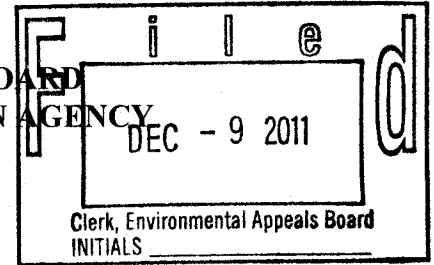


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
)
ArcelorMittal Cleveland Inc.) NPDES Appeal No. 11-01
)
)
NPDES Permit No. 3ID00003*OD (OH0000957))
)

**ORDER GRANTING IN PART EPA'S MOTION TO FILE SURREPLY,
DENYING PETITIONER'S REQUEST TO PROVIDE ADDITIONAL
INFORMATION, AND GRANTING ORAL ARGUMENT**

On November 10, 2011, Region 5 ("Region") of the United States Environmental Protection Agency ("EPA" or "Agency") submitted a motion for leave to file a surreply brief responding to arguments in ArcelorMittal Cleveland Inc.'s ("Arcelor") reply brief, filed November 4, 2011. The Region claims that Arcelor's reply brief contains "new arguments, new issues, and mischaracterizations" that warrant clarifying responses. On November 21, 2011, Arcelor filed an opposition to the Region's motion to file a surreply. Arcelor asserts that its reply does not contain new arguments or issues, and it seeks permission, in the event the surreply is allowed, to supplement its reply brief with information obtained from the Region through a separate Freedom of Information Act ("FOIA") process. On November 23, 2011, the Region filed an opposition to Arcelor's request to supplement its reply brief with FOIA information.

The Environmental Appeals Board ("Board") has discretion to grant requests to file surreply briefs and typically does so in cases where new arguments are raised in opposing reply briefs or where further briefing would assist the Board in resolving disputed issues. *E.g., In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, at 11 (EAB Mar. 19, 2008) (Order Denying Review); *In re D.C. Water & Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10 to

-12, at 1-2 (EAB Aug. 3, 2007) (Order Granting Leave to File Surreply and Accepting Surreply for Filing); Environmental Appeals Board, *Practice Manual* § IV.D.7, at 48 (Sept. 2010). Upon examination of the filings in this case to date, the Board finds that a surreply would be helpful in the decisionmaking process and that good cause exists for granting the Region's motion for leave to file a surreply.

The Board hereby **GRANTS IN PART** the Region's request to file a surreply, limited to the issues numbered 2, 3, 4, 7, and 8 in the Region's motion. The Board directs the Region to ensure that its response is reviewed by and concurred with by the Agency's Associate General Counsel for Water Law. In addressing these matters, the Agency must specifically incorporate discussions of the following issues:

- (A) In Issue #2: Specify whether a previously granted Clean Water Act ("CWA") § 301(g) variance can be "renewed" when a permit is renewed and, if so, what procedural steps must be followed to do so.
- (B) In Issue #3: Explain whether any legislative history exists indicating that Congress intended to *prohibit*: (1) the modification of CWA § 301(g) variances once granted; or (2) the granting of new CWA § 301(g) variances for new sources after the original statutory deadline(s) for variance applications has elapsed.
- (C) In Issue #4: Explain the facts and the Region's decision and reasoning with respect to the 2001 modification of the CWA § 301(g) ammonia-nitrogen variance held by Arcelor's predecessor, referenced in footnote 2 of the Region's response brief, including the Region's explanation for its authority to grant this modification. Further, specify whether

the Region agrees with the facts of the other Agency permit decisions recited in Arcelor's reply brief.

- (D) In Issue #7: Specify and explain the Agency's position as to whether it met the 365-day deadline set forth in CWA § 301(j)(4) for deciding Arcelor's application.

The Board hereby **DENIES** permission for further briefing on the remaining elements of the Region's motion to file a surreply (i.e., issues numbered 1, 5, and 6).

Furthermore, the Board **DIRECTS** the Agency to provide supplemental briefing on the following two issues:

- (E) Does the Agency agree that the Board has jurisdiction to review Arcelor's petition, and, if so, under which regulatory provisions?
- (F) Does the Agency contend that CWA § 301(g) prohibits:
- (1) Any modification of CWA § 301(g) variances, once granted; and/or
 - (2) Any grants of new CWA § 301(g) variances to new sources applying for permits, after the original statutory deadline(s) for seeking variances have passed?

The Region is hereby ordered to file its supplemental brief as directed above on or before **Friday, January 6, 2012**, addressing each of the foregoing elements. Arcelor may file a reply to this supplemental brief on or before **Friday, January 20, 2012**. The Board hereby **DENIES** Arcelor's request for permission to supplement its reply brief with additional information obtained through the FOIA process.

Finally, the Board **GRANTS** Arcelor's request for oral argument, filed on November 4, 2011, in conjunction with its reply brief. After receipt and review of the supplemental brief(s),

the Board will issue an order specifying the date, time, subject matter, and other pertinent details for the oral argument.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: December 9, 2011

By: *Catherine R. McCabe*
Catherine R. McCabe
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Granting in Part EPA's Motion to File Surreply, Denying Petitioner's Request to Provide Additional Information, and Granting Oral Argument** in the matter of *ArcelorMittal Cleveland Inc.*, NPDES Appeal No. 11-01, were sent to the following persons in the manner indicated:

By Facsimile and First Class U.S. Mail:

Dale E. Papajcik, Esq.
Lianne Mantione, Esq.
Squire, Sanders & Dempsey LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44144
telephone: (216) 479-8479
facsimile: (216) 479-8780

Scott J. Nally, Director
Ohio Environmental Protection Agency
50 West Town Street, Suite 700
Columbus, Ohio 43215
telephone: (614) 644-2782
facsimile: (614) 644-3184

Kendra S. Sherman, Esq.
Squire, Sanders & Dempsey LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215
telephone: (614) 365-2726
facsimile: (614) 365-2499

George Elmaraghy, P.E., Chief
Division of Surface Water
Ohio Environmental Protection Agency
50 West Town Street, Suite 700
Columbus, Ohio 43215
telephone: (614) 644-2041
facsimile: (614) 644-2745

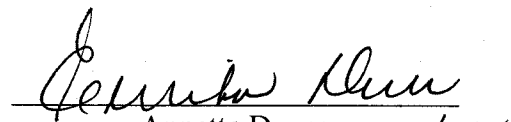
By Facsimile and EPA Pouch Mail:

Terence Branigan, Esq.
U.S. Environmental Protection Agency, Region 5
Office of Regional Counsel
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604
telephone: (312) 353-4737
facsimile: (312) 385-5500

By EPA Interoffice Mail:

Richard Witt, Esq.
U.S. Environmental Protection Agency
Office of General Counsel, Water Law Office
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Date: 12/9/11


Annette Duncan
Secretary