BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NACME STEEL PROCESSING, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 15-153
	)	(Permit Appeal-CAAPP)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

NOTICE OF SERVICE

To: See Attached Service List
(VIA ELECTRONIC FILING)

PLEASE TAKE NOTICE that I have today filed with the Illinois Pollution Control Board, the **AGENCY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT.**

Respectfully submitted,

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Date: July 31, 2015

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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on July 31, 2015, I served true and correct copies of the **AGENCY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT**, upon the persons and by the methods as follows:

[First Class U.S. Mail]

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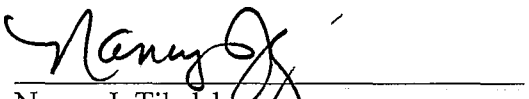

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AGENCY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

Now Comes Respondent, Illinois Environmental Protection Agency ("Agency"), by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, and pursuant to 35 Ill. Adm. Code 101.500(a), provides its Reply to NACME Steel Processing, L.L.C., ("Petitioner" or "Nacme") Response to Motion for Summary Judgment in this matter ("Response"). The Agency Administrative Record[1] ("Record") shows there is no genuine issue of material fact and the Agency properly found that the Petitioner's oil coating operation is subject to the New Source Performance Standards[2]: Standards of Performance for Metal Coil Surface Coating pursuant to 40 CFR[3] 60 Subpart TT ("coating rule"), as set forth in special conditions 2a and 2b of Federally Enforceable State Operating Permit[4] No. 031600FWL issued on December 22, 2014 ("Nacme FESOP").

Hence, the Agency is entitled to summary judgment as a matter of law, and to a ruling upholding the Nacme FESOP as issued. The Agency provides its Reply in Support of Its Motion for Summary Judgment ("Reply") as follows:

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[1] See Record previously filed March 10, 2015 with the Illinois Pollution Control Board ("Board")
[2] ("NSPS")
[3] Code of Federal Regulations ("CFR")
[4] ("FESOP")

The Agency repeats and incorporates by reference herein its Motion for Summary Judgment filed on May 4, 2015 ("MSJ").[5]

I. There are No Genuine Issues of Material Fact

The Board should find there is no genuine issue of material fact, and grant the Agency's MSJ as a matter of law. The Response requests that the Board deny the Agency's MSJ and enter judgment in favor of Petitioner by removing special conditions 2a and 2b from Nacme's FESOP.[6] In its Response, Petitioner fails to dispute there is any genuine issue of material fact. Instead, Petitioner adds for the Board's consideration additional facts not found in the Record and requests judgment in its favor as a matter of law.

Furthermore, the Petitioner presents legal arguments in its Response and asks for the Board to base its determination solely on the legal arguments and not because there is a dispute of material fact. Reciprocally, the Agency has no dispute of material fact, as the Record speaks for itself. Accordingly, the Board should find there is no genuine issue of material fact and grant the Agency summary judgment as a matter of law.

II. The Petitioner's Affidavit Facts Not in the Record are Not Admissible Facts for a Permit Appeal

The Board should strike the Affidavit of John DuBrock[7] attached as Exhibit A of the Response. The Petitioner should not be allowed to submit the DuBrock Affidavit,[8] given it includes information that was not part of the Record. Section 105.214 (a) of the Board's Procedural Rules, 35 Ill. Adm. Code 105.214(a), requires that a hearing of a Permit Appeal "will be based exclusively on the record before the Agency at the time the permit or decision was

[5] See Agency's MSJ previously filed with the Board.
[6] See Response at page 11.
[7] See Petitioner's Response, Exhibit A; ("DuBrock Affidavit"), if the Board allows it.
[8] See Response at Exhibit A.

issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act.[9]" *Emphasis added.*

In *Alton*, the court found that the admission of evidence in Board hearings on a permit appeal was to test the validity of the information relied upon by the Agency and not to allow supplementing the record with new matter that had not been considered in the Agency at the time it denied a permit, See *Alton Packaging Corp. v. Pollution Control Bd.*, 162 Ill. App. 3d 731, 738-39, 516 N.E.2d 275, 280 (1987) (citing *E.P.A. v. Pollution Control Bd.*, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986)). The *Alton* Court also found *Alton* was afforded an adequate opportunity to challenge the reasons given by the Agency for its permit denial. Id.

Moreover, in *Alburn*, the court denied supplemental material where the parties were not in agreement and found that the Board's review of the Agency's permit denial was limited to consideration of material relied upon by the Agency at the time it made its permit decision. *Alburn, Inc. v. Illinois Environmental Protection Agency*, 1982 WL 25362, at *1.

In this instance, where fact statements in DuBrock's Affidavit are not a part of the Record, the Agency neither agreed to supplement the Record with this information nor considered it when it made its decision regarding the Nacme FESOP. Many of the statements made in the DuBrock Affidavit were not a part of Nacme's FESOP application or subsequent submittals to the Agency that the Agency considered when making its Nacme FESOP decision. Petitioner failed to cite to the Record where each factual statement in the DuBrock Affidavit can be found in the Record. Consequently, to the extent that the information in DuBrock's Affidavit is a material fact that was not in the Record, and is supplemental information where the parties were not in agreement to add to the Record, it should not be considered by the Board in this proceeding.

