

August 26, 2011

Via Electronic Filing and Fed-Ex

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ronald Reagan Building
EPA Mailroom
1300 Pennsylvania Avenue N.W.
Washington, D.C. 20004

**Re: Informal Appeal of NPDES Permit Modification Denial
ArcelorMittal Cleveland Inc. NPDES Permit No. 3ID00003*OD (OH0000957)**

Dear Environmental Appeals Board:

Pursuant to 40 CFR §124.5(b), ArcelorMittal Cleveland Inc. (“ArcelorMittal”), by and through its undersigned counsel, hereby submits this informal appeal letter requesting review by the Environmental Appeals Board (“the Board”) of U.S. Environmental Protection Agency Region V’s (“Region V’s”) denial of ArcelorMittal’s April 13, 2010 application to modify its National Pollutant Discharge Elimination System (“NPDES”) permit to incorporate proposed revisions to its Clean Water Act Section 301(g) variance effluent limitation for ammonia-nitrogen (“ammonia-N”) at Outfall 604.¹

¹ ArcelorMittal received Region V’s denial of the NPDES permit modification application by email on July 27, 2011 and by certified mail on August 3, 2011. However, ArcelorMittal just received (on August 23, 2011) a copy of Region V’s rationale letter dated August 18, 2011. Insofar as ArcelorMittal has not had

Region V's denial of ArcelorMittal's requested permit modification warrants review because it is based on the erroneous premise that the requested permit modification is a new variance request under Section 301(g) of the Clean Water Act, which Region V asserts is untimely. The denial further merits review because, should Region V's position be accepted, variances would essentially be frozen in time, and could not be modified to account for changing circumstances once the statutory deadline for the initial variance request has passed (1983 in this case), ***even if the modified variance continues to meet the substantive requirements of Section 301(g)***. Such a result is contrary to Congressional intent in establishing Section 301(g) of the Clean Water Act, 33 U.S.C. §1311(g), which is to avoid "treatment for treatment's sake," and is inconsistent with other Region V decisions on variances.

I. STATEMENT OF FACTS

ArcelorMittal owns and operates a steel facility located at 3060 Eggers Avenue, Cleveland, Ohio ("the Cleveland plant"). The Cleveland plant operates under NPDES Permit No. 3ID00003*OD (OH0000957) that, pursuant to a variance obtained under Section 301(g) of the Clean Water Act, exempts it from complying with established Best Available Technology (BAT) effluent limitations for ammonia-N. Instead, ArcelorMittal is required to comply with ammonia-N effluent limitations established through its Section 301(g) variance.

substantial time to fully evaluate the issues contained in Region V's rationale letter, but has submitted this letter for purposes of timely filing this appeal, ArcelorMittal reserves the right to supplement this informal appeal letter and may raise additional grounds in this appeal as appropriate in accordance with rules, orders, and directives issued by the Environmental Appeals Board.

On April 13, 2010, ArcelorMittal submitted an application to the Ohio Environmental Protection Agency (“Ohio EPA”) to modify the existing Section 301(g) variance contained in the Cleveland plant’s NPDES permit.² See Exhibit 1. The requested modification was necessitated when two blast furnaces, which were idled in 2008 due to the economic downturn, resumed production resulting in unusually high ammonia-N concentrations. See *id.* On June 14, 2010, Ohio EPA forwarded ArcelorMittal’s application to Region V seeking concurrence with Ohio EPA’s recommendation to approve ArcelorMittal’s requested permit modification.³ See Exhibit 2. Representatives from Ohio EPA, U.S. EPA and ArcelorMittal had several meetings and communications in 2010 and 2011 to discuss the NPDES permit modification application.

On June 23, 2011, Region V notified Ohio EPA that it was denying ArcelorMittal’s permit modification request on the basis that ArcelorMittal’s variance request was untimely.⁴ See Exhibit 3. ArcelorMittal did not receive notice or a copy of Region V’s June 23, 2011 letter until more than one month later, on July 27, 2011, and only then in response to ArcelorMittal’s request to Region V for the status of its review.⁵ See Exhibit 4. Region V noted that its June 23, 2011 letter was “misplaced before it was mailed and was not found until [July 26, 2011].” *Id.* Strikingly, Region V never once raised the issue

² See April 13, 2010 ArcelorMittal modification application to Ohio EPA, attached at Exhibit 1. Ohio EPA has been authorized by Region V to administer the NPDES program within the State of Ohio.

