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BRIEF IN OPPOSITION TO INFORMAL APPEAL

Pursuant to the September 8 and 26, 2011 Orders of the Environmental Appeals Board (“Board”), the United State Environmental Protection Agency, Region 5 respectfully submits to the Board this response to the Informal Appeal filed by ArcelorMittal Cleveland Inc. (“ArcelorMittal”) in the above-captioned matter.¹

I. STATEMENT OF THE CASE

ArcelorMittal is appealing EPA Region 5’s denial of ArcelorMittal’s request for further revisions under Section 301(g) of the Clean Water Act (“Act”), 33 U.S.C. § 1311(g), of the otherwise applicable best available technology effluent limitations for ammonia-nitrogen (“ammonia-N”) to which it is subject.² ArcelorMittal characterizes the issue on appeal as the denial of its request to modify its current permit under the National Pollutant Discharge Elimination System (“NPDES”) program. EPA Region 5, however, has no authority either to grant or deny a request to modify ArcelorMittal’s NPDES grant, since EPA Region 5 is not the NPDES permitting authority in the State of Ohio,

The NPDES permitting authority for Ohio is and has been the State of Ohio since EPA approved the State of Ohio’s NPDES program on March 11, 1974. 71 Fed. Reg. 65509 (November 8, 2006); *see also U.S. v. Sharon Steel Corporation*, 1989 U.S. Dist. LEXIS 16736 (N.D. Ohio 1989). Once EPA approves a state NPDES program, EPA is generally prohibited

¹ As required by the Board’s Orders of September 8, 2011, this brief reflects consultations with EPA’s Office of General Counsel and the Office of Water.

² EPA Region 5 granted a previous revision of these limits under Section 301(g) of the Act to ArcelorMittal’s

(subject to certain limited exceptions) from issuing NPDES permits in the state. 33 U.S.C. § 1342(c). The State of Ohio, through the Ohio Environmental Protection Agency (“Ohio EPA”), issued ArcelorMittal’s current NPDES permit. AR-15.

ArcelorMittal filed its appeal pursuant to 40 C.F.R. § 124.5(b), which authorizes informal appeals to the Board of denials of requests for modifications of permits. The Board, however, “generally does not have authority to review state-issued [NPDES] permits; such permits are reviewable only under the laws of the state that issued the permit. *See* “The Environmental Appeals Board Practice Manual,” p. 36, and the cases cited therein. Thus, the Board lacks jurisdiction over informal appeals alleging denials of requests for modifications of NPDES permits issued by a state.³

Decisions by EPA to approve or deny variances, including modifications under Section 301(g) of the Act, however, may be appealed as specified by 40 C.F.R. § 124.64(b) under the provisions found in 40 C.F.R. § 124.19. For purposes of this brief, EPA Region 5 assumes that the Board will treat ArcelorMittal’s Informal Appeal as if filed as a petition to review pursuant to 40 C.F.R. §§ 124.64(b) and 124.19.

EPA Region 5 properly and reasonably denied ArcelorMittal’s request for further revisions under Section 301(g) of the Clean Water Act (“Act”), 33 U.S.C. § 1311(g), of the otherwise applicable effluent limitations for ammonia-N, because the request was time-barred under the Act and EPA’s implementing regulations.⁴ The Board should deny ArcelorMittal’s

predecessor in 2001.

3 The only relief authorized by 40 C.F.R. § 124.5(b) – *i.e.*, to direct the Regional Administrator to begin permit modification proceedings under 40 C.F.R. § 124.5(c) – is relief that the Board is not authorized to grant when EPA is not the permitting authority.

4 EPA anticipated that decisions on NPDES variance requests ordinarily would be made during the permit

request for further modifications under Section 301(g) of the Act because it failed to demonstrate that EPA Region 5 committed a clear error of fact or law in denying ArcelorMittal's request.

II. Statutory and Regulatory Requirements

A. Clean Water Act

Congress enacted the Federal Water Pollution Control Act in 1972 “to restore and maintain the chemical, physical, and biological integrity of the Nations waters.” 33 U.S.C. § 1251(a); *Texas Oil & Gas Association v. United States Environmental Protection Agency*, 161 F.3d 923, 927 (5th Cir. 1998). To that end, the Act declared as a national goal “that the discharge of pollutants into navigable waters be eliminated by 1985....” 33 U.S.C. § 1251(a)(1).

