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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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| **NACME Steel Processing, L.L.C.,** | ) | |
| | ) | |
| *Petitioner,* | ) | |
| | ) | |
| v. | ) | PCB No. 15-153 (Permit Appeal) |
| | ) | |
| **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,** | ) | |
| | ) | |
| | ) | |
| *Respondent.* | ) | |

**NACME STEEL PROCESSING INC.'S RESPONSE TO**
**MOTION FOR SUMMARY JUDGMENT**

Petitioner NACME Steel Processing, L.L.C. ("NACME"), by its attorneys, Reed Smith, LLP., responds to the Illinois Environmental Protection Agency's (the "Agency") motion for summary judgment as follows:

## BACKGROUND

As set forth in NACME's underlying Petition for Hearing ("Petition"), the arguments presented by the parties on the Agency's Motion for Summary Judgment ("Motion") are by now familiar to the Board. The Agency's Motion and NACME's Petition recite the back and forth exchanges between the parties on the proper interpretation of 40 CFR 60 Subpart TT (the "Coating Rule") and whether or not it is triggered when NACME applies a rust preventative/lubricating oil to pickled steel at NACME's facility located at 429 West 127th Street, Chicago, Illinois (the "Facility"). NACME contends that the Coating Rule does not apply to its facility and that the Agency's inclusion of special conditions 2a and 2b in the FESOP, further described below, is in error

Following the pickling ("de-scaling") of steel at its Facility, NACME applies either rust preventative oil, lubricating oil, or no oil, depending upon customer specifications. (Affidavit of John DuBrock, par. 5, attached as Exhibit A; hereafter "DuBrock Aff." ¶ __.) The oil is neither cured nor dried. (Id. ¶4.) NACME's Facility does not contain a curing oven or quenching station. (Id.) The oil instead remains on the steel shipped to customers for their particular uses. The oil must be removed from the steel by the customer before being made into a product and before any permanent coating, such as paint or special coatings can be applied. (Id.)

On or about October 2005, NACME applied to the Agency for a Federally Enforceable State Operating Permit ("FESOP") for its Facility. (Agency Mot., at p4.) On or about December 22, 2014, the Agency issued a FESOP for NACME's facility containing various standard and special conditions. (Agency Mot., at p6; a copy of the FESOP is attached to NACME's Petition, and here, as Exhibit B.)

Two special conditions, 2a and 2b, were included in the FESOP based on the Agency's incorrect conclusion, previously debated at length as set forth in NACME's Petition and the Agency's Motion, that NACME engages in a metal coil surface coating operation at its Facility because it applies rust preventative or lubricating oil to some steel coils before shipment to customers.

Conditions 2a and 2b state in relevant part:

> *2a) The coil coater associated with the steel coil pickling line is subject to the New Source Performance Standards (NSPS) for Metal Coil Surface Coating, 40 CFR 60 Subparts A and TT. The Illinois EPA is administering the NSPS in Illinois on behalf of the United States EPA under a delegation agreement. Pursuant to 40 CFR 60.460(a) and (b), the provisions of 40 CFR 60 Subpart TT apply to the following affected facilities in a metal coil surface coating operation:* ***each prime coat operation, each finish coat operation, and each prime and finish coat operation combined when the finish coat is applied wet on wet over the prime coat and both coatings are cured simultaneously*** *that commences construction, modification, or reconstruction after January 5, 1981.*

> *2b) Pursuant to 40 CFR 60.462(a)(1), on and after the date on which 40 CFR 60.8 requires a performance test to be completed, each owner or operator subject to 40 CFR 60 Subpart TT shall not cause to be discharged into the atmosphere more than 0.28 kilogram VOC per liter (kg VOC/1) of coating solids applied for each calendar month for each affected facility that does not use an emission control device(s).* (emphasis supplied)

NACME's previous efforts to convince the Agency that it was misinterpreting Board rules is described in NACME's Petition and in the Agency's Motion. NACME pointed out, among other things, that its Facility does not entail a prime coating or finish coating operation as defined in the Rule, nor does it apply a wet on wet finish coating over a prime coating with curing of both coatings simultaneously so as to invoke the Coating Rule. (Dubrock Aff. ¶ 4.)

## ARGUMENT

### 1. The Agency's Interpretation of the Unambiguous Coating Rule is Wrong

The Agency is plainly wrong in its decision to include special conditions in the FESOP imposing the Coating Rule on NACME's Facility. By the plain language of the Rule NACME does not engage in "coating operations".

