

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

In Re:

ArcelorMittal Cleveland Inc.

Permit No. OH0000957

NPDES Appeal No. 11-01

**ARCELORMITTAL CLEVELAND INC.'S BRIEF IN OPPOSITION
TO U.S. EPA REGION 5'S MOTION TO STRIKE**

I. INTRODUCTION

Five weeks after the parties submitted supplemental briefing as directed by the Board, ***and without citing a single rule or legal basis***, U.S. EPA Region 5 now seeks to strike certain exhibits and related arguments from ArcelorMittal Cleveland Inc.'s Supplemental Brief,¹ or in the alternative to respond to such exhibits and legal arguments. See 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 ("Motion to Strike"). As described more fully below, Region 5's claims are without merit.

First, it is wholly appropriate for the Board to consider facts and documents that are not part of the administrative record underlying Region 5's decision to deny ArcelorMittal Cleveland's Clean Water Act ("CWA") section 301(g) variance modification, or that were not considered by Region 5 in rendering its variance modification denial. That the Board should consider all relevant facts and documents is particularly

¹ ArcelorMittal Cleveland Inc.'s Supplemental Brief as Ordered by the Board (March 23, 2012).

important where, as here, the issues are complex and have important public policy implications. Second, the exhibits and related argument at issue in ArcelorMittal Cleveland's Supplemental Brief are directly relevant to the Board's directive to brief the applicability of the CWA and State of Ohio antibacksliding and antidegradation provisions to ArcelorMittal Cleveland's CWA section 301(g) variance modification request. The exhibits illustrate precisely the EPA actions at issue here and are, in fact, final actions of the EPA and State agencies themselves.² Finally, there is no evidence that Region 5 has been prejudiced by the arguments or exhibits presented by ArcelorMittal Cleveland in its Supplemental Brief. Put simply, Region 5's Motion to Strike should be denied.

II. LEGAL ARGUMENT

A. It is Appropriate for the Board to Consider All of the Documents Included in ArcelorMittal Cleveland's Supplemental Brief.

Without citing any legal support, Region 5 asserts that certain exhibits in ArcelorMittal Cleveland's Supplemental Brief should be stricken because they are not part of the administrative record underlying Region 5's decision to deny ArcelorMittal Cleveland's CWA section 301(g) variance modification and were not otherwise considered by Region 5 in rendering its variance modification denial. To the contrary, it is both lawful and important for the Board to consider all documents included in ArcelorMittal Cleveland's Supplemental Brief prior to rendering its decision on this appeal.

² Exhibits 2 through 6 in ArcelorMittal Cleveland's Supplemental Brief, which are at issue in Region 5's Motion to Strike, contain final NPDES permits and associated Technical Support Document containing alternate effluent limits pursuant to CWA section 301(g).

The Board has previously ruled that, “[a]lthough a document is not part of the administrative record, the Board may nonetheless consider it.” *In re: Guam Waterworks Authority*, NPDES Appeal Nos. 09-15 & 09-16, 2011 EPA App. LEXIS 37 (EAB Nov. 11, 2011). This is especially true where, as here, the appeal marks the first opportunity for an appellant to present such information. In fact, “[t]he Board has on numerous occasions, considered, in examining a case, documents presented on appeal that were not part of the administrative record. This is particularly true in cases where, as here, a petitioner submits such documents as support for its arguments on appeal and where the appeal process is the logical and/or first opportunity to present such documentation.” *Id.* (emphasis added). See also *In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-1 to 10-5, slip op. at 51-52 (EAB Nov. 18, 2010), (considering certain documents submitted in support of the petition even though documents were not part of the administrative record), appeal docketed sub nom.; *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 418 (EAB Sept. 27, 2007) (same as above, and citing other Board decisions for the same proposition).

As acknowledged by Region 5 in prior briefing in this appeal, there was no opportunity for public comment on Region 5’s denial of ArcelorMittal Cleveland’s CWA section 301(g) variance modification request. Rather, the instant appeal represents the first opportunity for ArcelorMittal Cleveland to present these submissions. The fact that the submissions are not part of the administrative record is immaterial. The documents at issue in Region 5’s Motion to Strike are offered by ArcelorMittal Cleveland to directly support its argument that antibacksliding and antidegradation are relevant to CWA section 301(g) variance modification decisions, and to support one of ArcelorMittal

Cleveland's primary claims in this appeal – that Region 5 has previously approved such variance modifications, which necessarily would have been subject to antibacksliding and antidegradation analyses.³ See *In re Dominion Energy Brayton Point, LLC* at 418 (where petitioner sought to have its submissions considered by the Board in support of its legal arguments, “it seems logical if not necessary that the Board consider the petitioner’s proffer of evidence in support of its assertion that the Region’s conclusions are erroneous”).

The Board’s consideration of ***all*** relevant documents – whether or not part of the administrative record – is particularly compelling in a case of this significance as the Board has already acknowledged. See Oral Argument Transcript, pp. 73-74 (“JUDGE MCCABE: ... There is a lot of important policies and ramifications involved in this one permit. As well as very important ramifications for ArcelorMittal's facility itself.”). Therefore, this Board should not be foreclosed from considering the exhibits at issue in Region 5’s Motion to Strike.

B. All of the Arguments In and Exhibits to ArcelorMittal Cleveland’s Supplemental Brief are Highly Relevant to the Board’s Supplemental Briefing Directive.

Region 5 further asserts that the arguments and exhibits at issue in its Motion to Strike are not relevant to the Board’s directive for briefing on the applicability of antibacksliding and antidegradation provisions to ArcelorMittal Cleveland’s requested CWA section 301(g) variance modification. Again, Region 5’s position is unavailing.

