures around the storage tanks
7 which are basically walls which if the tanks should fail
8 and lose its contents, these, as the name implies,
9 secondary walls would capture that oil or that fuel and
10 not allow it to flow over land to gain access to water.

11 Q. Now, in the course of your tenure as the permit
12 manager, approximately how many tax certifications have
13 you had occasion to review?

14 A. I would estimate somewhere between 400 and 500.

15 Q. Could you tell us generally what kind of
16 facilities we are talking about?

17 A. Most of the facilities we have looked at have been
18 for industrial wastewaters of the types that I described a
19 few minutes ago that collect the wastewater through piping
20 systems and channels, mainly transport types of equipment
21 and bring it down to a treatment device. And, of course,
22 the treatment device itself is also certifiable.

23 We have dealt with the livestock waste aspects.
24 There we are dealing with facilities that contain the

1 waste, store it, and prevent its getting loose from the
2 livestock operations and gaining access to waters.

3 We have dealt with the ag-chem industry for a number
4 of facilities. There we are looking at facilities very
5 similar to what we are looking at in the fuel case in that
6 we are looking at secondary containment and operational
7 pads that actually are designed to collect any spillage or
8 leakage and bring it into a controlled environment.

9 Q. Now, the fueling facilities, how many of those
10 have you had occasion to review?

11 A. Fueling facilities, we are looking at the very
12 beginning of this program, and we have had four or five
13 come to us.

14 Q. So that prior -- so when did we get the first one,
15 do you recall?

16 A. Last year sometime.

17 Q. So prior to that, to your knowledge there were not
18 any tax certification applications for fueling facilities?

19 A. To my knowledge there have been no applications
20 for fueling facilities.

21 Q. Okay. Of the four or five that you have reviewed,
22 have you approved the roof or any part of the roof on any
23 of these as pollution control facilities?

24 A. No, we have not.

1 Q. Have you approved roofs on any other types of
2 facilities?

3 A. We have approved roofs on ag-chem facilities.

4 Q. Could you explain the circumstances under which
5 you have --

6 A. We have approved a roof when it provides
7 protection of the product. So if the products are stored
8 in paper or some other type of material which is subject
9 to damage from the elements and, therefore, loss of the
10 material to waters, that we approved the roof there as a
11 pollution control device.

12 Q. Now, let me ask you this. If you have a building
13 that has, say, some paper -- a fertilizer building which
14 has some stacks of fertilizer in paper bags and then next
15 to that or some distance from it under the same roof you
16 might have a completely different kind of operation, would
17 you normally approve the entire roof?

18 A. No. We would approve only the portion of the roof
19 over the material that was of interest.

20 Q. So you have in the past approved partial roofs --
21 or partially approved roofs, I should say?

22 A. Yes.

23 Q. Okay. Thank you. Now, let's see. I would like
24 to -- off the record just a minute.

1 (Discussion off the record.)

2 MS. MORENO: I would like to have this marked as
3 Respondent's Exhibit Number 1. It is instructions and a
4 blank certificate form.

5 MR. ROOSEVELT: I would stipulate that it is an
6 application form used for this purpose and these permits,
7 and I have no objection to it being introduced.

8 HEARING OFFICER FELTON: Since there is no objection,
9 the application and the instructions for tax certification
10 are admitted.

11 (Whereupon said document was duly marked for purposes
12 of identification and admitted into evidence as
13 Respondent's Exhibit 1 as of this date.)

14 Q. (By Ms. Moreno) I would like to hand you what is
15 Respondent's Exhibit Number 1, and I would ask you is this
16 the form and instructions that we send out with request
17 for tax certifications?

18 A. Yes, it is. This is the material that we provide
19 to potential applicants for tax certification.

20 Q. Now, to your knowledge, does the Mazon facility,
21 leaving aside for a moment the ag-chem facility, does it
22 have any other kind of permits from the Illinois -- water
23 related permits from the Illinois EPA?