The construction of administrative rules and regulations is governed by the same standard as the construction of statutes. *Bridgestone/Firestone, Inc. v. Doherty,* 711 N.E.2d 799, 804 (4th Dist. 1999). In cases involving the interpretation of a statute by an agency charged with administering it, the agency's interpretation is afforded considerable deference, but it is not binding on the court and will be rejected if erroneous. *Denton v. Civil Serv. Comm'n,* 679 N.E.2d 1234, 1236 (1997). The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Solich v. George & Anna Portes Cancer Prevention Ctr. of Chicago, Inc,* 630 N.E.2d 820, 822 (1994) The words of a statute are given their plain and commonly

understood meanings. *Forest City Erectors v Industrial Comm'n*, 636 N.E. 2d 969, 972 (1st Dist. 1994)

The Agency argues that broad public policy considerations justify its expansive interpretation of the Coating Rule, further arguing that the "*Illinois General Assembly intended the Act to be consistent with the Clean Air Act*". (Agency Mot., at p9.) The Agency is wrong in ignoring the basic rules of statutory construction. The Agency also ignores the United States Supreme Court's mandate on the proper interpretation of the Clean Air Act. In *Environmental Protection Agency v Eve Homer City Generation LP,* 134 S. Ct. 1584, 1600 (S Ct. 2014) the Court states that the role of a reviewing court is to *"apply the text [of the statute] not to improve upon it"*. (citations omitted)

In rejecting an appellate court's expansive interpretation of the Clean Air Act, the Court further states:

> *"The practical difficulties cited by the Court of Appeals do not justify departure from the Act's plain text…We must presume that a legislature says in a statute what it means and means in a statute what it says there.*" Id at 1601 *(internal quotations and citations omitted).*

A. <u>The Plain Language of the Coating Rule</u>

The Agency admits that it may only impose conditions in a permit when consistent with the regulations promulgated by the Board. (Agency's Mot., at p7.) The conditions sought to be imposed on NACME are not consistent with the plain language of the Coating Rule, which states in relevant part:

> *"The provisions of this subpart apply to the following affected facilities in a metal coil surface coating operation: each prime coat operation, each finish coat operation, and each prime and finish coat operation combined when the finish coat is applied wet on wet over the prime coat and both coatings are cured simultaneously." (40 CFR 60.460(a))*

Under the plain language of this section of the Rule it applies only to each prime coat operation, each finish coat operation and each such operation when combined and the coatings

are cured together. The Agency does not argue that NACME conducts a "prime coat operation", failing to cite that definition in its brief, nor does it argue that NACME conducts a combined prime/finish coat operation. Rather the Agency argues that NACME conducts, and cites the definition of, a "finish coat operation." (Agency's Mot., at p12)

The Agency correctly quotes the definition of a "finish coat operation" in its Motion, as follows:

> *Finish coat operation* means the coating application station, curing oven, *and* quench station used to *apply and dry or cure* the final coating(s) on the surface of the metal coil. Where only a single coating is applied to the metal coil, that coating is considered a finish coat." (Id)

However the Agency wholly ignores the first sentence of the definition, and understandably so, because by its plain terms the definition does not apply to NACME's Facility. This definition unambiguously states that a finish coating operation involves *three* physical attributes: a coating application station, curing oven *and* quench station. The use of the conjunction "and" leaves no doubt about this interpretation. *Soh v Target Mktg. Sys*, 817 N.E.2d 1105, 1109 (1st Dist. 2004) (as a general rule the use of the conjunctive, as in the word "and" indicates that the legislature intended for *all* of the listed requirements to be met); citing, *AFM Messenger Serv., Inc. v Dept. of Employment Sec.y,* 763 NE2d 272, 283 (Ill. 2001) (three conditions in a definition phrased in the conjunctive meant that all three conditions had to be met for an exemption to apply)

Moreover, because it is plain that the definition of "finish coat operation" requires that *some* drying or curing of the initial applied coating is necessary, and because NACME does no such drying or curing, the definition does not apply to NACME's Facility.

If it was intended that *either* a coating application station *or* a curing oven *or* a quench station would suffice individually for purposes of the definition, the disjunctive "or" instead of

the conjunctive "and" would have been used in the definition, under the holdings in *Soh* and *AFM.* The fallacy of the Agency's argument becomes clear upon simple consideration that de-coupling the phrases "curing oven" and "quench station" from the phase "coating application station" renders the definition absurd. Presumably the Agency does not argue that curing or quenching alone equals "coating".

In any event some drying or curing of the initial applied coating would also be necessary for this definition to apply, and NACME does neither. (DuBrock Aff. ¶4.) The rust preventative/lubricant applied by NACME to specified steel coils remains on the coil as applied and is shipped to the customer as applied. No drying or curing occurs. (Dubrock Aff. ¶¶ 4, 5.)

