

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

In re:)
)
ArcelorMittal Cleveland Inc.)
) NPDES Appeal No. 11-01
)
Permit No. OH0000957)
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)
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_____)

SURREPLY BRIEF OF EPA REGION 5

Region 5 of the United States Environmental Protection Agency (“Region 5” or “the Region”) respectfully submits to the Environmental Appeals Board (“Board” or “EAB”) this Surreply Brief in the above-captioned matter, in accordance with the Board’s Order Granting in Part EPA’s Motion to File Surreply, Denying Petitioner’s Request to Provide Additional Information, and Granting Oral Argument, dated December 9, 2011 (“Board’s Order”).¹

The Region submits this Surreply to respond to the Board’s order and to respond to new arguments and mischaracterizations contained in the ArcelorMittal Cleveland Inc.’s Reply in Support of Informal Appeal (“ArcelorMittal’s Reply Brief”), filed with the Board on November 4, 2011.

The Board’s Order granted the Agency’s request to address issues numbered 2, 3, 4, 7, and 8 in the Region’s motion. The Board also directed that the Agency’s response address certain other questions. The Agency’s surreply first addresses whether the Board has jurisdiction to review Arcelor’s petition. (*See* Board’s Order – Issue (E)). The

¹ As required by the Board’s Order, the EPA’s Associate General Counsel for Water Law has reviewed and concurs in this surreply

surreply then addresses in turn the other issues specified in the Board's Order. (*See* Board's Order - Issues (A) – (D) and (F)). In the course of doing so, the surreply provides further briefing on issues numbered 2, 3, 4, 7 and 8.

I. Issue (E) - Does the Agency agree that the Board has jurisdiction to review ArcelorMittal's petition, and if so, under which regulatory provision?

The Agency agrees that, although Arcelor cited the wrong basis for appeal in its initial submission to the Board, the Board does have jurisdiction to review Arcelor's petition under 40 C.F.R. § 124.64(b). This provision expressly provides that variance decisions made by EPA may be appealed under the provisions of section 124.19(a). ArcelorMittal initiated this proceeding before the Board by submitting an Informal Appeal letter under 40 C.F.R. § 124.5(b). As demonstrated in the Brief of EPA Region 5 In Opposition to Informal Appeal of ArcelorMittal Cleveland Inc. (Region 5 Reply Brief , at 1 - 2, the Board has no jurisdiction over this action as an informal appeal of a permit modification denial under 40 CFR § 124.5(b). EPA approved the State of Ohio's NPDES program on March 11, 1974. The State of Ohio (through the Ohio EPA) is thus the NPDES permitting authority in Ohio. Only Ohio has authority to modify an NPDES permit issued by the State of Ohio. EPA's action on the requested variance from the otherwise applicable effluent limitations guidelines and standards, however, is not a permit modification.

As explained in Region 5's Reply Brief, ArcelorMittal should instead have sought review by the Board under 40 C.F.R. § 124.19. Pursuant to 40 C.F.R. § 124.64(b), the Board has jurisdiction under 40 C.F.R. § 124.19 to hear petitions to review variance decisions by EPA. Because the Agency has not been prejudiced in any way by Arcelor's improper reliance on 40 C.F.R § 124.5(b), Region 5 believes that it would be appropriate

for the Board to view ArcelorMittal's Informal Appeal as if it were filed properly as a petition to review under 40 C.F.R. § 124.19.

Region 5 does note that the requirement in section 124.19(a) that a requester must have submitted comments on a draft permit or participated in a public hearing cannot be met by Arcelor in this case. However, this fact should not bar this appeal, as it was impossible for Arcelor to comply with this requirement under the procedural circumstances of the instant variance action. Here, there was no draft permit or public hearing on EPA's denial of the variance request and so no "commenters" or hearing "participants." Nonetheless, the purpose underlying these types of public participation prerequisites, to ensure that the issues have been squarely presented to the Region in the first instance before Board review, has been met here. *See In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996). That Region 5 had the opportunity to review Arcelor's position prior to making its decision is unquestionable. In any event, to read 40 C.F.R. § 124.19(a) narrowly to deny Arcelor the right to appeal to the EAB under these circumstances would be at odds with the plain language of 40 C.F.R. § 124.64(b), which clearly states an intent to provide for EAB review of Regional section 301(g) variance decisions.²

II. Issue (A) - #2 - Renewal of a previously granted variance under section 301(g) of the Clean Water Act is consistent with the statute.

The Board directed EPA to explain whether a section 301(g) variance may be renewed when a permit is reissued and what procedural steps must be followed to do so.

² The Region also notes that should the Board disagree that the regulations can be read to allow EAB review despite the fact that Arcelor did not comment on or participate in a hearing on the request the Board should invoke its power to waive procedural requirements when "the ends of justice require it." *See, e.g., In re Peabody Western Coal Company*, 2010 EPA App LEXIS 34, 10-13, citing *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970) (It is "always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.").