24 A. There are no water related permits that I am aware

2 Q. Would there be any required?

3 A. No.

4 Q. Okay. Thank you. Now, let me hand you -- I would
5 like to hand you the answer and record in the
6 Kendall-Grundy County case, and I would like to direct
7 your attention to page 12. I am sorry. That is the wrong
8 page. I would like to direct your attention to page 13
9 and 14 of that record. It is at the very end. Especially
10 page 14. That is your signature?

11 A. Yes, it is.

12 Q. Okay. So you reviewed this application, as you
13 review other applications?

14 A. Yes.

15 MS. MORENO: Okay. Thank you very much.

16 HEARING OFFICER FELTON: Anything else, Ms. Moreno?

17 MS. MORENO: No, not for this witness.

18 HEARING OFFICER FELTON: Mr. Roosevelt, any
19 cross-examination?

20 MR. ROOSEVELT: Yes. Thank you.

21 CROSS EXAMINATION

22 BY MR. ROOSEVELT:

23 Q. If I may, Mr. McSwiggin, would you turn to pages
24 four and five of the record that has just been handed to

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1 you?

2 A. Yes.

3 Q. Thank you. And whose notes are these? Do you

4 know who the writer was of this two page statement?

5 A. Yes, I do.

6 Q. Who was that?

7 A. It was Blaine Kinsley, a member of my staff.

8 Q. All right. Are you in agreement with Mr. Kinsley
9 on what is stated there?

10 A. Yes, I am, except to the extent of the stipulation
11 earlier this afternoon.

12 Q. Do you agree with his statement that the reviewer
13 does not dispute that the building and containment
14 structure prevent stormwater from being contaminated by
15 contact with fueling activities?

16 A. Do I agree with that?

17 Q. Yes.

18 A. Yes.

19 HEARING OFFICER FELTON: Where is that passage that
20 you are referring to?

21 MR. ROOSEVELT: The bottom of page four and the top
22 of page five.

23 HEARING OFFICER FELTON: Thank you.

24 Q. (By Mr. Roosevelt) Directing your attention just

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1 below that, the second complete sentence, do you agree
2 with the statement that it appears that the primary
3 purpose of the steel building is to shelter fueling
4 activity workers from adverse weather conditions?

5 A. Yes, I agree with that.

6 Q. Do you know whether Blaine Kinsley had gone to the
7 site to inspect it before he made these conclusions?

8 A. To the best of my knowledge, he did not go to the
9 site.

10 Q. Had he interviewed the manager of Kendall-Grundy
11 FS or any of its employees before he reached these
12 conclusions?

13 A. Not to my knowledge.

14 Q. You have heard -- let me ask you, have you
15 established any rules or regulations that assist you or
16 the public in determining what constitutes a primary, the
17 definition of a primary purpose under this statute?

18 A. No, we have not.

19 Q. Do you have any rule or regulation or any other
20 authority that supports your opinion as to what the
21 primary purpose of this steel containment structure is?

22 A. Other than the statute itself, no.

23 Q. You have heard that the bulk fertilizer facility
24 there at Mazon has a structure over it which has been

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1 approved. Are you familiar with that structure?

2 A. I did not check the records on that case prior to
3 this hearing.

4 MR. ROOSEVELT: May I have a document marked?

5 (Whereupon said document was duly marked for purposes
6 of identification as Exhibit 17 as of this date.)

7 Q. (By Mr. Roosevelt) Mr. McSwiggin, I have handed
8 you Exhibit 17. Is that a document that you prepared?

9 A. Yes, it is.

10 Q. And in it did you approve an application for a
11 portion of a building over liquid fertilizer, a bulk
12 distribution building?

13 A. Yes, we did. It is described as a portion of the
14 building over one liquid agri-chemical operational
15 containment structure.

16 Q. All right. Thank you.

17 HEARING OFFICER FELTON: Are you moving that into
18 evidence?

19 MR. ROOSEVELT: I move its introduction.

20 HEARING OFFICER FELTON: Do you have any objection to
21 that?

22 MS. MORENO: Yes. I have a -- I would not mind this
23 going into the record if we also had the application with
24 it. The problem is that this is a -- I know there has

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1 been some testimony about ag-chem facilities and this is
2 an ag-chem facility, but it does not specify what parts
3 were approved, what parts were not approved. I am not
4 sure that this is going to -- that by itself it is going
5 to assist the Board in any way.

