

**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))
)
_____)

SUPPLEMENTAL 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”) this Supplemental Brief in the above-captioned matter.¹ In accordance with the Board’s Order of March 1, 2012, this Supplemental Brief addresses the relevance and applicability of section 402(o) of the Clean Water Act (“CWA”) and of the State of Ohio’s anti-backsliding and antidegradation statutes and regulations to the application of ArcelorMittal Cleveland Inc. (“ArcelorMittal”) for modified section 301(g) limitations.²

Because EPA denied ArcelorMittal’s application as untimely under the plain language of section 301(j)(1)(B) of the CWA, EPA did not address anti-backsliding and antidegradation in that decision. If, however, the Board determines that section 301(g) is not a limited, “once and done” variance and that EPA may consider ArcelorMittal’s application, then the State of Ohio’s antidegradation requirements would be relevant and applicable to EPA’s decision on ArcelorMittal’s application. Further, if EPA were to

¹EPA’s Associate General Counsel for Water has reviewed this brief and concurs in the views expressed here.

² While ArcelorMittal characterized its application to the Ohio EPA as a permit modification, Ohio EPA appears to have understood it (as did EPA Region 5) as also including an application under section 301(g) for modification of the ammonia-nitrogen limitation in their NPDES permit. *See e.g.*, Exhibit AR-21.

approve the application for modified section 301(g) limitations, the State of Ohio's anti-backsliding requirements would be relevant to a decision by Ohio EPA as the NPDES permitting authority about whether ArcelorMittal could backslide in its NPDES permit from its current section 301(g) limitations to further modified 301(g) limitations. The following sections describe the relevance and applicability of anti-backsliding and antidegradation requirements if EPA may consider ArcelorMittal's application for a modification of its effluent limits under section 301(g).

I. Issue 1 – Are the anti-backsliding provisions of section 402(o) of the Clean Water Act, of 40 C.F.R. § 122.44(l) of the federal NPDES permit program, and of the State of Ohio's anti-backsliding statutes or regulations relevant or applicable to ArcelorMittal's section 301(g) application?

If the Board decides that EPA may consider an application for further modification of an existing section 301(g) variance, neither section 402(o) of the CWA nor 40 C.F.R. § 122.44(l) would restrict EPA from granting such a request when EPA is the permitting authority. Similarly, unless Ohio anti-backsliding requirements are more stringent than EPA requirements, Ohio may also modify ArcelorMittal's permit to include less stringent limitations provided EPA has approved the request as consistent with section 301(g).

First, the anti-backsliding requirements of section 402(o) do not apply with respect to alternate effluent limitations established under section 301(g). Section 402(o) only applies to section 402(a)(1)(B) limitations – “best professional judgment (“BPJ”) effluent limitations” – and to section 301(b)(1)(C) or 303(d) or (e) – water quality-based effluent limitations or WQBELs.

The ammonia-nitrogen limitations at issue here are effluent guidelines limitations under section 301(b)(2)(A) that have been modified pursuant to section 301(g) and not BPJ or WQBEL limitations. On its face, then, section 402(o) does not apply to the ammonia-nitrogen limitations in ArcelorMittal's existing permit. Consequently, ArcelorMittal's observation that, in section 402(o)(2)(D), the anti-backsliding provision contains an explicit exception allowing a permit to be renewed, reissued or modified to contain less stringent effluent limitations if the permittee has received a permit modification under section 301(g) is correct, but irrelevant. *See e.g.*, ArcelorMittal's Reply in Support of Informal Appeal, at 10. Section 402(o) applies to the modification of BPJ or WQBEL limitations, not section 301(g) limitations.

Second, if EPA were the permitting authority, EPA's anti-backsliding regulation at 40 C.F.R. § 122.44(l)(1) also would not restrict the renewal, reissuance or modification of a permit to include less stringent section 301(g) limitations.³ 40 C.F.R. § 122.44(l)(1)⁴ establishes the requirement that a renewed or reissued permit must include limitations at least as stringent as the previous permit, except when the circumstances under which the previous permit was issued have substantially and materially changed and such changed circumstances would constitute grounds for modification under 40 C.F.R. § 122.62. One ground for modification under 40 C.F.R. § 122.62 is "[w]hen a permittee has filed a request for a variance under CWA section . . . 301(g) . . . within the time specified in 122.21 . . ." 40 C.F.R. § 122.62(a)(5). Therefore, if the Board finds that the statutory deadline (as provided in section 301(j)(1)(B) and 40 C.F.R. §

³ It is unclear whether 40 C.F.R. § 122.44(l)(1) applies at all because, by its terms, this provision does not refer to modifications. Even if 40 C.F.R. § 122.44(l)(1) does apply, permit modifications to include less stringent section 301(g) variances will meet the conditions for an exception to the prohibition, as explained below, if subsequent applications for modified section 301(g) limits are not time-barred.

