

**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))
)
)
)

**EPA REGION 5'S MOTION TO STRIKE PORTIONS OF PETITIONER'S
SUPPLEMENTAL BRIEF AND TO EXCLUDE NEW EXHIBITS,
OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE REPLY**

During oral argument on February 28, 2012, the Environmental Appeals Board (“Board”) declined to allow ArcelorMittal Cleveland Inc. (“Petitioner”) to introduce an exhibit because Region 5 had not had an opportunity to review it. Transcript for Oral Argument at 11-13. In an end run around the Board’s determination, Petitioner has now reproduced portions of that same exhibit in its Supplemental Brief. In addition, Petitioner has included five new exhibits with its brief -- none of which has been introduced previously in this proceeding. Petitioner’s brief also provides extensive new analysis and argument based on the new and previously excluded materials.

Region 5 of the U.S. Environmental Protection Agency requests that the Board reject Petitioner’s flagrant flouting of the Board’s ruling at oral argument and elementary notions of fairness. Specifically, EPA asks that the Board: (i) strike two tables included in the Supplemental Brief filed by Petitioner with the Board on or about March 23, 2012, that are based on the exhibit excluded at oral argument; (ii) exclude new Exhibits 2 through 6, which were submitted by the Petitioner for the first time with its Supplemental Brief, and (iii) strike analysis and argument based on the tables and new exhibits. In the alternative, Region 5 asks for an opportunity to file a reply to Petitioner’s Supplemental Brief to address these tables, exhibits, and associated analysis and argument.

A. Tables and Associated Analysis and Argument

A comparison of the exhibit prohibited at oral argument with the tables incorporated at pages 11 and 12 of the Petitioner's Supplemental Brief reveals they are virtually identical. Attached to this motion as Exhibit 1 is a copy of an email sent by counsel for the Petitioner to counsel for Region 5 on the night before oral argument. That email states: "Attached please find copies of the demonstrative exhibits that ArcelorMittal Cleveland may use at Tuesday's oral argument in the above-referenced appeal." Attached to that email was Petitioner's "Demonstrative Exhibit A," a copy of which is attached to this motion as Exhibit 2.

Demonstrative Exhibit A includes three horizontal rows, the first marked "ArcelorMittal Cleveland," and the second marked "AK Steel Middletown." Petitioner has incorporated the second row from the prohibited Demonstrative Exhibit A almost verbatim into the table on page 11 of Petitioner's Supplemental Brief and has incorporated the first row from the prohibited Demonstrative Exhibit A almost verbatim into the table on page 12 of Petitioner's Supplemental Brief.

In footnotes to the tables, Petitioner has also attached several new exhibits to its Supplemental Brief, specifically including Exhibits 2 through 4,¹ listed in the Exhibit List for Petitioner's Supplemental Brief. None of these exhibits has been introduced previously in this proceeding. None of these exhibits pertains to the NPDES permit or the facility at issue in this proceeding. None of these exhibits is included in the Administrative Record for Region 5's decision to deny Petitioner's 2010 application. As a consequence, none of these exhibits was included in Region 5's deliberations when it decided to deny the Petitioner's 2010 section 301(g) application.

Petitioner relies on these tables and the new exhibits to introduce new arguments in the

¹ Exhibit 2: 2008 AK Steel Middletown NPDES Permit Fact Sheet and 2008 AK Steel Middletown NPDES Permit; Exhibit 3: Technical Support Document for Proposed NPDES Permit Effluent Limitations, AK Steel Corporation - Middletown Works (Feb. 1997) and 1997 AK Steel Middletown NPDES Permit; Exhibit 4: Technical Support Document for Proposed NPDES Permit Effluent Limitations, AK Steel Corporation - Middletown Works (Oct. 2001) and 2002 AK Steel Middletown NPDES Permit.

Supplemental Brief to which EPA has had no chance to respond. These include the assertion that the “incremental increase between BAT limitations and §301(g) variance limits at the AK Steel Middletown facility achieves a result no different, i.e. a less stringent effluent limitation, from that approved by Ohio EPA for the ArcelorMittal Cleveland facility,” Pet. Supp. Br. at 11, and that “[t]he point of comparing the AK Steel Middletown to the ArcelorMittal Cleveland facility as reflected in the tables above is to incontrovertibly show that U.S. EPA has heretofore approved on numerous occasions increases in § 301(g) variances.” Pet. Supp. Br. at 12. Not only are these arguments completely erroneous and utterly specious, but they are also irrelevant to the matters specified for supplemental briefing in the Board’s Order dated March 1, 2012, since they have nothing whatsoever to do with anti-backsliding or antidegradation.

Region 5 has had no opportunity to address the tables, the new exhibits, or the analysis and argument based on the tables and new exhibits. Accordingly, Region 5 moves to strike the tables on pp. 11 and 12 of the brief, exclude new exhibits 2, 3, and 4, and strike the analysis and argument that rely on these tables and exhibits² from the brief and the record for this proceeding.