6 HEARING OFFICER FELTON: Mr. Roosevelt, do you have a
7 response to that?

8 MR. ROOSEVELT: I do. His testimony has been on
9 direct examination that he has approved roofs over ag-chem
10 facilities or portions of roofs where there was material
11 there that was subject to degradation that were packaged
12 in paper. So I want simply to present this as
13 certification which on its face shows a roof over an
14 ag-chem facility that involved liquid bulk storage.
15 Obviously, I think that this is cross-examination and it
16 goes to his inconsistency here and what he testified to
17 earlier.

18 MS. MORENO: The thing is, though, if we look at the
19 text of this, it is the liquid agri-chemical operation
20 area. And as I understand it, the operational area is
21 where they actually do the mixing. It is not simply a
22 storage area. So, again, my understanding is that when
23 you are mixing -- and I may be completely wrong here. But
24 my understanding is that when you are actually mixing the

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1 chemicals, you would actually have the barrels or whatever
2 open and you would be mixing them and people would be
3 doing things. Whereas, as I understand here, what we have
4 is pipes, tubing, that come in from the outside, the
5 outside tanks into the truck, and that the only time that
6 oil would be exposed to the elements, as it were, is if it
7 were spilled from the truck. I think that's a quite a bit
8 different case than actually mixing the fertilizers and,
9 you know, putting together different people's blends for

10 different purposes.

11 MR. ROOSEVELT: This is mixing liquids, and Mr.
12 Bonneur testified that in the ag-chem liquid type
13 facility, they are moving it from container to container,
14 but it is a liquid, so it is not subject to -- I think
15 that's the same argument here. It is the same thing as
16 gas or oil. It is a liquid. If that's what is happening,
17 then if it is approved in one facility where it is being
18 mixed or transferred then it ought to be approved in
19 another. That's our argument, just so the Hearing Officer
20 understands.

21 MS. MORENO: Sure. And my position is that mixing
22 and transferring, in this context, are two different
23 things.

24 HEARING OFFICER FELTON: I appreciate both of your

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1 arguments. I am going to admit it. I think that it can
2 at least be admitted to possibly establish some
3 inconsistency in the statement, but I would also open the
4 opportunity for you, Ms. Moreno, to file the application
5 as well in your post hearing brief.

6 MS. MORENO: I would be glad to.

7 HEARING OFFICER FELTON: And then the Board can make
8 a determination as to what sort of weight they are going
9 to give this exhibit, if anything.

10 MS. MORENO: Thank you very much.

11 HEARING OFFICER FELTON: So Exhibit 17 is admitted
12 into this record.

13 (Whereupon said document was admitted into evidence
14 as Exhibit 17 as of this date.)

15 HEARING OFFICER FELTON: Okay. Mr. Roosevelt, do you
16 have -- make sure that we get the original of that one.

17 MR. ROOSEVELT: Yes.

18 Q. (By Mr. Roosevelt) Mr. McSwiggin, I have already
19 asked you this, but on the question of the liquid
20 fertilizer facility, the bulk fertilizer distribution at
21 Mazon, are you familiar with that facility or have any
22 recall of it?

23 A. At Mazon?

24 Q. At Mazon.

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1 A. No, I do not.

2 Q. Do you recall approving the confinement building
3 over that bulk fertilizer distribution area?

4 A. No, I do not.

5 HEARING OFFICER FELTON: Anything further, Mr.
6 Roosevelt?

7 MR. ROOSEVELT: No, Your Honor. Thank you. That's
8 it.

9 HEARING OFFICER FELTON: Ms. Moreno?

10 MS. MORENO: Yes, just a couple things on redirect.

11 REDIRECT EXAMINATION

12 BY MS. MORENO:

13 Q. Mr. McSwiggin, when you make your decision on
14 primary purpose, what do you take into account?

15 A. What do I take into account?

16 Q. Yes.

17 A. What are we trying to achieve with this particular
18 structure or piece of equipment. Are we actually serving
19 as a primary purpose the prevention of rain water from
20 getting access to an area where it could pick up and move
21 contaminants out and to cause water pollution. Or if it
22 is a piece of equipment, is the sole purpose of that piece
23 of equipment treatment, or is the major purpose of that
24 piece of equipment treatment.