To meet these objectives, the Act prohibits the discharge of any pollutant into navigable waterways unless the discharge complies with the requirements of the Act, 33 U.S.C. § 1311(a), including the requirements for technology-based effluent limitations in Section 301(b) of the Act, 33 U.S.C. § 1311(b). “Section 301(b) of the [Clean Water Act], 33 U.S.C. § 1311(b)(1976 *ed. and Supp. III*), authorizes the Administrator to set effluent limitations for categories of point sources”⁵. *EPA v. National Crushed Stone Association*, 449 U.S. 64, 69-70, 101 S.Ct. 295 (1980). The effluent limitations for categories of point sources [“effluent limitation guidelines”

issuance process, subject to the public notice and comment requirements of 40 C.F.R. § 124.10. Full review under 40 C.F.R. § 124.19 is available only to persons that who filed comments on a draft permit or participated in a public hearing for a draft permit. Public notice and comment is not required under 40 C.F.R. § 124.5(b) in cases where a request for permit modification is denied. The Board, however, may wish to ask for further briefing about whether requests for Section 301(g) variances should be processed only in conjunction with a permit issuance subject to full public notice and comment requirements, and not in conjunction with requests for permit modifications.

⁵ “Point source” means any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C. § 1362(14).

or “ELGs”⁶] under Section 301(b) of the Act are technology-based, “that is, they reflect the capabilities of available pollution control technologies to prevent or limit discharges rather than the impact that those discharges have on the water.” *Texas Oil & Gas Association v. U.S. Environmental Protection Agency*, 161 F.3d 923, 927 (5th Cir. 1998). Section 301(b) requires ‘progressively more stringent’ technology-based effluent limitations guidelines that NPDES permitting authorities must use in issuing NPDES permits.

Under Section 301(b)(1)(A), all point sources (other than publicly owned treatment works) were required to meet effluent limitation guidelines that reflect the application of the “*best practicable control technology currently available*” (“BPT”) by July 1, 1977. [*Emp. added.*] 33 U.S.C. § 1311(b)(1)(A). Under Section 301(b)(2), all point sources (other than POTWs) were required by March 31, 1989, to meet effluent limitation guidelines for categories and classes of point sources for toxic and non-conventional pollutants, including ammonia-N, that reflected the “*best available technology economically achievable for such category or class, which result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants*” (“BAT”).^{7, 8} [*Emph. added.*] 33 U.S.C. § 1311(b)(2)(A). Point sources other than POTWs were required by March 31, 1989, to meet effluent limitation

6 Requirements for developing effluent limitation guidelines are specified in 33 U.S.C. § 1314(b).

7 In other words, effluent limitation guidelines that are intended to satisfy BAT must “reflect the amount of pollutant that would be discharged by a point source employing the best available [control] technology that the EPA determines to be economically feasible across the category or subcategory as a whole.” *Texas Oil & Gas Association v. U.S. Environmental Protection Agency*, 161 F.3d 923, 928 (5th Cir. 1998).

8 “Toxic” pollutants include those pollutants listed pursuant to § 307(a) of the Act, 33 U.S.C. § 1317(a)(1), and are currently listed at 40 C.F.R. § 401.15. “Conventional” pollutants are designated pursuant to § 304(a)(4), 33 U.S.C. § 1314(a)(4) and five such pollutants are currently listed at 40 C.F.R. § 401.16, including biological oxygen demand (BOD), total suspended solids, pH, fecal coliform, and oil and grease. Pollutants that are not classified as either “toxic” or “conventional” pollutants are referred to as non-conventional pollutants. *American Petroleum Institute v. EPA*, 787 F.2d 965, ns. 3 – 5 (5th Cir. 1986).

guidelines for conventional pollutants that reflected the application of the *best conventional pollutant control technology* (“BCT”). [*Emph. added.*] 33 U.S.C. § 1311(b)(2)(E). In circumstances for which effluent limitation guidelines have not been promulgated, “permits must incorporate, on a case-by-case method, ‘such conditions as the Administrator determines are necessary to carry out the provisions of the Act.’” *American Petroleum Institute v. EPA*, 787 F.2d 965, 969 (5th Cir. 1986).

Discharge of any pollutant from a point source is unlawful under the Act unless the discharge is compliance with an NPDES permit. *Texas Oil & Gas Association v. U.S. Environmental Protection Agency*, 161 F.3d 923, 928 (5th Cir. 1998). NPDES permits are issued by EPA or by states that have NPDES program that have been approved by EPA. 33 U.S.C. §§ 1342(a) – (d). Such permits must include all applicable effluent limitations,⁹ including effluent limitations that reflect the pollution reduction achievable by using technologically practicable controls, unless a variance applies (discussed *supra*). 33 U.S.C. § 1342(a) and 1311(b); *American Paper Institute, Inc. v. U.S. Environmental Protection Agency*, 996 F.2d 346, 349 (D.C. Cir. 1993).

