

ILLINOIS POLLUTION CONTROL BOARD

February 17, 2000

KENDALL-GRUNDY FS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 99-98
)	(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 Kendall-Grundy FS, Inc. (Kendall) is an agricultural service cooperative that owns and operates a bulk petroleum storage and transfer facility in Mazon, Kendall 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. Kendall transfers the petroleum from the tanks to trucks for delivery to customers.

In 1998, Kendall 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. Kendall 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 Kendall 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 January 6, 1999, Kendall filed an appeal of the Agency's December 4, 1998 partial denial of Kendall's tax certification application. On January 21, 1999, 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 Kendall and two witnesses appeared for the Agency. Kendall offered six exhibits, all of which were admitted. The Agency offered one exhibit, which was admitted.²

Kendall filed a posthearing brief on August 18, 1999. On January 6, 2000, the Agency filed a response brief, accompanied by a motion for leave to file the brief *instanter*. The Board grants the motion. Kendall filed a reply brief on January 14, 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 Kendall's tax certification application as well as the evidence presented at the July 21, 1999 hearing. See Cass County Service Company v. Illinois Environmental Protection Agency (January 20, 2000), PCB 99-031, slip op. at 2 (citing 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)).

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

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

³ Kendall's posthearing brief is cited as "Pet. Br. at _;" the Agency's response brief is cited as "Resp. Br. at _."

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).

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

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

The facility contains eight steel tanks to store the petroleum product. Tr. at 13. All eight tanks are located inside a concrete dike. A 40 feet by 60 feet steel building covers the steel tanks, the concrete dike, and the facility's 36 feet by 40 feet concrete spill pad. The steel building has a roof, sidewalls, and 14 feet by 14 feet entrance doorways. Tr. at 13, 16, 34; Pet. Exh. 6, 14, 15.

The concrete dike and spill pad are secondary containment structures. The dike is located around and underneath the petroleum storage tanks. Kendall installed the spill pad to contain spillage incident to transferring petroleum product to and from the tanks. Tr. at 23. The steel building was part of the overall design to control pollution at the facility. Specifically, Kendall 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 23-24, 29.

Spilled petroleum product and rainwater in this area accumulate in a concrete trench. The trench contains a sump pump that Kendall uses to pump the material from the trench. If petroleum and rainwater commingle, Kendall cannot return the material to the tanks. Kendall has incurred additional expense to dispose of such material at an offsite facility. Tr. at 24-25, 30-31.

Product can be loaded and transferred without the building. Tr. at 21. For approximately 50 years before the 1995 construction of the building, Kendall conducted its fuel distribution activities at this location without an enclosure. Tr. at 31-33. In the past, Kendall's engineers designed bulk petroleum facilities without steel buildings to cover loading and unloading operations. These bulk petroleum facilities were capable of operating in an open environment. Tr. at 24-25.

Kendall 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. The building's design took into account concerns arising out of a United States Environmental Protection Agency enforcement action involving alleged violations of 40

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.

C.F.R. 112 at Hancock's fuel loading and unloading facility in Hancock County, Illinois. Tr. at 21-22.

By covering Kendall's 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 14, 20-22. Absent the steel building, Kendall would have to increase its containment capacity to avoid an overflow of petroleum-impacted rainwater, and install an oil-water separator for accumulated petroleum and rainwater. Tr. at 20-21.

On April 16, 1998, the Agency received Kendall's application for property tax certification of the dike, spill pad, and steel building as pollution control facilities. R. at 1. On December 4, 1998, the Agency granted tax certification status for the dike and spill pad, but denied that status for the steel building. R. at 6-9.

The Agency acknowledged that the steel building aids in the prevention of stormwater becoming contaminated with fueling activities. Tr. at 59. The Agency determined that the primary purpose of the structure is to shelter workers from the weather during fueling activity. Tr. at 59, 60-61; R. at 4-5. Agency representatives did not inspect Kendall's facility, interview Kendall's employees, or review design plans for the steel building.

Kendall operates an agrichemical facility in Mazon, Illinois. Tr. at 47-48. At this facility, Kendall mixes and stores agrichemicals and fertilizers. On January 2, 1996, Kendall applied with the Agency to certify, among other things, the building covering certain of its operations as a pollution control facility for tax purposes. Tr. at 48; Pet. Exh. 17; Resp. Br., Exh. C. On September 6, 1996, the Agency certified, among other things, the portion of the building that covers certain containment structures. Tr. at 48-50; Pet. Exh. 17.