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1 Q. So this is a test that you have applied
2 consistently over your --

3 A. Yes.

4 Q. And are you familiar with any of the cases that
5 have been decided under the statute?

6 A. Yes.

7 Q. And have you taken the results of those cases into
8 account?

9 A. Yes.

10 MS. MORENO: Thank you.

11 HEARING OFFICER FELTON: All right.

12 MR. ROOSEVELT: No further cross.

13 HEARING OFFICER FELTON: Okay. Anything further,

14 then, for Mr. McSwiggin?

15 Okay. Thank you, Mr. McSwiggin.

16 (The witness left the stand.)

17 HEARING OFFICER FELTON: Your next witness, Ms.

18 Moreno.

19 MS. MORENO: The Agency would like to call Mr. Blaine

20 Kinsley.

21 HEARING OFFICER FELTON: Okay. We will have the

22 witness sworn in.

23 (Whereupon the witness was sworn by the Notary

24 Public.)

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1 B L A I N E K I N S L E Y ,

2 having been first duly sworn by the Notary Public, saith

3 as follows:

4 DIRECT EXAMINATION

5 BY MS. MORENO:

6 Q. Would you state your name, please.

7 A. Blaine Kinsley.

8 Q. And your address?

9 A. My address is 1805 South Whittier, Springfield,

10 Illinois.

11 Q. And are you employed, Mr. Kinsley?

12 A. Yes.

13 Q. Where are you employed?

14 A. I am employed with the Environmental Protection

15 Agency, the Division of Water Pollution Control, the

16 Permit Section.

17 Q. How long have you been so employed?

18 A. Approximately four years.

19 Q. And would you please tell us your educational
20 background?

21 A. I have an engineering degree from the University
22 of Missouri-Rolla.

23 Q. And as part of your duties as a permit engineer,
24 do you have occasion to review tax certifications?

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1 A. Yes, I do.

2 Q. And could you tell me approximately how many you
3 have reviewed?

4 A. I get one to two a year to review, so I guess that
5 would work out between four and six probably in the time
6 that I have been here.

7 Q. You are not the only person that reviews tax
8 certifications?

9 A. No, I am not.

10 Q. Okay. I would like to direct your attention to
11 the answer and record. I would like to have you look at
12 pages four and five, and could you tell me if these are
13 your review notes?

14 A. Yes, they are.

15 Q. And the review aspect sets out your analysis as to
16 the -- as to what should be certified?

17 A. Yes.

18 Q. Okay. Now, keeping in mind that we have
19 previously stipulated that the concrete pad is a -- is
20 certifiable as a pollution control device, let me ask you
21 about your reasoning with respect to the structure and the
22 roof.

23 A. Do you want me to give you a narrative about that?

24 Q. Yes, give me a narrative about that.

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1 A. I reviewed the information that was submitted with
2 the application. They are talking about a concrete with
3 what they term a containment structure. It appeared to me
4 that the steel building was the same size as the pad, 40
5 by 60. And I made a determination, based on the
6 information that I received, that it appeared to me that
7 the structure over the pad was most likely as its primary
8 purpose under the definition that I was given to protect
9 the workers in their fueling activities from the freezing
10 weather, rain, whatever.