While there is a statutory deadline for applying for a section 301(g) variance, there is no time limit specified in the statute for termination of the variance. Therefore if a permit is renewed, the variance can be continued or renewed in subsequent permits.

When an NPDES permit expires and a permittee requests that the permit be renewed or re-issued, the permittee often requests the continuation or renewal of alternate effluent limits established under the previously granted section 301(g) variance.³

Between the time EPA grants a section 301(g) variance and the time a permittee's NPDES permit expires and is due for reissuance, changes in conditions in the receiving waters for the permittee's discharges could change such that the permittee's discharges under the section 301(g) variance no longer meet the requirements of CWA section 301(g), which are intended to insure that water quality, human health and the environment are not adversely affected by the permittee's discharges under the alternate effluent limits. Therefore, when a permittee requests the continuation of such alternate effluent limits when requesting the reissuance of the permittee's NPDES permit, Region 5 (or the state permitting authority) generally requires the permittee to submit information to demonstrate that such alternate effluent limits continue to satisfy the requirements in CWA section 301(g) (2).⁴ This procedure is consistent with the statutory requirement to insure that alternate effluent limits established under CWA section 301(g) meet the requirements of CWA section 301(g)(2). Such an approach is also supported by the legislative history of the Water Quality Act of 1987 ("WQA"). In discussing changes that the WQA would make to CWA section 301(g), the Senate Report states:

³ Requests to continue alternate limits under a previous § 301(g) variance would be included in the permittee's application to re-issue the NPDES permit that the permittee submits to the permitting authority.

⁴ There is no formal process for providing this additional information. Sometimes Region 5 relies on information included with the permittee's renewal application that is submitted to the permitting authority; at other times, Region 5 may require that the permittee submit an updated § 301(g) application.

If a modification is granted under [CWA § 301(g)], the applicant is expected to make a new demonstration each time the applicable permit expires, for such modification to be granted in the future.

See Sen. Rep. 99-50, at 18 (1985), *reprinted in* Legislative History of the Water Quality Act of 1987, Vol. 2 at 1420 (Comm. Print 1988).

Region 5, for example, did not oppose the continuation or renewal of the alternate effluent limits established for ammonia in ArcelorMittal's permits when its NPDES permit was reissued in 2008. Region 5's decision that the continuation of the same limits was appropriate in the reissued permits was not an additional action under CWA section 301(g), and thus the request to continue these limits did not need to meet the statutory deadline imposed by CWA section 301(j)(1)(B).

ArcelorMittal's 2010 application did not request a mere continuation of the alternate effluent limits under the section 301(g) variance previously approved by Region 5. Instead, the 2010 application requested completely revised alternate effluent limitations in a manner that would significantly increase the total pollutant mass that ArcelorMittal would be allowed to discharge. As such, this request is broader than the original variance request submitted within the statutorily prescribed period of time for such requests. As argued in Region 5's Reply Brief, there is no provision in the statute or the regulations that provides a basis independent of CWA section 301(g) now to request a variance that would expand limits established under a previously requested and granted variance, and ArcelorMittal has not rebutted Region 5's argument on this point. As the requested variance was to seek further relaxation of the nationally applicable effluent limitations guidelines established as best available technology economically achievable ("BAT") for certain nonconventional pollutants, Region 5 processed ArcelorMittal's

2010 application for decision under CWA section 301(g). Because applications for a particular variance from nationally applicable effluent limitations guidelines under CWA section 301(g) are subject to strict deadlines under CWA section 301(j)(1), Region 5 reasonably and appropriately denied the 2010 application.

ArcelorMittal, throughout its Reply Brief, erroneously treats the mere continuation of alternate effluent limits applied for and established under a previous section 301(g) variance as the equivalent of a request for alternate effluent limits that are broader and much less stringent than the alternate limits timely applied for and established under a previous section 301(g) variance. Thus, for example, the title of Section I.B of ArcelorMittal's Reply Brief erroneously states that "Congress and U.S. EPA Expected Previously Approved CWA § 301(g) Variances to be Renewed and/or Modified," ArcelorMittal Rep. Br. at 5, and ArcelorMittal argues through this section that the legislative history, EPA guidance and EPA's alleged practices support the conclusion that section 301(g) variances can be renewed or modified. ArcelorMittal's failure to clearly distinguish the mere continuation of previously established alternate effluent limitations from a request for a complete set of wholly different alternate effluent limitations would run counter to the strict statutory deadlines in CWA section 301(j)(1). This section provides that "[a]ny application filed under this section for a modification of the provisions of -- * * * (B) section (b)(2)(A) [BAT] of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section [nonconventional pollutants] shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title. . . ." The use of the term "any" and the time frame of 270 days applies to the instant application.