³ See June 14, 2010 Letter from George Elmaraghy, Chief, Division of Surface Water, Ohio EPA, to Kevin Pierard, Region V, attached at Exhibit 2.

⁴ See June 23, 2011 Letter from S. Hedman, Regional Administrator, Region V, to S.J. Nally, Director Ohio EPA, attached at Exhibit 3.

⁵ See July 27, 2011 Email from S. Yedavalli, Region V, to S. Rihtar, ArcelorMittal, attached at Exhibit 4.

of timeliness of ArcelorMittal's permit modification variance application during the several meetings between ArcelorMittal and Region V in 2010 and 2011.

On August 4, 2011, ArcelorMittal sought reconsideration of Region V's decision by submitting verification that it had timely submitted its initial request for a 301(g) variance, which ArcelorMittal understood was the basis for Region V's June 23, 2011 denial decision.⁶ See Exhibit 5. On August 18, 2011, Region V responded to ArcelorMittal's reconsideration request.⁷ See Exhibit 6. In its August 18, 2011 response, which ArcelorMittal did not receive until this week, Region V conceded that ArcelorMittal's initial request for a variance under Section 301(g) was timely and previously approved by U.S. EPA. However, Region V premised its denial of ArcelorMittal's 2010 NPDES permit modification application on the basis that the permit modification application constituted a new Section 301(g) variance request filed beyond the statutory deadline. See *id.*

II. JURISDICTION

The Board has authority to review Region V's decision to deny ArcelorMittal's 2010 NPDES permit modification application under the informal appeal procedures set forth in 40 CFR §124.5(b), which states: "If the [Region] decides the request [for a permit modification, revocation and reissuance, or termination] is not justified, the [Region] shall send the requester a brief written response giving a reason for the decision. Denials of requests ... are not subject to public notice, comment, or hearings.

⁶ See August 4, 2011 Letter from S. Rihtar, ArcelorMittal, to S. Hedman, Regional Administrator, Region V, attached at Exhibit 5.

⁷ See August 18, 2011 Letter from T.G. Hyde, Director, Water Division, Region V, to S. Rihtar, ArcelorMittal, attached at Exhibit 6.

Denials by the Regional Administrator may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts

(emphasis added).”

III. BASIS FOR REVIEW

Region V denied ArcelorMittal’s NPDES permit modification application that incorporated the Section 301(g) variance on the basis that the variance submittal was untimely. Region V’s denial was, however, based upon the misguided premise that the 2010 permit modification application constitutes a new Section 301(g) variance application that should have been submitted by no later than 270 days of the May 27, 1982 promulgation date of the applicable effluent limitations for ammonia–N, codified at 40 CFR Part 420. However, U.S. EPA’s implementing regulations and its own Section 301(g) guidance make clear that this statutory deadline applies only to ***initial requests*** for a Section 301(g) variance, and here Region V has already conceded in its August 18, 2011 letter that ArcelorMittal’s initial Section 301(g) variance was “timely” and “filed within the deadlines in [Clean Water Act] Section 301(j)(1)(B), 33 U.S.C. §1311(j)(1)(B).” Further, Region V’s denial is expressly contrary to Congressional intent in establishing variances for nonconventional pollutants and Region V’s own prior acts and decisions with respect to variances.

Accordingly, and as discussed more fully below, review and reversal by the Board of Region V’s denial of ArcelorMittal’s NPDES permit modification incorporating the Section 301(g) variance is warranted.

A. ArcelorMittal's Request to Modify its Existing Section 301(g) Variance Does Not Constitute a New Variance Request.

Pursuant to Section 301(j)(1)(B) of the Clean Water Act ("CWA"), a variance request under Section 301(g) must be filed "not later than 270 days after the date of promulgation of an applicable effluent guideline under Section 304 or not later than 270 days after the enactment of the Clean Water Act of 1977, whichever is later." 33 USC §1311(j)(1)(B). The CWA implementing regulations, and EPA's own NPDES permit guidance,⁸ make clear that this statutory deadline applies only to *initial requests* for a Section 301(g) variance. Specifically, 40 CFR §122.21(m)(2)(i)(A) states:

A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified in this paragraph: ... (2) Non-conventional pollutants. A request for a variance from the BAT requirements for CWA section 301(b)(2)(F) pollutants (commonly called "non-conventional" pollutants) pursuant to ... section 301(g) of the CWA ... must be made as follows: (i) For those requests for a variance from an effluent limitation based upon an effluent limitation guideline by: (A) **Submitting an initial request to the Regional Administrator**, as well as to the State Director if applicable, stating the name of the discharger, the permit number, the outfall number(s), the applicable effluent guideline, and whether the discharger is requesting a section 301(c) or section 301(g) modification or both. This request must have been filed **not later than: ... (2) 270 days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 27, 1977**; and (B) Submitting a completed request no later than the close of the public comment period under §124.10 demonstrating that the requirements of §124.13 and the applicable requirements of part 125 have been

⁸ See Exhibit 6, U.S. EPA Technical Guidance Manual for the Regulations Promulgated Pursuant to Section 301(g) of the Clean Water Act of 1977 40 CFR Part 125 (Subpart F) (Appendix G, Section 301(g) Checklist, includes questions asking "***the date the initial request (in accordance with 40 CFR 122.21) for the section 301(g) variance was submitted to EPA? ([W]as a postcard submitted by September 1978, or was an initial request submitted 270 days after the promulgation of the applicable guideline?)***" (emphasis added).

met. Notwithstanding this provision, the complete application for a request under section 301(g) shall be filed 180 days before EPA must make a decision (unless the Regional Division Director establishes a shorter or longer period) (emphasis added).

NPDES permits may be modified for a Section 301(g) variance as long as “the permittee has filed a request for variance under CWA section ... 301(g) ... within the time specified in §122.21 or §125.27(a).” *Id.* at §122.62(a)(5).

Here, Republic Steel Corporation, the former owner of the Cleveland plant, filed a notice of intent to apply for the Section 301(g) variance for its facility on September 21, 1978.⁹ See Exhibit 7. Republic Steel then formally applied for the Section 301(g) variance for NPDES Permit No. OH0000957 on February 17, 1983, which is within 270 days of the promulgation date of May 27, 1982 for 40 CFR Part 420.¹⁰ See Exhibit 8. In fact, its February 17, 1983 application stated that Region V had advised Republic Steel that the variance application was due by February 21, 1983 and therefore Republic Steel submitted its Section 301(g) application for ammonia and phenol prior to that date -- on February 17, 1983. Therefore, as conceded by Region V in its August 18, 2011 letter, the Cleveland plant “timely” submitted its **initial request** for a Section 301(g) variance within the deadlines in CWA Section 301(j)(1)(B) and “EPA previously approved that application.”

⁹ Sept. 21, 1978 Letter from D.H. Clark, Republic Steel to Regional Administrator, Region V, attached as Exhibit 7.

¹⁰ Feb. 17, 1983 Letter from W. West, Republic Steel to Regional Administrator, Region V attached as Exhibit 8.

On April 13, 2010, ArcelorMittal submitted an NPDES permit modification application to modify the Section 301(g) variance limits contained in its NPDES permit. By its letter dated August 18, 2011, Region V explained that ArcelorMittal's NPDES permit modification application is denied based on the erroneous premise that the Clean Water Act "does not include special provisions for applications to modify alternate limits previously approved by EPA under CWA Section 301(g)." See Exhibit 6. However, as noted above, ArcelorMittal's NPDES permit modification application is expressly authorized to include Section 301(g) variances pursuant to 40 CFR §122.62.

Moreover, EPA's characterization of an NPDES permit modification application that addresses effluent limits established by previously existing Section 301(g) variance as a new Section 301(g) variance request "must independently meet the deadlines in CWA Section 301(j)(1)(B)," effectively results in all CWA Section 301(g) variances as "one and done", with no renewals, amendments or modifications to the variance as ever possible. If such were the case, ArcelorMittal's existing 301(g) variance is "frozen in time" based on circumstances that existed at the facility nearly 30 years ago when the initial variance application was submitted. Such a result is completely contrary to Congress' intent to eliminate "treatment for treatment's sake"¹¹ when – as is the case here – the requested modification continues to comply with all substantive requirements under CWA Section 301(g).

¹¹ U.S. EPA expressly acknowledged this Congressional intent in its Section 301(g) Regulatory Technical Guidance Manual, p.3: "***The enactment of section 301(g) was the result of an effort to eliminate 'treatment for treatment's sake' for nonconventional pollutants.***" See Exhibit 6 (emphasis added).