B. The Cases Cited by the Agency Hurt its Argument

The Agency cites the Illinois Supreme Court's decision in *Town & Country Utils., Inc. v Pollution Control Board*, 866 N.E.2d 227 (Ill. 2007) as declaring the purpose of the Act and, apparently, that it should be liberally construed. (Agency's Mot., at p8.) The Agency ignores the main point of the decision, however, where the Court states:

> *The fundamental principle of statutory construction is to ascertain and give effect to the legislature's intention. The language of the statute is the most reliable indicator of the legislature's objectives in enacting a particular law. We give statutory language its plain and ordinary meaning, and, where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction. We must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent. Moreover, words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions in the statute.* Id. 66 N.E.2d at 235 (citations omitted emphasis added)

In *Town & Country* the Supreme Court decided, based on the plain language of the Act, that the Board's decision, and not a local body's, was "final" within the meaning of appellate review rules. Similarly, in *Sherex Chemical Company v Illinois EPA*, 1992 Ill. Env. Lexis 545 (IPCB 1992) , also cited by the Agency, the Board *rejected* the Agency's interpretation of a

consent decree as allowing the Agency to impose conditions in a permit and found that the challenged permit conditions, as here, were not necessary to accomplish the purposes of the Act and regulations. Id at 9 (Agency's Mot., at p7.) The other cases cited by the Agency, *Rochelle Disposal Service v. Illinois Pollution Control Bd.*, 639 NE2d 988 (2d Dist. 1994) and *City of Chicago v Krisjon Constr. Co.* 617 N.E.2d 21 (1st Dist. 1993), both landfill cases, also simply reinforce the concept that the plain meaning of statutory language must be given effect and a construction given that does not render specific language meaningless or superfluous as the Agency urges here. (Agency's Mot., at p 8-10.)

In sum, under the plain language of the Coating Rule, in applying either a rust preventative oil or lubrication oil to steel coils at its Facility NACME does not conduct a finish coat operation as argued by the Agency. As such the Coating Rule does not apply to NACME's Facility and inclusion of special conditions 2a and 2b in the FESOP is in error.

**2. The Agency's Other Arguments Are Without Merit**

A. The EPA's 1988 Applicability Determination Has No Bearing Here

The Agency's argument that a one page EPA Applicability Determination ("AD") issued nearly 30 years ago shows that NACME is covered by the Coating Rule fails. (Agency's Mot., at p 13.) The Agency argued this point previously in correspondence date June 15, 2012. (attached to NACME's Petition as Ex. E and here as Ex. C) NACME's consultant Mostardi Platt responded by letter dated June 26, 2012 (transmitted by e-mail dated June 27), noting that the EPA AD was inapplicable on its face. The EPA AD does not address at all the issue of what constitutes a coating operation within the meaning of the Metal Coating standard. Rather it focuses on an entirely unrelated issue, the alleged failure to appropriately measure VOC emissions from a plant in conducting performance tests. NACME repeats and incorporates by

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reference the contents of its June 26, 2012 comment letter as though fully set forth herein. (NACME's June 26, 2012 comment letter is attached to its Petition as Ex. F and here as Ex. D)

The Agency attempts to bolster its argument now by asking the Board to draw an inference from a sentence in the AD that states: "[t]he coating station does not have a flash off area or a curing oven." The Agency says that logic dictates that because the AD addresses the performance test requirement under the Coating Rule, and because the facility in issue did not have the noted equipment, like NACME, then the Rule must also apply to NACME. There are numerous flaws in this argument. First, if the AD can be interpreted as the Agency suggests, then the EPA was plainly wrong based on the above cited statutory interpretation precepts. The AD then is simply a faulty interpretation by a government agency, like the one the Agency makes here. Second, the Agency cites no authority that the AD has the force of law. Third, "flash off area" is not defined in the Rule so its reference in the AD is a legal nullity in this analysis. Fourth, assuming *arguendo* that coating within the meaning of the Coating Rule can occur even in the absence of a curing oven, as noted above, *some* drying is required for the Rule to apply based on the phrase "dry or cure" as used in the definition of "finish coat operation". The AD is silent about how the coatings at the facility in the AD are dried. The AD is also silent about the presence of the other equipment necessary for application of the Rule, such as a quenching station. No inference can be drawn from the AD's silence that no drying occurs or no quenching station exists at the facility discussed in the AD, thus making it more "like" NACME's facility. It is equally plausible that the facility in the AD conducts drying and has a quench station but they are not mentioned in the one page AD. Thus the Agency's "logic" fails as does its argument based on the AD that NACME's Facility is subject to the Coating Rule because it is "like" the facility at issue in the AD.



