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	

ARCELORMITTAL CLEVELAND INC.'S REPLY TO SURREPLY BRIEF OF EPA REGION 5

In accordance with the Board's December 9, 2011 Order,[1] ArcelorMittal Cleveland Inc. timely submits this Reply to EPA Region 5's Surreply Brief filed on January 7, 2012. Region 5's Surreply conspicuously lacks any legal authority demonstrating that existing 301(g) variances may not be modified. For example, Region 5 fails to cite *any* legislative history that Congress intended to prohibit the modification of 301(g) variances once granted. In fact, Region 5 concedes this point in its Surreply. And while Region 5 asserts on one hand that a request to modify an existing 301(g) variance limit must be treated as a new 301(g) variance request because the CWA does not expressly provide for such modifications, the Region admits on the other hand that there is also no formal procedure authorizing EPA's practice of approving 301(g) variance renewal requests. Finally, Region 5's denial of ArcelorMittal Cleveland's 301(g) variance modification application ignores the fundamental purpose behind the enactment of section 301(g), as shown in the legislative history of the 1977

[1] See "Order Granting in Part EPA's Motion to File Surreply, Denying Petitioner's Request to Provide Additional Information, and Granting Oral Argument".

amendments to the Act, which was that Congress wanted to avoid the burden of imposing "treatment for treatment's sake."

Here, ArcelorMittal Cleveland's request to modify existing 301(g) variance limits (1) remains protective of water quality, human health and the environment and (2) continues to satisfy all of the requirements of CWA Section 301(g)(2). The variance modification request was approved by Ohio EPA. Unlike Ohio EPA, however, Region 5 failed to consider *any* of the statutory criteria set forth in Section 301(g)(2) when considering ArcelorMittal Cleveland's modification request. Instead, Region 5 arbitrarily and with no technical merit summarily denied the modification request in an untimely fashion based on a convoluted argument that is directly contrary to EPA's own historical practice. Simply put, Region 5's denial will force ArcelorMittal Cleveland to comply with more stringent standards when no environmental benefit will result from such compliance. Such a result is not supported by the law and contravenes sound public policy. Therefore, reversal of Region 5's June 23, 2011 denial is warranted and the Board should direct Region 5 to commence appropriate modification proceedings.[2]

A. Region 5 Concedes That "There is No Legislative History Clearly Stating that Congress Intended to Prohibit Modification of a Previously Granted 301(g) Variance".

Region 5 and ArcelorMittal Cleveland agree that neither the text of Clean Water Act Section 301(g) nor its legislative history prohibits modification of an existing 301(g)

[2] All parties agree that the Board has jurisdiction to hear this appeal. If the Board accepts Region 5's jurisdictional argument that ArcelorMittal Cleveland's appeal should have been filed pursuant to 40 CFR §124.19, ArcelorMittal Cleveland's Informal Appeal satisfied the substantive requirements of that provision. Additionally, ArcelorMittal Cleveland timely filed its appeal under the circumstances within 30 days of receipt of Region 5's denial letter. Region 5 has already conceded that it would have been "impossible" for ArcelorMittal Cleveland to comply with the requirement of section 124.19 to have "submitted comments on the draft permit or participate[] in a public hearing". Surreply at 3.

variance.[3] In fact, in its Surreply, Region 5 flatly admits: "***There is no legislative history clearly stating that Congress intended to prohibit modification of a previously granted 301(g) variances [sic]***." Surreply at 9 (emphasis added).

Despite this, Region 5 argues that, while a "variance can be continued or renewed in subsequent permits" because "there is no time limit specified in the statute for termination of the variance" (Surreply at 4), modifications (*i.e.*, any change in an existing variance limit) should be "subject to strict deadlines under CWA section 301(j)(1)." Id. at 6. Region 5 argues that the variance *application* deadline in Section 301(j)(1) is applicable to variance *modification* requests[4] but not to variance *renewal* requests. As described below, this interpretation is both flawed and contrary to EPA's own prior actions in issuing 301(g) variance renewals and, in fact, 301(g) variance modifications.