11 Q. Now, you did not go out and look at this yourself?

12 A. No, I did not.

13 Q. Would it be usual for you to go out on a site?

14 A. No, no. I did talk to Mr. Keith Honager (spelled
15 phonetically). He called. I guess he is the one who
16 submitted the application. I talked to -- he actually
17 called me and was just inquiring about, you know, what the
18 status of the review was. But that's the only person that

19 I talked to in connection with the Kendall-Grundy
20 facility.

21 Q. To your recollection did you discuss the physical
22 appearance?

23 A. No, he just asked me how it was going or, you
24 know, if it was going to be issued soon.

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1 Q. Out of curiosity, have you reviewed any other of
2 these types of fuel --

3 A. No, this is the first one.

4 MS. MORENO: Those are all of the questions I have.

5 MR. ROOSEVELT: Thank you.

6 CROSS EXAMINATION

7 BY MR. ROOSEVELT:

8 Q. Mr. Kinsley, you didn't speak with anyone from
9 Kendall-Grundy FS about the facility?

10 A. Not from Kendall-Grundy, specifically, no.

11 Q. Well, did you speak to anyone else about the
12 facility and its design?

13 A. Not as far as the design, no.

14 Q. You didn't go look at it, right?

15 A. No.

16 Q. And your engineering degree was at Mazoo, right?

17 A. No, the University of Missouri-Rolla. It is a
18 separate campus.

19 Q. Was it in ag engineering?

20 A. Geological engineering.

21 Q. Let me ask you this. You said that you didn't
22 have anything other than the definition that was given to
23 you of what a primary pollution source was?

24 A. Right, right. In my notes I didn't dispute that

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1 it kept rainwater from being in contact.

2 Q. Right. But what definition was given to you?

3 A. Well, just that -- what I was referring to is the
4 regulation that states it has to have as its primary
5 purpose pollution control.

6 Q. That would not be a regulation, right?

7 A. Let's see. I think I stipulated that in my review
8 notes. 35 --

9 Q. You would be referring to the statute, correct?

10 A. Oh, okay. Sure.

11 Q. I was confused, because I had asked Mr. McSwiggin
12 if there was any regs and he said there were not. So you
13 are referring simply to the statute?

14 A. Yes.

15 Q. You, though, in your report on page five did say
16 on the last sentence that the primary purpose of the
17 concrete structure appears to be to provide a stable
18 platform for fueling activities. Can you tell me how you
19 came to that conclusion?

20 MS. MORENO: I think we have stipulated that.

21 MR. ROOSEVELT: You did, but I am asking how he

22 concluded that.

23 MS. MORENO: Oh, okay.

24 THE WITNESS: Well, like I stated earlier, it looked

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1 like it was sitting on top of the pad. I know earlier you
2 discussed that these buildings basically hung over the
3 sides to add a buffer zone. This one looked like it was
4 sitting right on top of the pad from the description. So
5 that was, I think, the basis of my decision.

6 Also when you have trucks, eighteen wheelers or big
7 storage trucks pulling in and out, you to need to provide
8 a stable platform, otherwise the ground underneath would
9 get ripped up pretty easily, so you would have to maintain
10 it.

11 Q. (By Mr. Roosevelt) The concrete structure, though,
12 here is one used for pollution confinement, do you agree
13 now at this date?

14 A. I concur with that decision.

15 Q. You, in your report, at page four and five, at the
16 bottom of four and the top of five, state that the
17 building and structure prevent stormwater from being
18 contaminated by contact with fueling activities. That is
19 your position today?

20 A. Yes.

21 Q. Based upon your familiarity with 40 CFR 112 and
22 runoff of fuels and oil contaminants, would you not agree

23 that that would be a major concern for FS, that stormwater
24 not be contaminated by contact with fueling activities?

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1 MS. MORENO: I am not sure that Mr. Kinsley has
2 testified about familiarity with 40 CFR 112.

3 HEARING OFFICER FELTON: Maybe you should ask whether
4 he is familiar.

5 Q. (By Mr. Roosevelt) Are you familiar with the --

6 A. No, I am not.

7 Q. So you would not, in making your analysis here or
8 finding, have considered 40 CFR 112 and the federal Spill
9 Prevention Control and Countermeasure regulations?

10 A. No.

11 Q. Did you interview any workers or anybody in
12 management as to how and why that would lead you to your
13 conclusion regarding the need to protect workers from
14 adverse weather?