The Board further asked the Agency to explain, if a permit may be reissued with a section 301(g) variance, what procedural steps must be followed to do so. The NDPES regulations establish a broad outline of the procedures to be followed in granting a 301(g) variance but they do not specifically address reissuance of a section 301(g) variance in a permit. The following briefly explains the permitting process for acting on the initial request for section 301(g) variances and for reissuing permits with section 301(g) alternate limitations.

EPA's regulation at 40 C.F.R. § 124.63 describe the procedures when a request for variance is filed in States where EPA is the permitting authority. Section 124.62(e) and (f) describe the process to be followed when a State is the authorized NPDES permitting authority. (The State Director may deny the request or forward it to EPA with a written concurrence). Section 124.62(f) provides that EPA may grant or deny a request for a 301(g) variance that is forwarded by the State. If EPA approves the request, a draft permit is prepared by either the EPA or the State where it is the permitting authority.

The process for reissuing an NPDES permit that contains alternative limitations under section 301(g) is as follows. In order to obtain reissuance of a currently effective permit, section 122.21(d) provides that the permittee must file a timely application to renew the permit.⁵ 40 C.F.R. § 122.21(m) discusses 301(g) variance requests. To fulfill the requirement of section 122.21(m), EPA would expect that the permittee would update the information submitted as the basis for its original variance request and new information relevant to continuation of the variance.

⁵ Authorized State NDPES programs must have comparable or more stringent requirements. 40 C.F.R. § 123.25(a)(4).

The NPDES permitting regulation presumes that NPDES variance decisions will be processed along with permit decisions. Thus, under 40 C.F.R. § 124.51(b):

Decisions on NPDES variance requests ordinarily will be made during the permit issuance process. Variances and other changes in permit conditions ordinarily will be decided through the same notice-and-comment and hearing procedures as the basic permit.⁶

In addition, 40 CFR § 124.62(f) provides:

If [EPA] approves the variance [under § 301(g)], the State Director . . . may prepare a draft permit incorporating the variance.

In connection with applications to issue or re-issue a permit, the NPDES regulations require that once an application is complete, the permitting authority decides whether or not to prepare a draft permit for the facility. 40 C.F.R. § 124.62(a).

The NPDES regulations do not specifically describe the process to be followed when a permit is reissued with a section 301(g) variance provision. As noted, information is required in the permit application about the request for the variance. When EPA is the permitting authority, there is no change in the general process for reissuance of a permit merely because of a 301(g) variance provision. In the case of NPDES-authorized States, often the States consult with EPA under an informal process if the State determines to continue (or deny) the alternate limitations.

III. Issue (B) - # 3 - Legislative history, guidance and preambles to promulgated regulations support the conclusion that section 301(g) variances can be continued when a permit is reissued, but not the conclusion that section 301(g) variances can be modified as requested by ArcelorMittal.

⁶ Section 124.51(b) is unusual in that it describes the “ordinary” process, but does not define exceptions to the ordinary process. The preamble to the regulations indicate that the EPA originally conceived the exception to the “ordinary” process to refer situations in which a request for a variance is submitted after a draft permit has been prepared, but has not yet been finalized, a set of circumstances different from those in the instant case. *See, e.g.*, 43 Fed. Reg. 37078, 37085 and 37111 (August 21, 1978).

The Board directed EPA in addressing issue #3 to 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 has elapsed.

There is no legislative history clearly stating that Congress intended to prohibit modification of a previously granted 301(g) variances. However, the statutory language, when read together with the legislative history, supports EPA's position that Congress did not intend to allow modifications of the terms of a 301(g) variance in the manner requested by ArcelorMittal.

Region 5's Reply Brief includes a detailed, comprehensive and coherent interpretation of the statutory and regulatory provisions pertaining to decisions under section 301(g) of the Act, drawing on relevant legislative and regulatory history, to explain why Region 5 properly and reasonably determined that ArcelorMittal's 2010 application for a 301(g) variance should be denied as time-barred.⁷ ArcelorMittal has not directly rebutted Region 5's interpretation of the statutory and regulatory provisions and has failed to buttress its contrary claims with convincing argument.

ArcelorMittal argues instead that the following secondary sources and practices "support" the conclusion that existing section 301(g) variances can be modified: "[i] the legislative history of the CWA, [ii] EPA's own published guidance, and [iii] the Agency's long-established practice of renewing or modifying previously approved 301(g) variances at the time of permit Renewal." ArcelorMittal Rep. Br., 5.

⁷ Region's 5's Reply Brief includes a specific rebuttal of ArcelorMittal's assertion in its Informal Appeal that the provisions of 40 C.F.R. § 122.62 provide an independent basis for requesting a modification of a previously granted § 301(g) variance. Region 5 Reply Brief, at 20 – 22. ArcelorMittal has provided no counter rebuttal.

While legislative history is often used to clarify the meaning of the intent of the words used in a statutory provision, ArcelorMittal has not cited any legislative history or Agency guidance and practice that clarifies the language of the statute and regulations in a manner that supports its interpretation.