First, the Clean Water Act does not make a distinction between 301(g) variance renewals and modifications. Under Region 5's interpretation, variance renewals made

[3] Region 5 devotes a great deal of ink in its brief in opposition filed on October 21, 2011 distinguishing between "initial requests" and "completed applications" for Section 301(g) variances. In its Surreply, Region 5 boasts that ArcelorMittal Cleveland has not directly rebutted this interpretation of Section 301(g) and its implementing regulations. However, "initial requests" and "completed applications" are red herrings that are irrelevant to the facts in this appeal. The first grant of a 301(g) variance may involve separate "initial requests" and "completed applications" due to the specific timeframes based on publication of the applicable effluent limitations. Here, the ArcelorMittal Cleveland facility timely submitted an initial request and completed application in order to obtain its existing 301(g) variance – a point which Region 5 has conceded. This certainly does not foreclose ArcelorMittal Cleveland from seeking a modification to its existing variance.

[4] However, as further described below (see Section B *infra*), Region 5 contorts its argument by conceding that *some* modifications to 301(g) variances are acceptable and do not need to meet initial 270-day statutory deadlines, while *other* modifications must meet the deadline. Region 5 approved the Wheeling Pittsburgh facility's variance modification, for example, at the time of permit renewal which was well after the initial statutory deadline. Additionally, as noted in ArcelorMittal Cleveland's Reply filed November 4, 2011, Region 5 also approved a modification of the existing 301(g) variance at ArcelorMittal's Indiana Harbor West facility. See Reply at 10-11. While Region 5 attempts to gloss over this fact by claiming that the overall limits were simply "redistributed," the fact is that Indiana Harbor West's 301(g) variance changed and Region 5 approved that change.

outside the 270-day "strict deadline" are exempt when, inexplicably, modifications are not. Applying Region 5's logic would mean that neither renewals nor modifications are authorized under the statute since both would occur outside the initial 270-day period. Yet, as pointed out in ArcelorMittal Cleveland's Reply filed November 4, 2011, Region 5 has consistently renewed many 301(g) variances where the variance renewal application did not occur within the initial 270-day statutory period. See ArcelorMittal Cleveland's Reply at 11 ("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. In doing so, EPA is inherently re-evaluating and re-approving the §301(g) variance modification limits, without arguing, as here, that such renewals are untimely "new" variances."). Clearly the smoking gun of authorizing a variance of precisely the sort pursued by ArcelorMittal Cleveland is in Region 5's hand. Region 5 cannot escape and fails to explain away these uncontroverted facts in its Surreply.

Second, Region 5 does not abide by its own conclusion that "*any application*" means "any application" when arguing that ArcelorMittal Cleveland's variance modification application was required to meet the 270-day statutory deadline. When explaining the variance ***renewal*** process, Region 5 recognizes that "[r]equests 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." Surreply at 4, fn. 3 (emphasis added). Indeed, Region 5 has

conceded that variance renewals occur as part of the permit renewal ***application*** process:

> 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. 40 C.F.R. § 122.21(m) discusses 301(g) variance requests. To fulfill the requirements 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 the continuation of the variance.

Id. at 7; see also id. at 4 ("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***.") (emphasis added). It is unclear (and unexplained in the Surreply) why Region 5 contends a variance modification application must adhere to the so-called "strict" 270-day deadline when a variance renewal application does not.

Region 5 claims that the variance renewal application 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)." Surreply at 4. However, Region 5 offers absolutely no justification as to why the same procedure should not apply to variance modifications. Here, ArcelorMittal Cleveland followed this very procedure when it applied to modify its existing 301(g) variance limits.[5] ArcelorMittal Cleveland included all necessary information supporting its requested variance modification and, in particular, demonstrated that the requested modified discharge limits ***would still be over ten times lower*** than the State's daily Waste Load Allocation for the receiving stream and that the discharge at those levels would

[5] A permit modification application (as opposed to a permit renewal application) was appropriate in this instance since ArcelorMittal Cleveland's existing NPDES permit is not currently up for renewal.

otherwise meet all of the requirements of Section 301(g)(2). See Ex. 1 to ArcelorMittal Cleveland's Informal Appeal Notice (Aug. 26, 2011). Based on Region 5's own interpretation of Section 301(g) and its implementing regulations, there simply is no legal authority for Region 5's assertion that variance renewals are appropriate under CWA Section 301(g) but variance modifications are not.