⁴ 40 C.F.R. § 122.44(l)(2) applies only to BPJ permit limitations.

122.21(m)(2)(i)(A)(2)) is no bar to subsequent section 301(g) modifications, then 40 C.F.R. § 122.44(l)(1), if it applies to permit modifications, would not bar EPA from establishing less stringent section 301(g) limitations.

Third, if the Board decides that EPA may consider ArcelorMittal's application and if EPA subsequently grants it, Ohio's anti-backsliding requirements - to the extent they are not more stringent than EPA requirements - appear not to restrict Ohio from modifying ArcelorMittal's permit to include less stringent limitations than those in its existing permit.⁵ The question of what Ohio's anti-backsliding laws require, however, is a question for the State of Ohio to determine.

The State of Ohio's anti-backsliding regulation appear to allow backsliding from existing limitations in order to incorporate alternate effluent limitations approved by EPA under a timely filed application for a section 301(g) modification. That anti-backsliding provision states in pertinent part:

- (1) Ohio NPDES permits may not be renewed, reissued or modified to contain effluent limitations that are less stringent than the comparable final effluent limitations in the previous permit except when:

...

- (e) The permittee has received a modification under section ... 301(g) ... of the act ...

OHIO ADMIN. CODE 3745-33-05(F)(1).

Consequently, as explained above, if section 301(j)(1)(B) does not prohibit EPA from further modifying ArcelorMittal's ammonia-nitrogen limitations, the anti-

⁵ Under 40 C.F.R. § 123.25(a)(15), the provisions of 40 C.F.R. § 122.44(l) are requirements for an authorized State program, and Ohio's regulations includes such requirements at OHIO ADMIN. CODE 3745-33-05(F)(1).

backsliding requirements of section 402(o), 40 C.F.R. §122.44(l), and OHIO ADMIN. CODE 3745-33-05(F)(1) also appear not to prohibit further modifications.

EPA notes that the policy considerations underlying the adoption of the anti-backsliding provision in section 402(o) are the same considerations supporting the view that sections 301(g) and (j) create a “once and done” variance for technology-based effluent limitations. The CWA enshrines as an objective “to restore and maintain the chemical physical and biological integrity of the Nation’s waters” toward the goal of eliminating the discharge of all pollutants into navigable waters. CWA section 101(a)(1), 33 U.S.C. § 1251(a)(1). In addition, the CWA requires that all discharges of pollutants by industrial point sources must achieve BAT effluent limitations in order to ensure “reasonable further progress toward the national goal of eliminating the discharge of all pollutants.” CWA section 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A). Repeated modification of 301(g) limitations to make them less stringent is generally at odds with that objective.

Senator Stafford explicitly linked the anti-backsliding policy to that objective, stating that anti-backsliding “is inherent in the [CWA’s] policy of requiring reasonable further progress toward the national goal of elimination of discharge of pollutants.” 131 CONG. REC. S15,325 (1985). He added that it would be “contrary to the [CWA] to allow one discharger to increase his pollution merely because another discharger has reduced his.” *Id.* Representative Oberstar was similarly concerned when “a company argued that its new permit should allow increased discharges because the water quality had improved since its last permit was issued.” 132 CONG. REC. H31,971 (1986). He was also concerned when: “a State proposed to reapportion wasteload allocations among four

plants, after a fifth plant on the stream segment had closed, thereby freeing up some stream assimilative capacity.” *Id.* In both of these cases, “the argument was that a stream could be polluted back down to the water quality standard. The effect of such procedures would be to freeze water quality at the standard, the lowest quality allowed by law, and would run counter to the thrust of the [CWA], which is the continued improvement of water quality.” *Id.* In later Senate discussion of the anti-backsliding provision, Senator Stafford stated that “Relaxation of permit effluent limits is fundamentally contrary to the spirit and intent of the [CWA], which is supposed to restore and maintain the chemical, physical and biological integrity of the Nation’s waters by reducing the amount of pollutants being discharged.” 132 CONG. REC. S32,381 (1986).