ArcelorMittal's appeal to legislative history appears in its Reply Brief at pp 5-8. With one exception, each citation of the legislative history cited by ArcelorMittal provides a portion of the rationale for Congressional approval of section 301(g) of the Act; none of these citations suggests that section 301(g) authorizes serial requests for different and higher limits from the section 301(g) variance that preceded it, as the argument advanced by ArcelorMittal implies.⁸ And as noted above, ArcelorMittal provides no explanation for how the legislative citations clarify the language of the statute in a manner that supports its claims.

At the end of this section in ArcelorMittal's Reply Brief at pp. 7 – 8, ArcelorMittal asserts that the “legislative history makes clear that Congress did not intend for § 301(g) to be a ‘one and done’ modification. Rather it was expected that § 301(g) variances could be renewed and/or modified as long as the applicant submitted.” While ArcelorMittal's Reply Brief cites Sen. Rep. No. 99-50, 99th Cong., 1st Sess., 18 (1987), it does not cite the specific language on which its claim rests. Presumably, the language to which ArcelorMittal refers is the following :

If a modification is granted under [CWA § 301(g)], the applicant is expected to make a new demonstration each time the applicable permit expires, for *such modification* to be granted in the future. (*Emphasis supplied*).

⁸ In fact, the House floor debate that accompanied the Water Quality Act of 1987, at least one representative emphasized that “strict deadlines are placed on . . . application for a modification . . .” 133 Cong. Rec. 1415 (Statement of Rep. Roe).

See Sen. Rep. 99-50, at 18 (1985), *reprinted in* Legislative History of the Water Quality Act of 1987, Vol. 2 at 1420 (Comm. Print 1988).

In fact, this language supports the Agency’s position. The Senate Report expresses the sense of the Senate committee that if a modification is granted, that *such modification* can be continued when the permit expires and is reissued. Thus, the statute and regulations allow a permittee to request that the same alternate effluent limits established under a section 301(g) variance be continued. Continuation of such alternate effluent limits, while not specifically addressed in the statute, is consistent with the terms of the statute. However, the inclusion of the phrase “such modification” clearly refers to the existing limitations, not to circumstances in which a permittee, like ArcelorMittal, now requests different and less stringent alternate effluent limitations than those established under the previously granted 301(g) variance. “Such modification” clearly refers to “a modification *granted* under section 301(g)” (emphasis supplied). A new modification cannot, by definition, have already been granted. As previously discussed in Region 5’s Reply Brief, such requests are inconsistent with the language of the statute and the applicable regulations.

ArcelorMittal also makes several arguments, none of which is persuasive, that EPA’s proposed rulemakings and guidance support the conclusion that existing section 301(g) variances can be extended or modified. *See* ArcelorMittal Rep. Br. at 8 – 10.

First, ArcelorMittal argues that the preamble to the proposed section 301(g) regulation (which has never been finalized) states that existing section 301(g) variances “will be continued if the State has promulgated a WLA for the pollutant in question,”

citing 49 Fed. Reg. 31462 (Aug. 7, 1984).⁹ See ArcelorMittal Rep. Br. at 8 – 9. This passage actually supports the Agency’s position that existing section 301(g) variances can be continued when an NPDES permit containing a section 301(g) variance is re-issued, but does not support ArcelorMittal’s further argument that existing section 301(g) variances can be modified to increase the alternate effluent limits without complying with the statutory deadlines in CWA section 301(j)(1).

Second, ArcelorMittal also argues, based on the preamble for the final NPDES rule published in the Federal Register on June 7, 1979, that the “initial grant of a variance” is like the initial grant of an NPDES permit, and thus the “logic for renewing and modifying NPDES permits” means that a section 301(g) variance should also be regarded as being capable of renewal and modification. See ArcelorMittal Rep. Br. at 9. However, the language from the preamble that is cited by ArcelorMittal simply does not mean what ArcelorMittal claims it means and provides absolutely no support for the broad conclusion that because NPDES permits can be renewed and modified then section 301(g) variances can be renewed and modified too.¹⁰

IV. Issue (C) - # 4 - ArcelorMittal erroneously argues that EPA’s alleged “long-established practice” of renewing or modifying previously approved

⁹ ArcelorMittal also cites EPA’s section 301(g) Variance Technical Guidance Manual for the proposition that states must establish water quality standards for the non-conventional pollutant and WLAs and TMDLs for the 301(g) source and other dischargers in the vicinity before a permit containing a section 301(g) variance is reissued. ArcelorMittal’s argument in this regard appears either to support the Agency’s position that existing section 301(g) variances can be continued when an NPDES permit containing a section 301(g) variance is reissued (*i.e.* provided that the state has promulgated numerical water quality standards, WLAs and TMDLs) or not to be relevant to the issues presented in this matter for Board review.