Finally, and perhaps most importantly, as fully briefed in ArcelorMittal Cleveland's Reply filed November 4, 2011, Region 5's position in this appeal runs wholly contrary to Congress's stated purpose in establishing Section 301(g) variances, which is ***to avoid treatment for treatment's sake.*** Section 301(g) variances represent a ***fairness exception*** to the nationwide effluent standards, by "seek[ing] to ensure that a firm not be forced to comply with the categorical standards when no environmental benefit would accrue from such compliance." *Chemical Manufacturers Assn. v. Natural Resources Defense Counsel, Inc*., 470 U.S. 116, 162 fn. 21 (Marshall, dissent, joined by Blackmun and Stevens) (1985) (internal citation omitted). As the House recognized: "It would be unconscionable to impose this burden on the economy under any circumstances, it would be even more unconscionable to do so in view of the considerable – and altogether justified – increased burden to be borne by many segments of industry in achieving compliance with the toxic control requirements being strengthened under this legislation, requirements which, as noted, also will contribute to the reduction or elimination conventional pollutants." 123 Cong. Rec. H 38961, 1977 Leg. Hist. 329-330.[6] See also id. at 123 Cong. Rec. H 38960, 1977 Leg. Hist. 326 ("The

[6] Citations to the 1977 legislative history ("1977 Leg. Hist.") are to the SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1978).

conferees … have adopted a coordinated approach strengthening, on the one hand, regulation of the increasingly evident toxics hazard, while modifying requirements for conventional pollutant control, on the other hand. This is in line with the greater-than-expected degree of water quality already achieved and projected to be achieved once requirements for 1977 have been met.")

Thus, as long as the permittee's requested modification continues to meet the statutory requirements for the exception (which ArcelorMittal Cleveland's variance modification request clearly does), the Congressional purpose underlying Section 301(g) remains satisfied no matter how many times an appropriately issued 301(g) variance is subsequently renewed or modified.

B. Region 5's Position in this Appeal Remains Contrary to Its Own Prior Actions Regarding 301(g) Variances.

Remarkably, while Region 5 has made it transparently clear that variance renewals are authorized, it is also apparent that the Region does not actually believe that ***all modifications*** are unauthorized. What Region 5 really takes issue with is the fact that ArcelorMittal Cleveland is seeking to increase its variance limits through its requested modification. However, as explained below, Region 5 has approved other variance modifications where, as here, the variance limits were similarly changed.

For example, Region 5 approved a Section 301(g) variance modification for lower discharge limits for Wheeling Pittsburgh's Steubenville facility. In its Surreply, Region 5 would have this Board focus on the cancellation of the phenols variance at that facility while glossing over the important details of the ammonia variance. See Surreply at 14-15. However, as demonstrated through Region 5's own Surreply exhibits, Region 5

expressly approved a modification of the existing ammonia variance in the Wheeling Pittsburgh NPDES permit proposed by Ohio EPA.

Ohio EPA's Dec. 29, 2003 letter to EPA states that "we have found that the existing variance limits are much higher than necessary at this time. Based on reported monitoring data over the last five years, we are proposing much lower variance limits for ammonia." Specifically, Ohio EPA proposed to ***LOWER*** the variance from 113.4 (summer/winter average) to 25.7 (summer) and 27.5 (winter), and from 226.8 (summer/winter max) to 35.2 (summer max) and 42.9 (winter max). See p. 6 of OEPA letter, attached as Ex. 1 to Surreply. Ohio EPA asked EPA Region 5 for its "review and approval" of this proposal. EPA (through its Regional Administrator, Bharat Mathur) responded to this letter on Feb. 24, 2004, stating: "***Upon review of the variance request, I am in agreement with the Ohio Environmental Protection Agency's proposed limits for ammonia … I approve the granting of a 301(g) variance for ammonia in response to that request.***" (Emphasis added).