15 A. What management and workers are you talking about?

16 Q. Well, did you talk to anyone associated with FS or
17 Growmark Companies asking anyone for any information that
18 led to your conclusion that the primary purpose of the
19 steel building was to shelter fueling activity workers
20 from adverse weather conditions?

21 A. No.

22 Q. Do you have any information that you relied upon
23 that you can point to today that led to that conclusion?

24 A. I guess the closest thing I could liken it to

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1 would be the fueling -- say, like a truck stop, where you
2 have shelter over the people fueling.

3 Q. All right.

4 A. That would be its primary purpose.

5 Q. That would be from your experience going into
6 truck stops and seeing canopies over gas pumps; is that
7 right?

8 A. Primarily, yes.

9 MR. ROOSEVELT: That completes my questions. Thank
10 you very much.

11 HEARING OFFICER FELTON: Anything else?

12 MS. MORENO: No, I don't have anything.

13 (The witness left the stand.)

14 HEARING OFFICER FELTON: All right. Do you have any
15 other witnesses?

16 MS. MORENO: No, I don't. That completes our
17 witnesses.

18 HEARING OFFICER FELTON: Any other matters for us to
19 proceed with before going on to closing statements?

20 MR. ROOSEVELT: No, I don't believe so. Thank you.

21 HEARING OFFICER FELTON: All right. Mr. Roosevelt,
22 when you are ready, if you have a brief -- or a closing
23 statement -- excuse me -- brief or not. That is fine.

24 MR. ROOSEVELT: Brief is a good suggestion.

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1 HEARING OFFICER FELTON: Whatever length of time you
2 need, please take it.

3 MR. ROOSEVELT: The Board will have heard two cases
4 here, and we respectfully suggest that the evidence here
5 is compelling that the Spill Prevention Control and
6 Countermeasures contained in 40 CFR 112 are regulations
7 that are in the minds of FS as they design. The
8 agricultural engineer has worked in this area many years,
9 and has explained exactly how the facility was designed.
10 He was asked directly what happens when we take away the
11 steel structure. And he explained very directly that
12 stormwater contamination then is a very big problem. It
13 cannot be handled given the present design of the
14 facility. The design of the facility is such that the
15 overhead steel building is an integral component of those
16 measures to secure the facility from the rainwater
17 invasion, to secure the fuel, to secure it from running
18 off and polluting the environment. That is why the
19 facility was designed as it was designed.

20 There is absolutely no evidence in this record that
21 supports the contention that this is for the benefit or
22 somehow for the convenience of the workers. No one from
23 FS was interviewed by Mr. Kinsley. No one in the field
24 was interviewed by Mr. Kinsley, no workers, no management.

1 The testimony is clear from management here, Mr. Bonneur,
2 who has been in this business for 20 years or more, that
3 for most of the time these fueling activities and the
4 workers have been outdoors, doing it in the outside,
5 exposed to the elements, and they have done their job.
6 And it is simply not correct that FS does this to make
7 them more comfortable or to in some way protect them from
8 adverse weather conditions.

9 The fact is that FS is doing this to protect and
10 avoid the spills that we are talking about, that is the
11 primary purpose. We don't have any regulations to define
12 primary. It appears to be awfully subjective in that
13 instance. Mr. Kinsley, when asked how he drew that
14 definition of primary, points to the statute, and that's
15 all we can point to here. As to how he drew the
16 conclusion on primary purpose of the steel buildings as
17 being to shelter the workers from adverse weather, he
18 points to his personal experience of seeing truck stops
19 and canopies over truck stops.

20 But I respectfully suggest that the record has
21 demonstrated what, in fact, these buildings are here for
22 and that is to protect from contamination from stormwater
23 and runoff, and it has nothing to do with these workers or
24 canopies similar to truck stops or any other similar

1 concerns. And I would suggest that our evidence, I think,
2 is overwhelming and conclusive that this should fit within
3 the primary definition, and the legislature has set this
4 up as public policy of Illinois that we encourage people
5 to invest these sums of money on pollution control
6 facilities, and was set up to somehow obviate the burden
7 that causes businesses such as FS, and respectfully
8 suggest that whether that causes any ramification on
9 taxing bodies or revenues or tax receipts cannot be a
10 consideration. Simply put, the legislature and the
11 governor had an opportunity to consider that when they
12 passed this legislation. And the sole issue here is one
13 of carrying out the intent when we do have pollution
14 control facilities built and constructed, such as here, to
15 somehow obviate that cost. Thank you.