[9] 415 ILCS 40(d)

Finally, to the extent that the DuBrock Affidavit is providing a legal conclusion, such conclusions should be given no weight by the Board, as these are the very matters pending review. The Agency respectfully request that the Board strike the DuBrock Affidavit attached as Exhibit A of the Response.

III. The Agency Correctly Interprets the Coating Rule.

The Agency presents an expanded explanation of its correct interpretation of the coating rule to the Petitioner's coating operation. The Agency previously, but briefly, noted in its MSJ that the ambiguity of the coating rule definitions required it to consult USEPA Applicability Determinations ("AD") for an interpretation. In contrast, Petitioner wrongly argues that only a single ambiguous definition of the coating rule is considered where several definitions must be considered in concert when making a determination of whether the coating rule applies to its coating operation.[10] Additionally, the Petitioner cites to 2 cases where the rules using a conjunction were clearly unambiguous. That is not the case here.

Given the various applicable coating rule definitions, it is a tenuous interpretation that the coating rule is not applicable to a metal coil coating operation that simply did not have all three components[11] in the list of a single definition, "finish coat operation," even if it met all the other criteria in the related coating rule definitions.[12] Understandably, the Agency looked to the USEPA for guidance. The Agency is the delegated authority to administer and enforce the federal NSPS coating rule as part of its delegation agreement with the USEPA.[13] Thus, the Agency is required to consult with the USEPA on the appropriate interpretation of applicable regulations. This includes the necessary review of relevant AD previously made by the USEPA.

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[10] See Response at 5; and SMJ at 7-9 and 11-13.
[11] "...coating application station, curing oven and quenching station...." See 40 CFR § 60.461.
[12] See SMJ at 12-13.
[13] 40 C.F.R. § 52.722

As discussed in the MSJ, the USEPA had previously determined the coating rule applied to a metal coil coating operation that had neither a flash off area nor a curing oven.[14] Specifically in this AD, the USEPA stated that "[T]he intent of subpart TT is to regulate VOC[15] applied and not VOC emitted from application."[16] *Emphasis added.* Similarly, in another AD, the USEPA found that an ink application process was subject to the coating rule. See *Response to 3M Request for Several MACT/NSPS Applicability Determinations,* USEPA, http://tinyurl.com/qafsoh9 and choose Control #1400018, question 4, page 3, August 9, 2013. In this AD, the USEPA found that ink containing VOC applied to steel coils during a printing process a "coating" and "coating application station" and, therefore, subject to the coating rule. Id.

In these analyses by USEPA, the coating operations failed to contain all 3 components (coating application station, curing oven and quenching station) and, yet, the USEPA determined the coating rule applied. Instead, the determining factor was clearly that each coating operation contained a coating application station that applied a VOC to the surface of a continuous metal strip packaged in a coil or roll.

Similarly, Nacme's coating operation applies oil, an organic coating and VOC, to the surface of a continuous metal strip and packaged in a coil. Like Nacme's coating operation each of the facilities reviewed by the USEPA AD facilities did not have all 3 of the components, a coating application station, curing oven and quenching station, listed in the definition of "prime coating operation" or "final coating operation." Yet, the USEPA found that NSPS coating rule applied to these facilities. Clearly, USEPA finds the intent of the coating rule to regulate the

[14] See SMJ at 13 – 14; See Record pages 108 – 110 (USEPA would not find a testing protocol inadequate for a coating operation under the coating rule if the coating rule were not applicable).
[15] Volatile Organic Compound.
[16] See FN 12.

application of VOC a critical element in determining the applicability of the NSPS coating rule to effectuate the Act and Regulations.

Here, Petitioner is applying a VOC during its oil coating operation. Where only a single organic coating is applied to a metal coil at a coating application station, it is a "finish coating operation." Accordingly, appropriately applying all the definitions of 40 CFR § 60.461 together that define the application of organic surface coatings to metal coils, and further considering the appropriate interpretation of the regulations and the intent of the rule previously articulated by USEPA in its AD, the Agency correctly found the coating rule applicable to Petitioner's coating operations.

IV. Conclusion

For the reasons previously stated in its MSJ and the additional reasons stated in its Reply herein, the Record shows there is no genuine issue of material fact. Moreover, the Petitioner has failed to sustain its burden of proof that special conditions 2a and 2b of the Nacme FESOP setting forth the coating rule are not applicable to its oil coating operation. Instead, a review of the regulatory language in conjunction with the material in the Record demonstrates that the Special Conditions, which incorporate the coating rule, are applicable to Nacme's oil coating operation and necessary to effectuate the purpose of the Act and regulations.

Therefore, the Agency requests that the Board enter an order: 1) finding that the Agency is entitled to summary judgment as a matter of law; 2) granting the Agency's Motion for Summary Judgment; and 3) denying the Petitioner's request to remove the Special Conditions from the Nacme FESOP.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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