The Wheeling Pittsburgh example is clearly an EPA approval of a modification of an existing 301(g) variance. Again, the smoking gun is in Region 5's hand, yet Region 5 attempts to dodge this determination by concluding – *without citing any authority* – that "imposition of different limitations" by the State "as a result of changed circumstances … does not constitute an action under section 301(g) of the CWA." Surreply at 21, fn. 19. Why not? In Wheeling Pittsburgh's case, the permittee made a request for continuation

of existing variance limits. Instead, the State modified that variance limit prior to recommending approval of its continuation.[7]

Here, ArcelorMittal Cleveland has requested a modification of an existing 301(g) variance and Region 5 claims that they cannot approve a modification -- ***any*** modification. Clearly, EPA ***can*** and ***did*** approve a downward modification of the Wheeling Pittsburgh 301(g) variance for ammonia. EPA Region 5 should similarly approve ArcelorMittal Cleveland's variance modification application where it continues to meet all statutory criteria set forth in CWA Section 301(g)(2) and remains protective of water quality, human health and the environment. Such a modification is entirely and completely consistent with Congressional intent in avoiding treatment for treatment sake.

C. Region 5's Denial Was Not Timely and Completely Failed to Meet the Statutory Criteria.

It is undisputed that Section 301(j)(4) requires EPA to approve or disapprove a 301(g) request "not later than 365 days after the date of filing." Region 5's claim that its June 23, 2011 response to ArcelorMittal Cleveland's April 13, 2010 modification application was timely tenuously rests on the argument that ArcelorMittal Cleveland's filing was not complete until its application was forwarded by Ohio EPA to Region 5 on May 3, 2010. See Surreply at 19. But Region 5's only argument in support of its timely response is not supported by the Agency's own implementing regulations.

[7] See "Fact Sheet Regarding an NPDES Permit To Discharge to Waters of the State of Ohio for Wheeling Pittsburgh Steel - Steubenville South (Sept. 23, 2003)," p. 18, attached as Ex. 2 to Surreply ("***Section 301(g) allows the U.S. EPA Administrator, with the concurrence of the State, to modify BAT (Best Available Technology Economically Achievable) limits found in the FEG for certain pollutants, provided that the discharge will meet BPT (Best Practicable Control Technology Available) limits and any applicable WQBELs***.")(emphasis added). Certainly the State believed it was acting pursuant to Section 301(g) in modifying Wheeling Pittsburgh's existing variance and requesting Region 5's concurrence in its decision.

Specifically, Region 5 relies on 40 CFR §122.21(m)(2)(i)(A), which requires that an "initial request" for a 301(g) variance be submitted to the Regional Administrator, as well as the State Director (if applicable). This initial request is subject to the 270-day deadline per section 122.21(m)(2)(i)(A)(2). ArcelorMittal Cleveland's predecessor followed this procedure when it applied for its original 301(g) variance limits. ArcelorMittal Cleveland's 2010 application, however, did not involve an "initial request" (or a "completed application" for the first variance, see fn. 3 *supra*) for a section 301(g) variance. ArcelorMittal Cleveland is instead seeking a decision on modifying an existing variance, which is not governed by the procedures outlined in section 122.21(m)(2).

For its variance modification application, ArcelorMittal Cleveland followed the procedures of 40 CFR §124.62, "Decisions on Variances." Section 124.62(e) explicitly states that the State Director may forward to EPA a variance request based on CWA section 301(g), and section 124.62(f) states that that Administrator may grant or deny a request forwarded by the State Director "or that is submitted to EPA by the requester where EPA is the permitting authority." In this case, Ohio EPA is the permitting authority, as Region 5 noted in its Surreply. Therefore, ArcelorMittal Cleveland properly "filed" its modification application with Ohio EPA, starting the 365-day decision clock. Even assuming *arguendo*, that the application was not "filed" until Ohio EPA first forwarded it to Region 5 on May 3, 2010, Region 5's June 23, 2011 decision would still be considered untimely in violation of CWA section 301(j)(4).