Similarly, as stated at oral argument, the repeated modification of section 301(g) limitations to make them less stringent is generally at odds with the CWA objective of continued improvements in water quality. The 1977 Act constituted a careful “mid-course correction,” *see, e.g.*, 123 CONG. REC. 38,960 (1977) (statement by Rep. Roberts), that adjusted the level of regulatory burden based on a re-evaluation of the environmental risks posed by categories of pollutants. The 1977 Act retained technology based limits for all categories of pollutants, but allowed applications for a limited variance **only** for specified medium-risk non-conventional pollutants from the strict requirements of the BAT limits within a narrow time window.⁶ Viewed within this context, the statutory deadline is not simply a bureaucratic hurdle that a discharger must meet, but the expression of a Congressional policy goal to allow some limited relief for dischargers,

⁶Section 301(g) variances were not allowed for either discharges of toxic pollutants, which continued to be regulated by BAT limits, or for conventional pollutants, which came to be regulated under the 1977 Act by BCT limits.

but with minimal disruption of the overall system of strict uniform technology based limits.

II. Issue 2 – Are Ohio’s antidegradation requirements relevant or applicable to ArcelorMittal’s request to increase further the allowable ammonia-nitrogen discharges from its facility?

Yes. Because EPA viewed section 301(j)(1)(B) as establishing a deadline for filing “any” application for a section 301(g) variance,⁷ making ArcelorMittal’s application untimely, EPA never made formal findings about the relevance and applicability of Ohio’s antidegradation requirements in making its 301(g) decision. If, however, the Board determines that EPA may consider ArcelorMittal’s section 301(g) application after the statutory deadline, then Ohio’s antidegradation requirements would be relevant to that decision. Of course, water quality based requirements would also independently apply to the permit under section 301(b)(1)(C). ArcelorMittal included an antidegradation analysis based on Ohio’s regulations with its application. *See* ArcelorMittal Cleveland Ex. 1. In the event of a remand, Region 5 would consider such information and Ohio’s antidegradation requirements in its assessment of whether granting ArcelorMittal’s application would comply with the requirements of section 301(g).

Specifically, section 301(g)(2)(A) requires that any modified limitations must “result at a minimum in compliance with the requirements of [section 301(b)(1)(A) and section 301(b)(1)(C)]...” 33 U.S.C. § 1311(g)(2)(A). The reference to section 301(b)(1)(C) means that any alternate effluent limitations under section 301(g) must be as

⁷ See *New York v. EPA*, 443 F.3d 880 (D.C. Cir.2006) and the numerous cases cited there for the proposition that “any” should be given an expansive reading in the absence of any reason to contravene its obvious meaning.

stringent as necessary to meet applicable water quality standards.⁸ Water quality standards include designated uses for water bodies, criteria to protect those uses and an antidegradation policy. *See, e.g., PUD No. 1 of Jefferson County v. Wash Dept of Ecology*, 511 U.S. 700, 705 (1994); *In re Teck Cominco Alaska Incorporated, Red Dog Mine*, 11 EAD 457, 463-66 (2004).


Consequently, EPA would need to evaluate whether any modified limitations would ensure compliance with Ohio's water quality standards, including its antidegradation requirements.⁹

CONCLUSION

For the reasons previously explained, Region 5 respectfully requests the Board to deny the appeal of ArcelorMittal.

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Respectfully submitted,


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⁸ Section 301(b)(1)(A) is the requirement to achieve BPT technology based limitations.

⁹ The State of Ohio has promulgated, pursuant to 40 CFR § 131.12, an antidegradation program, codified at OHIO ADMIN. CODE 3745-1-05.

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of March, 2012, I sent copies of the foregoing "Supplemental Brief of EPA Region 5," dated March 23, 2012, in the following manner to the addressees listed below:

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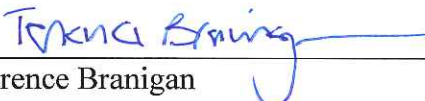
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