¹⁰ Finally, ArcelorMittal includes a paragraph in which it argues that the CWA includes an exception to the anti-backsliding requirements in cases where a section 301(g) variance has been granted during the period since an NPDES permit was last issued, and in such cases the re-issued NPDES permit may include a less stringent requirement than the previous NPDES permit, based on the section 301(g) variance. See ArcelorMittal Rep. Br. at 10. ArcelorMittal’s argument provides no support for its position that existing section 301(g) variances can be modified to increase the alternate effluent limitations without satisfying the statutory deadlines in CWA § 301(j)(1).

section 301(g) variances supports the conclusion that existing section 301(g) variances can be modified.

The Board directed the EPA to explain the facts and the Region's decision and reasoning with respect to the 2001 grant of the CWA section 301(g) ammonia-nitrogen variance held by Arcelor's predecessor, including the Region's explanation for its authority to grant this modification. In addition, the Board also directed the Region to specify whether the Region agrees with the facts of the other Agency permit decisions recited in Arcelor's reply brief.¹¹

The following discussion explains Region 5's actions in the permitting proceedings cited by Arcelor. This discussion shows that the actions taken by Region 5 in all instances are consistent with its position here that, after the timely application for and grant of a 301(g) variance, no new application for modification of the variance is authorized by the CWA after the statutory deadline for application for a section 301(g) variance has passed. Region 5 acknowledges that the language describing its actions may in some instances have been confusing and legally imprecise. The reality of each proceeding, however, is that in no instance did Region 5 approve a new variance that was requested after the expiration of the statutory application period.

Arcelor-Mittal's Predecessor

As explained in Region 5's Reply Brief, ArcelorMittal's predecessor originally filed a request for a § 301(g) variance not later than February 17, 1983, within 270 days of the promulgation of the effluent limitations guidelines (ELG) for the iron and steel

¹¹ None of the information submitted by ArcelorMittal in support of its argument appears in the Administrative Record for Region 5's decision to deny ArcelorMittal's 2010 application; the information was not considered by Region 5 in making its decision to deny the 2010 application; and thus the information is not relevant to Region 5's decision. Region 5's decision to deny ArcelorMittal's 2010 application was based on the application of the requirements of the statute and applicable enabling regulations to the facts of the case as represented in the Administrative Record.

manufacturing category on May 27, 1982. Region 5 tentatively approved this timely application on March 14, 2001, and the alternative effluent limitations established under that approval were incorporated into the final permit of ArcelorMittal's predecessor on September 27, 2001. Region 5 Rep. Br. at 9.

Wheeling Pittsburgh's Steubenville, Ohio Facility

ArcelorMittal alleges that "Region 5 approved a modification of the §301(g) variance contained in the 1993 NPDES permit for Wheeling Pittsburgh's Steubenville, Ohio facility during the facility's 2006 NPDES permit renewal." ArcelorMittal Rep. Br., at 10.

Ohio EPA in a letter to Region 5 dated December 29, 2003, informed Region 5 that

"[t]he Wheeling Pittsburgh Steel Corporation (WPSC) has requested that the Section 301(g) variance be renewed for their Steubenville South Plant. . . . Since the data shows that the Steubenville South Plant should be able to meet the BAT limits for total phenolics, we are not proposing variance-based limits for this parameter. "

See Sur. Br. Ex. 1 (Letter from Lisa J. Morris, Division Chief Ohio EPA, to Rebecca Harvery, EPA, Dec. 29, 2003).¹²

Thus, Ohio EPA indicated that it was proposing to remove the alternate effluent limitations established for phenols under the section 301(g) variance granted by EPA and replace them with the applicable BAT effluent guidelines limitations. Ohio EPA explained:

"For phenolics, the draft permit proposes to incorporate the BAT limits from the Federal Effluent Guidelines. The data over the last five years shows that two values were higher than the proposed daily maximum loading limit of 0.22 kilograms per day; Ohio EPA determined that these two values were outliers since

¹² The letter also stated: "Ohio has updated our analysis of this variance which was originally granted in 1987 for ammonia and phenolics. We have found that the existing variance limits are much higher than necessary at this time. Based upon reported monitoring data over the last five years, we are proposing much lower variance limits for ammonia." As noted, however, the limits for ammonia that were ultimately incorporated into the final permit were the same as for the 1993 permit. Thus, the same ammonia limits from the 1993 permit were merely continued in the 2006 permit.

ther were more than six times greater than next highest value. Ohio EPA believes that WPS should not have difficulty in complying with the BAT limits for phenolics.”

See Sur. Br. Exhibit 2 (Fact Sheet Regarding an NPDES Permit to Discharge to Waters of the State of Ohio for Wheeling Pittsburgh Steel – Steubenville South, Sept. 23, 2003).