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B. The Agency's Construction Permit Argument is Wrong

The Agency argues that NACME "admitted" that it was subject to the Coating Rule in a construction permit application process. NACME did no such thing. As recited above and at length in the Agency's Motion the issue now before the Board has been contested by NACME for years. In fact in a Construction Permit issued by the Agency for NACME's Facility on April 26, 2012, the Agency recognizes the above cited definitional prerequisites for application of the Metal Coating standard (i.e., Subpart TT), specifically citing the "prime" and "finish coat operation" language. Later, in the exchanges with NACME outlined above, IEPA wholly ignored these specific provisions and instead generally argued, with no basis in law, that "protective oil application operations" are subject to Subpart TT. (the Construction Permit is attached to the Petition as exhibit H and here as exhibit E)

**3. Persuasive Authority Shows That the Agency is Wrong.**

Unlike the Agency's prior and current reliance on the one page, 30 year old EPA AD that does not evenly obliquely address the issue here, NACME relies on sister state agency decisions that squarely address the issue presented here. These decisions hold that the Coating Rule does not apply without the presence of the equipment specified in the definition of "finish coat operation". The Board should find persuasive these decisions by the Indiana Department of Environmental Management ("IDEM"), involving the same facts as at issue here. In at least three different permit decisions regarding steel processing facilities in Indiana, IDEM made the following findings.

- "This source [applying a rust preventative surface coating] is not subject to the requirements of the New Source Performance Standard…40 CFR 60.640, Subpart TT… which applies to prime coat, finish coat and prime and finish coat combined operations because it is not a prime or finish coat operation. (See, *Exempt Construction and Operation Status approval, Kastle Metal Processing, January 2006, Technical Support Document, page 4 of 5;* attached hereto as Ex. F.)

- "The application of rust preventative oils to the steel coils is not subject to the New Source Performance Standard...(40 CFR Part 60, Subpart TT) because this rule only applies to coating operations which use a curing oven and quench station as part of the process" ( See, *Part 70 Construction Permit, Ispat Inland, April 1999, Technical Support Document for New Construction and Operation, page 4 of 6;* attached hereto as Ex. G.)
- "The definition of a finish coat operation is the coating application station, curing oven and quench station used to apply and dry or cure the final coating on the surface of the metal coil. The metal stamping press line only involves coating the metal coil with a petroleum lubrication oil ...there are no curing ovens or quench stations associated with this process. The metal stamping press line does not fall under the definition of a finish coat operation; therefore, the requirements of 40 CFR 60.640, Subpart TT do not apply. (See, *FESOP, Syndicate Sales 1997, Techical Support Document, page 5 of 12;* attached hereto as Ex. H.)

The Agency also goes to great lengths to distance itself from a USEPA survey document. (Attached to the Petition as part of exhibit D and here as exhibit I) The Board should find persuasive, along with the sister state agency's determinations above, that the USEPA in 2000 provided background information on the metal surface coating industry and in pages 3-1 through 3-10 describes in detail the process of metal coating that is wholly consistent with the interpretation of the Rule that NACME urges. The survey describes coating, oven treatment and "quenching". (Id., at 3-1, 2, 3-9.) It also describes the prevalent coatings used, such as polyesters, alkyds and epoxies, but does not mention rust preventative/lubricating oil or any type of oil. (Id. at 3-5, 3-6, table 3-1)

In sum, the survey document, IDEM's decisions, and the plain language of the Coating Rule show that the Agency is wrong in imposing the Coating Rule on NACME's facility.

**CONCLUSION**

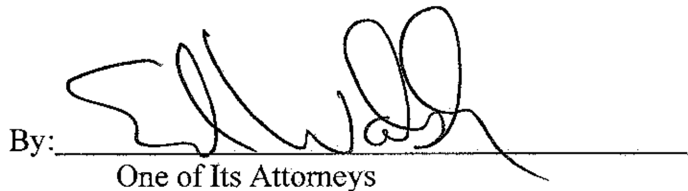
For all of the above reasons the Coating Rule does not apply to operations conducted at NACME's facility and the Agency's decision to impose conditions 2a and 2b in the FESOP issued to NACME should be rejected by the Board.

Accordingly, Petitioner requests that the Agency's Motion be denied and judgment entered in favor of NACME removing special conditions 2a and 2b from the FESOP.

Dated: July 8, 2015

Respectfully submitted,

**NACME STEEL PROCESSING, L.L.C.,**
*Petitioner*



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## CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on July 8, 2015, I served true and correct copies of **NACME STEEL PROCESSING INC.'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT** upon the persons and by the methods as follows:

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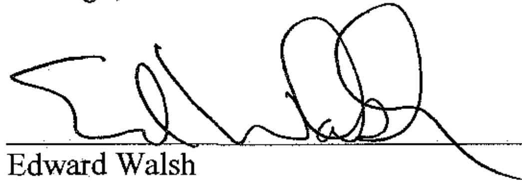

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