In addition to ignoring the statutory deadline for deciding ArcelorMittal Cleveland's request, Region 5 also failed to comply with the statutory procedures

governing variance decisions. In both its June 23, 2011 and August 18, 2011 decision letters, Region 5 summarily denied ArcelorMittal Cleveland's variance modification request as untimely, without considering ***any*** of the statutory criteria section 301(g)(2) requires the Agency to consider when making variance decisions. See AR, Doc. AR-39; See also Informal Appeal Notice, Ex. 7. As ArcelorMittal Cleveland has demonstrated throughout its briefing in this appeal, the statutory deadline referenced by Region 5 applies only to the first variance request; not to subsequent requests to renew or modify an existing variance.

Region 5 was obligated to evaluate all criteria in Section 301(g)(2) before deciding on ArcelorMittal Cleveland's modification request. The criteria in section 301(g)(2) are relevant factors that EPA must consider to avoid arbitrary and capricious decision-making. See, e.g., *Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). Region 5's failure to consider these factors in denying ArcelorMittal Cleveland's request alone justifies reversal of the Agency's action.

D. Region 5's Position is Contrary to the Public Policy Established by CWA Section 301(g).

Section 301(g) waivers are authorized by the Clean Water Act to achieve two objectives: (1) to focus the provisions of the Act on the most critical problems of water pollution control facing the nation, and (2) to conserve the resources of the regulatory agency and scarce resources of industry and in turn, the economy. See 123 Cong. Rec. H 38961, 1977 Leg. Hist. 331. In other words, if the 301(g) provisions of the Clean Water Act are administered in this same spirit, the goals intended by Congress will be achieved – that is to practically – not punitively – address issues of potential industrial

water pollution at the least cost in public and private resources. See id. Region 5's approach in this matter is directly contrary to the legislative intent expressed by the Senate and House alike. See, e.g., S. REP. No. 95-370, 95th Cong., 1st Sess., 40-44 (1977), 1977 Leg. Hist. 674-677; 123 Cong. Rec. H 38958-38961, 1977 Leg. Hist. 324-331. Region 5's action in this matter unnecessarily wastes scarce industrial resources and thereby risks job creation in the American heartland without any corresponding environmental benefit. Region 5's approach in this matter can be characterized as follows – the legally unsupported creation of a bureaucratic hurdle to drain scarce industrial resources away from the engine of American job creation.

III. CONCLUSION

It is undisputed that the initial and completed requests for a Section 301(g) variance were timely submitted and culminated in the existing variance in effect at the ArcelorMittal Cleveland facility. Region 5 has not presented a single valid reason or any legal authority for its decision denying ArcelorMittal Cleveland's requested modification of its existing variance. To the contrary, the facts and law of this case demonstrate:

- ArcelorMittal Cleveland demonstrated, and Ohio EPA agreed, that the requested modification (1) remains protective of water quality, human health and the environment and (2) continues to satisfy all of the requirements of CWA Section 301(g)(2).
- The limits requested by ArcelorMittal Cleveland remain well below the total Waste Load Allocation approved with the original 301(g) variance.
- Neither CWA Section 301(g), nor the legislative history to this rule, prohibits modifications of existing variances. Indeed, Congressional intent in drafting section 301(g), a fairness exception to the categorical standards for conventional pollutants was to avoid treatment for treatment's sake, which intent supports both renewals and modifications of existing variances.
- The 270-day statutory deadline applies only to the first grant of a variance under Section 301(g).

- EPA's own historical practice has been to review proposed renewals and modifications of variances issued pursuant to CWA Section 301(g) for approval.
- EPA Region 5's current denial is completely contrary to sound public policy.

For all of the reasons set forth here and in its prior briefing in this appeal, ArcelorMittal Cleveland respectfully requests the Board reverse EPA Region 5's June 23, 2011 denial and direct Region 5 to commence the appropriate modification proceedings.

Dated: January 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2012, I served by email and regular mail **ArcelorMittal Cleveland Inc.'s Reply to Surreply Brief of EPA** to the following:

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