Region 5 responded to Ohio EPA on February 24, 2004, and provided its views on Ohio EPA’s proposed permit limitations:

“This is in response to your letter of December 29, 2003, to Rebecca Harvey of my staff requesting the review and approval of a 301(g) variance request by the Wheeling-Pittsburgh Steel Corporation for their Steubenville South Plant. Upon review of the variance request, I am in agreement with the Ohio Environmental Protection Agency’s proposed limits for ammonia and the denial of a variance for phenols. I approve the granting of a 301(g) variance for ammonia in response to that request.”¹³

See Sur. Br. Ex. 3 (Letter from Bharat Mathur, Region 5, to Lisa J. Morris, Ohio EPA, Feb. 24, 2004).¹⁴ In the case of phenols, Region 5 agreed with Ohio EPA’s termination of the section 301(g) variance previously granted by Region 5. Ohio EPA had apparently concluded that the facility could achieve the applicable guideline limitations for phenols and so modifying the permit to reduce the allowable discharge to below the authorized 301(g) limitations would work no hardship on the facility. In any event, under section 510 of the CWA, States are always free to adopt more stringent restrictions on discharges than otherwise required by the CWA. Region 5’s statement that it agreed with Ohio EPA’s recommendation to terminate the § 301(g) variance is obviously not, however, an action granting a variance under section 301(g). Ohio’s termination of the section 301(g)

¹³ While the language of Region 5’s letter may suggest that Region 5 was granting a 301(g) variance for ammonia, the letter simply reflects EPA’s position that a permit may be reissued with previously approved section 301(g) limitations. This is not grant of a new variance after the expiration of the statutory period.

¹⁴ The revision alleged by ArcelorMittal at the Wheeling-Pittsburgh facility involved a reduction in the effluent limits for the pollutant at issue, while in this case, ArcelorMittal has requested a significant increase in the alternate effluent limitations.

variance limitations to restore otherwise applicable BAT effluent limitations does not require EPA approval under CWA section 301(g).

ArcelorMittal Indiana Harbor West Facility

ArcelorMittal also alleges that Region 5 approved the modification of a previously-issued section 301(g) variance when the Indiana Department of Environmental Management (“IDEM”) reissued NPDES Permit No. IN0000205 for the ArcelorMittal Indiana Harbor West facility in East Chicago, Indiana. However, IDEM’s reissuance of the NPDES permit for ArcelorMittal’s Indiana Harbor West facility did not, contrary to ArcelorMittal’s assertions, an approval action by Region 5 under CWA section 301(g). A letter from Bruno Pigott, Assistant Commission at IDEM, to EPA states that that the application submitted by ArcelorMittal Indiana Harbor West requested “ the *continuance* of the variance under Section 301(g) of the Clean Water Act for the non-conventional pollutants ammonia (as N) and phenols ...” In addition Mr. Pigott stated that while the proposed modified effluent limitations “will be re-distributed, the cumulative total effluent limit for ammonia and phenol for the three outfalls is the same as the total PMEL approved by EPA” when it initially approved the 301(g) variance in 1986.” See Sur. Br. Ex. 4 (Letter from Bruno Pigott, Indiana Department of Environmental Management, to Kevin Pierard, Region 5, August 3, 2011). In response, Region 5 agreed not to object to the reissuance of the NPDES permit which included revised limits for outfalls for which the alternate effluent limits had been established by a previous section 301(g) variance, based on the conclusion that the water bubble concept in the existing effluent guideline covered the revised limits proposed for the re-issued

permit. *See* ArcelorMittal Rep. Br. Ex. 7 (Letter from Kevin M. Pierard, Region 5, to Bruno Pigott, Indiana Department of Environmental Management, August 9, 2011).

The “water bubble” is a regulatory flexibility mechanism found at 40 C.F.R. § 420.03 that allows for trading or redistribution of pollutant discharge mass limitations among multiple discharge outfalls. “The effect of such a water bubble was to allow a greater or lesser quantity of a particular pollutant to be discharged from any single outfall so long as the total quantity discharged from the combined outfalls did not exceed the allowed mass limitation.” 70 Fed. Reg. 73618 (December 13, 2005). Region 5 thus concluded that the water bubble allowed IDEM to require the Indiana Harbor West facility to comply with the aggregate limits for ammonia and phenols established by the previously approved section 301(g) variance, but with the effluent discharge mass re-distributed differently among the source’s outfalls 009, 010, and 011 outfalls. *See* Sur. Br. Ex. 5 (Declaration of David Soong). While the pollutant discharge load for a specific outfall may increase under the water bubble, the overall aggregate load does not. Applications of the water bubble to redistribute pollutant discharge limitations that may include section 301(g) limitations at a discharge point is not an action under CWA section 301(g).