B. There Have Been Numerous Communications with Region V Regarding the Cleveland Plant's NPDES Permit Modification Application and at No Time During Those Communications Did Region V Suggest that the Application Was Untimely.

Republic Steel and LTV Steel, another former owner of the Cleveland plant, provided supplemental information to both Ohio EPA and Region V on numerous occasions following the February 17, 1983 Section 301(g) variance application. As noted above, the Section 301(g) variance for ammonia-N at Outfall 604 was ultimately approved by Ohio EPA, granted by Region V, and incorporated into the NPDES permit for the Cleveland plant.

After ArcelorMittal's application to modify the existing Section 301(g) variance for ammonia-N at Outfall 604 was submitted to Ohio EPA in April 2010, several communications and discussions were held between representatives from ArcelorMittal, Ohio EPA and Region V regarding the NPDES permit modification application. Indeed, in a meeting on March 16, 2011, EPA noted it anticipated issuing an action on the variance by June 2011. At no time during any of these meetings or in any communications prior to issuance of its letter on June 23, 2011 did Region V ever suggest that the 2010 submittal was untimely or must have been submitted 270 days after May 27, 1982.

U.S. EPA's own Section 301(g) Technical Guidance strongly encourages such close communication with the Region regarding Section 301(g) requests. Indeed, its Technical Guidance directs that: "***The applicant should work as closely as possible with the State and Regional permitting authority in order to determine an acceptable plan for developing a completed [Section 301(g) request This will***

help to avoid denial of an application based on incompleteness or misinterpretation of the section 301(g) requirements.” Exhibit 6 at p.5 (emphasis added). Not only did ArcelorMittal and its predecessors involve Region V early in the initial Section 301(g) variance process, ArcelorMittal subsequently consulted with the Region on several occasions after submitting its NPDES permit modification application. Region V’s action in summarily denying ArcelorMittal’s application on June 23, 2011 on a basis never raised before that letter frustrates the very purpose of consultations with the permitting authority – to avoid denials based on “misinterpretation of the section 301(g) requirements” – which Region V has done in this instance.

IV. CONCLUSION

The Cleveland plant’s initial request for a Section 301(g) variance was timely submitted and Region V’s determination that the facility’s 2010 NPDES permit modification application constitutes a new variance request is both erroneous and contrary to Congressional intent in establishing Section 301(g) variances. Moreover, Ohio EPA has determined that the requested modification meets all regulatory requirements under Section 301(g). Accordingly, ArcelorMittal respectfully requests that this Board reverse the July 27, 2011 permit modification denial and direct Region V to initiate the NPDES permit modification proceedings.

Respectfully submitted,

/s/ Lianne Mantione

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Attachments (see list of attached exhibits on next page)

cc: Scott J. Nally, Director, Ohio EPA
George Elmaraghy, P.E., Chief, Division of Surface Water, Ohio EPA
Tinka Hyde, Water Division Director, U.S. EPA Region V
Sreedevi Yedavalli, U.S. EPA Region V

LIST OF EXHIBITS:¹²

- Exhibit 1: April 13, 2010 ArcelorMittal NPDES permit modification application submitted to Ohio EPA
- Exhibit 2: June 14, 2010 Letter from G. Elmaraghy, Chief, Division of Surface Water, Ohio EPA, to K. Pierard, Region V
- Exhibit 3: June 23, 2011 Letter from S. Hedman, Regional Administrator, Region V, to S.J. Nally, Director Ohio EPA
- Exhibit 4: July 27, 2011 Email from S. Yedavalli, Region V, to S. Rihtar, ArcelorMittal.
- Exhibit 5: August 4, 2011 Letter from S. Rihtar, ArcelorMittal, to S. Hedman, Regional Administrator, Region V
- Exhibit 6: U.S. EPA Technical Guidance Manual for the Regulations Promulgated Pursuant to Section 301(g) of the Clean Water Act of 1977 40 CFR Part 125 (Subpart F) (*excerpts only*)
- Exhibit 7: August 18, 2011 Letter from T.G. Hyde, Director, Water Division, Region V, to S. Rihtar, ArcelorMittal
- Exhibit 8: Sept. 21, 1978 Letter from D.H. Clark, Republic Steel to Regional Administrator, Region V
- Exhibit 9: Feb. 17, 1983 Letter from W. West, Republic Steel to Regional Administrator, Region V.

¹² All information contained in the exhibits is hereby expressly incorporated into this informal appeal letter by reference.