In the alternative, because the tables and the analysis and arguments based on the new exhibits and tables are deeply misleading and erroneous, Region 5 respectfully requests leave to file a reply to these materials. Region 5 believes that if the Board does not grant the motion to strike or exclude these materials, a reply brief that addresses them is necessary to correct Petitioner’s errors and will materially assist the Board in resolving ArcelorMittal’s Informal Appeal.

B. New Exhibits 2, 5, and 6 and Associated Analysis and Argument

Petitioner has also attached two further new exhibits to its Supplemental Brief, specifically Exhibits 5 and 6,³ listed in the Exhibit List for Petitioner’s Supplemental Brief. Like

² The argument begins on and includes the first full paragraph on page 11 and runs through the end of the paragraph immediately following the table on page 12.

³ Exhibit 5: 2011 ArcelorMittal Burns Harbor NPDES Permit Fact Sheet and 2011 ArcelorMittal Burns Harbor NPDES Permit; Exhibit 6: 2011 ArcelorMittal Indiana Harbor NPDES Permit Fact Sheet and 2011 ArcelorMittal Indiana Harbor NPDES Permit.

Exhibits 2 through 4, these exhibits suffer from the same infirmities noted above. That is, they were not introduced previously in this proceeding, do not relate to the NPDES permit or the facility at issue in this proceeding, they were not included in the Administrative Record for Region 5's decision to deny Petitioner's 2010 application, and thus were not included in Region 5's earlier deliberations .

Nonetheless, Petitioner devotes extensive analysis in pages 10 - 14 of its Supplemental Brief to new exhibits 2, 5 and 6 in support of a fallacious argument that, reduced to its essentials, asserts:

- i. alternate BAT limits established under section 301(g) are based on water quality standards and water quality assessments; and thus
- ii. CWA section 401(o)(1), which prohibits backsliding from effluent limits established under section 301(b)(1)(C) (sometimes called water quality based effluent limitations), also applies to § 301(g) alternate BAT limits.

Region 5 has not had the opportunity to comment on the significance or meaning of new Exhibits 2, 5, or 6, or of the analysis and argument based on the new exhibits. Region 5 therefore requests that the new exhibits be excluded from the record for this proceeding and that the analysis and argument based on the new exhibits be stricken in their entirety.⁴

In the alternative, Region 5 respectfully requests leave to file a reply to these new exhibits and the analysis and arguments based on these new exhibits. Region 5's view is that, in the event the Board accepts the new exhibits, addressing them and the analysis and argument based on them will materially assist the Board in resolving ArcelorMittal's Informal Appeal.

C. Conclusion

For good cause shown, Region 5 requests that the Board grant this motion to strike portions of the Petitioner's Supplemental Brief and exclude new exhibits in its entirety. In the

⁴ This includes all of the text in Petitioner's Supplemental Brief commencing with and including the second paragraph on p. 10 through and including all the text of the Petitioner's Supplemental Brief before the heading for Section B on p. 14 of the Petitioner's Supplemental Brief (excluding only the tables on pages 11 and 12 and associated argument and analysis, previously discussed above).

alternative, Region 5 asks that the Board allow it to file a reply to the tables and new exhibits included in Petitioner's Supplemental Brief and the analysis and arguments relying on them.

Respectfully submitted,

Counsel for EPA/Region 5

4/27/2012
Date

Terence Branigan
Terence Branigan
Associate Regional Counsel (C-14J)
U.S. EPA/ Region 5
77 W. Jackson Boulevard
Chicago, IL 60604
(312) 353-4737 (voice)
(312) 385-5500 (fax)
branigan.terry@epa.gov

OF COUNSEL

Richard Witt
Office of General Counsel
Water Law Office
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
(202) 564-5496

CERTIFICATE OF SERVICE

I certify that on this 27th day of April 2012, I sent copies of the foregoing "EPA Region 5's Motion to Strike Portions of Petitioner's Supplemental Brief and to Exclude New Exhibits, or in the Alternative, Motion for Leave to File Reply," dated April 27, 2012, with attached exhibits, 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

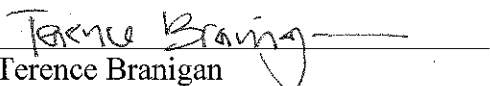
Mr. Dale E. Papajcik
Ms. Lianne Mantione
Squire, Sanders & Dempsey LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44144

Ms. Kendra S. Sherman
Squire, Sanders & Demsey LLP
2000 Huntington Center
41 South High Street
Columbus, OH 43215

Mr. Scott J. Nally, Director
Ohio Environmental Protection Agency
50 West Town St., Suite 700
Columbus, OH 43215

Mr. George Elmaraghy, P.E., Chief
Division of Surface Water
Ohio Environmental Protection Agency
50 West Town St. Suite 700
Columbus, OH 43215

Dated: 04/27/2012


Terence Branigan
Associate Regional Counsel
U.S. Environmental Protection Agency/Region 5