16 HEARING OFFICER FELTON: Thank you. Ms. Moreno?

17 MS. MORENO: Yes. As Mr. McSwiggin testified, the
18 Agency has reviewed over 400 -- over the years over 400
19 tax certifications, and has consistently applied the
20 primary purpose test as set out in the statute and as he
21 testified as explicated by the Courts.

22 The primary purpose test is actually, we believe, an
23 objective test and the burden is on the Petitioner to show
24 that the operational primary purpose of those roofs are to

1 prevent pollution. The fact that they may disagree with
2 us over the protection of workers, I think that comes down
3 to on the one hand a question of perhaps motive instead of
4 operational purpose, but it does not matter. The Agency
5 could very well be incorrect that FS is not particularly
6 concerned about its workers, and I don't say that in a
7 condemning way.

8 On the other hand, that does not change the
9 fundamental question, which is what is the primary purpose
10 of this particular roof, and when we look at the roof and
11 we contrast it with the secondary containment structures,
12 for example, around the tanks where it is perfectly clear
13 that those concrete -- the purpose of those concrete walls
14 is to prevent the spills from leaking out onto the ground
15 and eventually potentially into the groundwater. The real
16 testimony that we have heard today has been, well, the
17 roofs are basically there to keep water from getting mixed
18 with the oil and having to be pumped out, because it is
19 more expensive. I think everybody pretty much testified
20 to that effect.

21 And I have -- the Agency has no dispute that taking
22 care of oil mixed with water is more difficult than taking
23 care of oil by itself. But preventing the oil from mixing
24 with water so that it is easier to handle and you don't

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1 have to pay as much is, we would argue, not the type of
2 primary purpose that is contemplated in the statute.

3 Thank you.

4 HEARING OFFICER FELTON: All right. Thank you both.
5 It is my understanding that the transcript in this matter
6 will be available on August 2nd. The parties have
7 expressed the desire to file post hearing briefs.
8 Accordingly, as we previously discussed off the record,
9 the Petitioner's post hearing brief will be due on August
10 16th. At that time the Petitioner has also agreed to file
11 the original photographs of Exhibits 6 and 7 from the Cass
12 County matter.

13 Respondent's response is due on August 30th. And
14 Petitioner's reply will be due on September 7th. The
15 record, therefore, will close when all briefs are
16 submitted. And the mailbox rule, as set forth at 35
17 Illinois Administrative Code 101.102(d) and 101.144(c)
18 will apply to all post hearing filings. Are there any
19 other matters that we need to discuss regarding this case?

20 MS. MORENO: No. Thank you.

21 MR. ROOSEVELT: I believe not. Thank you.

22 HEARING OFFICER FELTON: Thank you both and everyone
23 for your attendance and participation today.

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1 STATE OF ILLINOIS)
2) SS
3 COUNTY OF MONTGOMERY)

3 C E R T I F I C A T E

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I, DARLENE M. NIEMEYER, a Notary Public in and for the County of Montgomery, State of Illinois, DO HEREBY CERTIFY that the foregoing 66 pages comprise a true, complete and correct transcript of the proceedings held on the 21st of July A.D., 1999, at 600 South Second Street, Springfield, Illinois, in the case of Kendall-Grundy FS, Incorporated v. IEPA, in proceedings held before the Honorable Amy Muran Felton, Hearing Officer, and recorded in machine shorthand by me.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my Notarial Seal this 30th day of July A.D., 1999.

Notary Public and
Certified Shorthand Reporter and
Registered Professional Reporter
CSR License No. 084-003677
My Commission Expires: 03-02-2003