Other facilities

Finally, ArcelorMittal has asserted that:

EPA also has repeatedly *extended or continued* existing § 301(g) variances in prior NPDES permits for ArcelorMittal’s Cleveland, Ohio and East Chicago and Burns Harbor, Indiana facilities; Weirton Steel Corporation in Weirton, West Virginia; and AK Steel’s Middleton, Ohio and Ashland, Kentucky facilities,”

ArcelorMittal Rep. Br., at 11. As discussed, *supra*, Region 5 agrees with the conclusion that “renewing,” that is to say continuing, alternate effluent limitations established under a previously approved section 301(g) variance is consistent with the Clean Water Act and

the applicable enabling regulations. Region 5 routinely refrains from objecting when a State permitting authority prepares a draft NPDES permit that includes a continuation (or “renewal”) of alternate effluent limitations established under a previously granted section 301(g) variance, unless Region 5 has reason to believe that the permit applicant no longer satisfies the requirements of CWA section 301(g)(2).¹⁵

In addition, ArcelorMittal never attempts to use its allegations about EPA’s “long-established practice” to clarify the meaning of the statute and regulations to argue for an interpretation of the language of the statute and regulations that supports its claims.

V. Issue (D) - # 7 - ArcelorMittal erroneously argued that Region 5 failed to follow the statutory requirements for decision-making under CWA section 301(g) when issuing its denial to ArcelorMittal.

In addressing issue # 7, the Board directed EPA to specify and explain the Region’s position as to whether it met the 365-day deadline set forth in CWA section 301(j)(4) for deciding Arcelor’s application.

CWA section 301(j)(4) requires that EPA must approve or disapprove an application for a modification under CWA section 301(g) not later than 365 days after the date that the application is filed.

In this case, ArcelorMittal submitted an application to the Ohio EPA by letter dated April 13, 2010, for a modification of the NPDES permit issued to it by the Ohio EPA and included with it a request for action under CWA section 301(g) for increased alternate effluent limits for discharges of ammonia-N from outfall 604 at their facility in

¹⁵ Under 40 C.F.R. § 123.44, the EPA Regional Administrator may object to proposed permits prepared by state permitting authorities pursuant to federally-approved state NPDES programs. Requests to continue alternate effluent limitations established under a previously granted § 301(g) variance are generally processed not by a new action under § 301(g), but by incorporation of the alternate effluent limits into the proposed permit and forbearance by the Regional Administrator to object to the terms of the proposed permit.

Cleveland, Ohio. *See* Items 16 and 17 of the Administrative Record, AR-16 and AR-17, previously submitted with Region 5's Submission of Relevant Portions of the Administrative Record. Under 40 C.F.R. § 122.21(m)(2), however, applications for variances under CWA § 301(g) "must be made ... by ... (A) Submitting an initial request to the Regional Administrator, as well as to the State Director, if applicable" Because ArcelorMittal failed to submit the application to EPA at the time of submission to Ohio EPA, filing was not complete at that time. Filing was not complete until Ohio EPA formally transmitted ArcelorMittal's 301(g) application by letter dated June 14, 2010, and it was received by Region 5 (per date stamp) on June 23, 2010.¹⁶ *See* Item 21 of the Administrative Record, AR-21, previously submitted with Region 5's Submission of Relevant Portions of the Administrative Record. The Regional Administrator of EPA Region 5 approved the denial of the ArcelorMittal's section 301(g) application 365 days later on June 23, 2011.¹⁷ Region 5 therefore asserts, based on the foregoing explanation, that it met the 365-day deadline set forth in CWA section 301(j)(4) for deciding Arcelor's application.¹⁸

¹⁶ Region 5 acknowledges that a copy of the section 301(g) application was informally transmitted by Ohio EPA to a Region 5 staff member by email on May 3, 2010. The Ohio EPA email indicated that there was difficulty completing approvals within Ohio EPA for authorization to transmit the application formally to Region 5: "I was hoping to send a copy with a transmittal letter, but I'm having some temporary issues with getting the letter through sign-off." *See* Ex. 8, submitted with ArcelorMittal's Reply Brief.

¹⁷ Region 5 acknowledges that after the Region 5 Regional Administrator signed the decision document on June 23, 2011, denying ArcelorMittal's section 301(g) application, the signed decision document was misplaced before it was subsequently transmitted to ArcelorMittal and Ohio EPA at the end of July 2011.

¹⁸ In the event that the Board should disagree with Region 5's conclusion, the CWA does not establish any remedy for the failure to meet the 365-day deadline, and certainly does not provide that the section 301(g) application is deemed approved if the deadline is not met. Arguably, under the CWA, ArcelorMittal could file a citizen suit under CWA section 505 for an order to compel EPA to perform a non-discretionary duty of approving or denying ArcelorMittal's section 301(g) application. Given that EPA has acted on ArcelorMittal request, such suit would be moot.

In addition, ArcelorMittal erroneously argues that the Board should reverse Region 5's denial because it failed to follow the statutory protocol for CWA section 301(g) variance decisions. In support of its conclusion, ArcelorMittal argues that Region 5 did not make formal findings about whether the requested section 301(g) variance would satisfy the requirements in CWA section 301(g)(2). ArcelorMittal argues further that Region 5 was considering some of these criteria when evaluating ArcelorMittal's application. *See* ArcelorMittal Rep. Br. at 12 -13.