³ Interestingly, Region 5 did not take issue with any documents attached to prior briefing by ArcelorMittal Cleveland in this appeal that was also not part of the record. As a matter of fact, Region 5 included documents that were not part of the administrative record in its own briefing in this appeal. See exhibits to Surreply of EPA Region 5 (Jan. 6, 2012).

In its May 1, 2012 Order Directing Supplemental Briefing, the Board directed both parties to address “the relevance and applicability of section 402(o) [of the CWA] and the State of Ohio’s antibacksliding and antidegradation statutes or regulations” to ArcelorMittal Cleveland’s request to modify its existing CWA section 301(g) variance limit for ammonia-nitrogen; Region 5’s denial of which is the basis for ArcelorMittal Cleveland’s instant appeal. The argument and exhibits at issue in Region 5’s Motion to Strike bear directly on the issues to be briefed per the Board’s Order.

As discussed fully in ArcelorMittal Cleveland’s Supplemental Brief, both CWA §402(o) and the applicable State of Ohio regulations authorize the relaxation of water-quality based limitations that were established on the basis of State water quality standards (“WQS”) or Total Maximum Daily Loads (“TMDLs”), as long as the change is consistent with CWA §303(d)(4). The exceptions to antibacksliding set forth in CWA §402(o)(2) and the State of Ohio’s implementing regulations in Ohio Administrative Code (“OAC”) rule 3745-33-05(F) clearly authorize the renewal, reissuance, or modification of a NPDES permit to include effluent limitations which are less stringent than the comparable limitations in the previous permit where the permittee has received a permit modification (variance) under CWA §301(g).

As further discussed in ArcelorMittal Cleveland’s Supplemental Brief, the antidegradation provisions in CWA §303(d)(4) may also apply to the renewal, reissuance, or modification of a NPDES permit independently of CWA §402(o). Here, Ohio EPA conducted the required antidegradation analysis prior to proposing approval of ArcelorMittal Cleveland’s variance modification request, while Region 5 did not, claiming instead that the CWA does not authorize an existing CWA section 301(g)

variance to be modified to be less stringent than the currently permitted alternate effluent limits.

The exhibits and arguments at issue in ArcelorMittal Cleveland's Supplemental Brief, for which Region 5 is seeking to strike, provide not only examples of similar antidegradation analyses for modifications of existing CWA section 301(g) variances at other facilities within Region 5, but also that Region 5 has, in fact, approved such modifications. Region 5's representation that it did not rely on these exhibits in deciding on ArcelorMittal Cleveland's variance modification request is irrelevant to whether this Board should consider such information. In reality, Region 5's failure to consider its own past actions is evidence of the incomplete permitting analysis it made in this case. Because the information at issue is directly relevant to the Board's Order to address the "relevance and applicability" of antibacksliding and antidegradation on ArcelorMittal Cleveland's requested CWA section 301(g) variance modification, it should not be stricken.

C. Region 5 Will Not Be Prejudiced by the Board's Consideration of the Arguments and Exhibits at Issue in Region 5's Motion to Strike.

Finally, Region 5 argues that the exhibits and related argument in ArcelorMittal Cleveland's Supplemental Brief should be stricken because the information is "new" and Region 5 has not had the opportunity to address it. See Motion to Strike at 4. As detailed below, Region 5 cannot reasonably claim prejudice from ArcelorMittal Cleveland's inclusion of the exhibits and related arguments in ArcelorMittal Cleveland's Supplemental Brief.

First, Region 5's assertion that documents should be stricken simply because they were submitted for the first time with ArcelorMittal Cleveland's Supplemental Brief

is nonsensical. The supplemental briefing was an independent submission based on the Board's Order for additional briefing. The Board's Order did not limit the parties to relying only on previously submitted documents when responding to the Board's briefing directive, nor is it reasonable to assume that a party briefing a new or expanded issue would do so.

Second, all of the NPDES permit decisions attached as exhibits to ArcelorMittal Cleveland's Supplemental Brief are from within Region 5, and required Region 5 approval for the 301(g) variance effluent limits contained therein. ArcelorMittal Cleveland has consistently argued throughout this appeal that Region 5 previously approved CWA section 301(g) variance renewals and/or modifications, and has previously cited all permits referenced in, and attached to, its Supplemental Brief. In addition, while the Board declined to allow use of ArcelorMittal Cleveland's demonstrative exhibits ***at oral argument*** on the basis that Region 5 had not had sufficient time to review ***prior to oral argument***, Region 5 did have that information well in advance of the supplemental briefing as evidenced by the email attached to the Region's Motion to Strike. Therefore, the inclusion of this information in ArcelorMittal Cleveland's Supplemental Brief cannot reasonably be considered prejudicial or an unfair surprise.

III. CONCLUSION

It is fully appropriate and warranted in this case for the Board to consider all relevant facts and documents presented in support of ArcelorMittal Cleveland's position on appeal. Region 5's Motion to Strike is untimely and unjustified. If the Region truly had concern about ArcelorMittal Cleveland's Supplemental Brief and exhibits thereto, it

should not have waited five weeks to raise them. At this point, and for all of the reasons set forth here, there is simply no reason to further delay this appeal. As such, ArcelorMittal Cleveland respectfully requests the Board deny Region 5's Motion to Strike.

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Respectfully submitted,

/s/Lianne Mantione

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2012, I served by email and regular mail **ArcelorMittal Cleveland Inc.'s Brief in Opposition to U.S. EPA Region 5's Motion to Strike** to the following:

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