B. Variances Under CWA Section 301(g)

In 1977, Congress amended the Act to add a new Section 301(g).¹⁰ As revised by

⁹ The term “*effluent limitations*” means any restriction established by a State or the Administrator on quantities, rates, and concentrations or chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . .” 33 U.S.C. § 1362(11).

¹⁰ P.L. 95-217 § 43 (Dec.1977), as re-printed in “A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act,” v. 3 at 21 (Comm. Print 1978).

Congress in 1987,¹¹ Section 301(g), 33 U.S.C. § 1311(g), provides that the “Administrator, with the concurrence of the State, may modify the requirements of [the effluent limitation guidelines intended to meet BAT requirements for non-POTWs] with respect to the discharges from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP)(when determined by the [EPA] Administrator to be a [non-conventional] pollutant . . .) and any other pollutant which the Administrator lists under [33 U.S.C. § 1311(g)(4)].” Section 301(g)(2), 33 U.S.C. § 1311(g)(2), specifies that the EPA Administrator shall grant modifications under Section 301(g) only upon a satisfactory showing by the owner or operator of the point source that the modified requirements will satisfy several requirements pertaining to water quality.¹² Modifications under Section 301(g) of the Act are also referred to as “variances” (hereinafter “Section 301(g) variances”). 40 C.F.R. § 122.2.¹³

11 P.L. 100-4 § 302 (Feb. 1987), *as re-printed in* “A Legislative History of the Water Quality Act of 1987 (Public Law 100-4) Including Public Law 97-440; Public Law 97-117; Public Law 96-483; and Public Law 96-148,” v. 1 at 252 - 253 (Comm. Print 1988).

12 Section 301(g)(2), 33 U.S.C. § 1311(g)(2), states:

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that – (A) such modified requirements will result at a minimum in compliance with the [BPT effluent limitation guidelines] . . . ;(B) such modified requirements will not result in any additional requirements on any other point or nonpoint sources; and (C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities.

13 Other variances include, e.g., “fundamentally different factors” variances under Section 301(n) of the Act, 33 U.S.C. § 1311(n) and variances based on a plant’s economic capability under Section 301(c) of the Act, 33 U.S.C. 1311(c). Section 301(h), 33 U.S.C. § 1311(h), of the Act includes provisions for modification of secondary treatment requirements applicable to publicly owned treatment works.

C. Applications for Variances Under CWA Section 301(g)

Section 301(j)(1)(B), 33 U.S.C. § 1311(j)(1)(B), specifies that any application for a Section 301(g) variance shall be filed not later than 270 days after the date of promulgation of an applicable effluent limitation guideline.¹⁴ Effluent limitation guidelines for the Iron and Steel Manufacturing Point Source Category, including the BAT effluent limitation guidelines for ammonia-N in discharges from iron blast furnaces, 40 C.F.R. § 420.33(a), were promulgated (and effective) on May 27, 1982. 47 Fed. Reg. 23258 (May 27, 1982). Thus, applications for Section 301(g) variances of the BAT effluent limitation guidelines for such discharges must have been submitted within 270 days after May 27, 1982, on or about February 21, 1983.

Applications for Section 301(g) variances must comply with the requirements of 40 C.F.R. § 122.21(m)(2). Such applications must be made by submitting an *initial request* to the Regional Administrator, as well as to the state permitting agency in states where the state is the NPDES permitting authority,¹⁵ including limited information concerning the request. The initial request must be filed not later than 270 days after promulgation of an applicable effluent limitation guideline. 40 C.F.R. § 122.21(m)(2)(i)(A)(2). A *completed request* must be filed not later than the close of the public comment period under 40 C.F.R. § 124.10, which specifies the public notice and comment requirements applicable to issuing a draft permit, and certain other

14 Section 301(j)(1)(B) states:

- (1) Any application under this section for a modification of the provisions of (B) subsection (b)(2)(A) of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

15 Thus, in states for which the State is the primary NPDES approval authority, applicants for a Section 301(g) modification would generally submit the initial request to both the State and the Regional Administrator.

actions.¹⁶ 40 C.F.R. § 122.21(m)(2)(i)(B).

In states where the state is the NPDES permitting authority, the state permitting authority may either deny the request for a Section 301(g) variance or forward a completed request to the EPA Administrator (or delegate) with a written concurrence. 40 C.F.R. § 124.62(e). EPA will act on a request for action under Section 301(g) that has been submitted to the state permitting authority only after approval of the request by the state permitting authority. *54 Fed. Reg.* 246, 251 (January 4, 1989). When the EPA Administrator or delegate receives the completed request with the written concurrence from the state permitting authority, the EPA Administrator or delegate may grant or deny the request. 40 C.F.R. § 124.62(f). The EPA Administrator has delegated authority under Section 301(g) of the Act in most cases to the EPA Regional Administrators. *See* 51 Fed. Reg. 16028 (April 30, 1986); EPA Headquarters Delegation 2-25.