That Region 5 was simultaneously considering the adequacy of each aspect of ArcelorMittal's section 301(g) application prior to making a decision should not be understood as remarkable, but as completely to be expected and reasonable. Once Region 5 reached the conclusion that the application was time-barred, however, Region 5 had no obligation whatsoever to make formal findings about whether the application satisfied the requirements of CWA § 301(g)(2).

VI. Issue E.- # 8 – Oral Argument

Region 5 does not oppose ArcelorMittal's request for oral argument if the Board believes that oral argument would clarify the issues.

VII. New Issues required to be addressed by the Board's order

A. Issue E - Addressed above

B. Issue (F)(1) – Does the CWA section 301(g) prohibit any modification of CWA section 301(g) variances, once granted.

Section 301(j)(1)(B) of the CWA requires that “[a]ny application filed under this section for a modification” must be filed by a fixed date. The time deadline for any application and the legislative history supports the notion a discharger must apply for the variance by that date. After that date, no application for modification of an approved

variance may be entertained by EPA. Therefore, it was appropriate for EPA Region 5 to deny ArcelorMittal's request as untimely. While, as discussed above, the permit may continue to include the 301(g) variance limitations in subsequently issued permits, EPA has no authority to entertain a request from a discharger for further modification to the variance limitations.¹⁹

Faithful application of the statutory deadline is consistent with Congress's goal of creating uniform requirements and finality for technology-based standards on industry-wide basis except under narrowly circumscribed conditions. This approach is mirrored in other provisions that allow narrow exceptions to categorical limitations. Section 301(n) of the CWA makes available, also under limited circumstances, a "fundamentally different factors" variance. This variance is only available when an application for the variance is filed 180 days after the guideline limitation is established. Further, the basis for the variance must be based on information and data submitted to EPA in the guideline limitations rulemaking or based on information that could not have been submitted. The FDF variance, like the 301(g) variance here, is available to dischargers in a narrowly circumscribed time frame. Also, like section 301(g) variances (see discussion below), FDF variances are not available for any new sources, again reflecting the uniform standards of performance Congress expected for industrial categories covered by the effluent limitations guidelines.

C. Issue F(2) - § 301(g) Variances Are Not Available to Statutory New Sources

¹⁹ As discussed above, the legislative history clearly indicates an applicant is expected to make a new demonstration each time the applicable permit expires in order for the variance to continue. In reviewing this demonstration under its authority under section 402 of the Act, the permitting authority may decide that changed circumstances warrant imposition of different limitations. But exercise of that authority (or any other authorities reserved to State under section 510 of the CWA) does not constitute an action under section 301(g) of the CWA.

It is well-established law that alternative non-conventional pollutants limitations are not available for new sources. Section 301(g) of the CWA provides that EPA may modify the requirements of (b)(2)(A) of Section 301 with respect to point source discharges of certain nonconventional pollutants. Sections 301(b)(2)(A) and 301(b)(2)(F) require the establishment of effluent limitations that require the application of the best available technology. New sources are subject not to section 301 limitations but to standards of performance under Section 306 of the CWA. Section 306(a)(1) requires EPA to establish standards of performance that reflect effluent reduction achievable through the application of the best available demonstrated control technology. Unlike section 301, section 306 does not include a provision that would authorize establishment of alternative standards of performance for non-conventional pollutants.

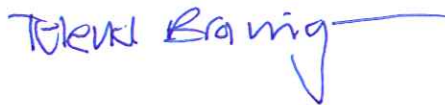
The U.S. Supreme Court has specifically held that there is no statutory provision for variances in section 306. The court reversed a decision of the U.S. Court of Appeals for the Fourth Circuit that required EPA to provide variance procedures for new sources. The court held that Congress intended the section 306 standards to be absolute prohibitions and a variance standard would be inappropriate in a standard intended to ensure national uniformity. *E.I. DuPont de Nemours v. Train*, 430 U.S. 112, 138 (1977).

VIII. CONCLUSION

EPA Region 5 respectfully requests that the Board reject the arguments made by ArcelorMittal Cleveland Inc. in its Informal Appeal and in its Reply in Support of Informal Appeal.

Dated: January 6, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 6th day of January, 2012, I sent copies of the foregoing "Surreply Brief of EPA Region 5," with attached exhibits, dated January 6th, 2012, in the following manner to the addressees listed below:

PDF copy, by CDX

Environmental Appeals Board

Copy by Email and by UPS Next Day Air (by depositing copies in the UPS drop box located in EPA/Region 5's Offices at 77 W. Jackson Blvd., Chicago, IL 60604)

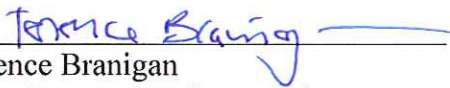
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