DISCUSSION

The issue presented to the Board is whether the steel building that covers Kendall's 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 Kendall's facility constitutes "water pollution" as defined in the Act. See *Supra* p. 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 Kendall to continue operating the

facility during adverse weather, rather than to control pollution. Kendall argues that the steel building was designed and constructed primarily to control water pollution. Larry Sands (Sands), Kendall's design engineer, testified as follows:

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

* * *

But if we didn't have the building there, we would have to redesign that, because it would not be adequate storage to also handle rain falls that could happen, when we could have a situation where the pad would overflow. Tr. at 20-21.

Sands also testified that if rainwater comes into contact with petroleum on the concrete pad, Kendall pumps out the mixture and disposes it offsite at cost. Tr. at 31. Sands testified further that the facility would not only have to increase its containment capacity in the absence of the steel building, but it would also have to install an oil-water separator for accumulated petroleum and rainwater. Tr. at 21.

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 Kendall to continue operating in inclement weather. In fact, the evidence shows that such facilities can operate in an open environment. The Agency does not dispute that, without the building, the existing containment capacity may result in overflows. It is also undisputed that rainwater can enter the petroleum handling area at Kendall's facility and commingle with spilled petroleum. If this happens, Kendall pays to dispose of the accumulation of petroleum-impacted water at an offsite facility. Tr. at 25, 31. The record shows that Kendall designed and built the steel building to prevent or reduce this water pollution.

Kendall also contends that the steel building's design takes into account the federal SPCC requirements at 40 C.F.R. 112 and concerns arising out of the enforcement action against Hancock involving these regulations. Pet. Br. at 11. The 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 Kendall 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 Kendall's position.

Kendall further argues that the Agency's 1996 tax certification of a portion of the building at Kendall's agrichemical facility supports Kendall's position in this appeal. Tr. at 50.

The Agency argues that its 1996 certification is irrelevant to this case because in that case the building covers an area where chemical containers are opened and chemicals are mixed. The Agency emphasizes that in the instant case, the fuel is inside storage tanks, piping, or trucks. Resp. Br. at 12. The Board disagrees with the Agency. The Agency's argument ignores the fact that spillage of petroleum occurs at the bulk petroleum facility. Accordingly, at both facilities, the need to control water pollution is present.

The Board's decision here is consistent with its recent decision in Cass County Service Company v. Illinois Environmental Protection Agency (January 20, 2000), PCB 99-31. In Cass County, the Board was faced with the analogous issue of whether a steel building over a bulk petroleum operation was designed and constructed for the primary purpose of preventing or reducing water pollution. That case presented essentially the same facts as those presented here. In Cass County, the Board disagreed with the Agency's decision and held that the steel building is a pollution control facility. In concluding that its decision is consistent with appellate court case law, the Board found that Cass' building is a component of Cass' "system" for controlling water pollution -- a system that also includes a dike area and spill pad. See Cass County, PCB 99-31, slip op. at 6 (analyzing Beelman Truck Co. v. Cosentino, 253 Ill. App. 3d 420, 624 N.E.2d 454 (5th Dist. 1993); Wesko Plating, Inc. v. Department of Revenue, 222 Ill. App. 3d 422, 584 N.E.2d 162 (1st Dist. 1991)). Likewise, Kendall uses the building, dike area, and spill pad as its system for controlling water pollution. The building is a component of this system.

CONCLUSION

The Board disagrees with the Agency's decision to deny tax certification status for Kendall's 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, 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). Kendall built the steel building in 1995 and the Agency received Kendall's 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

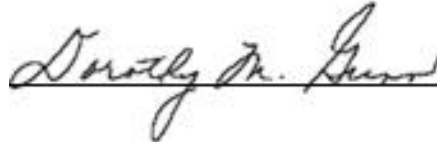
1. The Board certifies that Kendall's steel building is a pollution control facility under the Property Tax Code (35 ILCS 200/11-10 (1998)). The effective date of this certification is April 16, 1998.

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 17th day of February 2000 by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board