III. Factual and Procedural Background

ArcelorMittal owns and operates a steel facility in Cleveland, Ohio (“Cleveland plant”), which operates under NPDES Permit No. 3ID00003*OD (OH0000957) (“current permit” or “NPDES permit”), issued by the Ohio Environmental Protection Agency (Ohio EPA) on June 30, 2008, for a term that does not expire until January 31, 2013. AR 15.

The current permit includes effluent limitations for discharges of ammonia-N from the Cleveland plant’s outfall 604 that have been modified from the otherwise applicable BAT

¹⁶ EPA assumes that applications for requests under Section 301(g) will ordinarily be made in conjunction with the permit issuance process. 40 C.F.R. § 124.51(b). The public comment period referenced in 40 C.F.R. § 122.21(m)(2)(i)(B) is thus the public comment period required by 40 C.F.R. § 124.10 (or the state law equivalent) for the draft permit in which the limits as modified by a request under Section 301(g) would be incorporated.

effluent limitation guidelines pursuant to a Section 301(g) variance previously granted by EPA Region 5 to ArcelorMittal's predecessor in 2001. By letter dated March 14, 2001, the Region 5 Acting Regional Administrator stated EPA Region 5's proposed decision "to grant the variances to [ArcelorMittal's predecessor] with the terms, conditions and limitations of the enclosed evaluation." AR-8. The evaluation attached to the letter included proposed modified effluent limitations for ammonia-N in lieu of the otherwise applicable BAT effluent limitation guidelines at outfall 604, as stated in Table 1 of the evaluation.¹⁷ AR-8. In evaluating whether the initial request for this Section 301(g) variance had been filed in a timely manner, the evaluation cited filings by ArcelorMittal's predecessor in September 1978, February 17, 1983, March 31, 1983, April 19, 1983, June 9, 1983, and February 18, 1993. The final permit subsequently issued by the Ohio EPA on September 27, 2001, includes the effluent limitations at outfall 604 for ammonia-N, as specified in the evaluation attached to Region 5's 2001 decision document. (AR-9).

ArcelorMittal did not submit, and has never submitted, a request to EPA Region 5 for further modification under Section 301(g) of the effluent limitations applicable to its ammonia-N discharges. Instead, by letter dated April 13, 2010, ArcelorMittal submitted to Ohio EPA a permit modification request to modify its existing Section 301(g) variance ("2010 application"), requesting significant increases in the effluent limits for ammonia-n discharged at outfall 604. (AR 16, 17).

17 PMELs, Section 301(g) variance (AR-8, Table 1):

Summer: 30Day Average 62.4 kg/day Daily Maximum 85.6 kg/day
Winter: 30 Day Average 81.6 kg/day Daily Maximum 211 kg/day

By letter dated June 14, 2010, Ohio EPA transmitted the 2010 Section 301(g) request to EPA, along with Ohio EPA's written concurrence. Ohio EPA's letter advised EPA:

ArcelorMittal Steel has submitted an NPDES modification requesting an increase in the allowable ammonia-nitrogen loading under their 301(g) variance. We believe that this requested increase meet the requirements of Section 301(g) of the Clean Water Act, and should be approved.

(AR-21). As summarized in Ohio EPA's, the requested increases were:

Season	Current Ammonia Limits (kg/day)	Requested Ammonia Limits (kg/day)	Percent Increase ¹⁸ (Not Included in Ohio EPA's letter)
Summer	62.4 (30-day)	224 (30-day)	259%
	85.6 (daily)	294 (daily)	243%
Winter	81.6 (30-day)	224 (30-day)	175%
	211	294 (daily)	39%

By letter dated June 23, 2011 ("June 2011 Decision"), the Regional Administrator for EPA Region 5 denied ArcelorMittal's request for a Section 301(g) variance as untimely. AR-39. Region 5 denied the request on the basis that ArcelorMittal did not file the request within 270 days of the promulgation of the applicable effluent guidelines on May 27, 1982, as required by Section 301(j)(1)(B) of the Act, 33 U.S.C. § 1311(j)(1)(B).¹⁹

By letter dated August 4, 2011, ArcelorMittal requested reconsideration of EPA Region 5's June 2011 Decision. AM Ex. 5. ArcelorMittal argued that Region's denial was "based upon the misguided premise that a timely filing of the application was not made within 270 days of the

¹⁸ The information in this column regarding percent increases was not included in ArcelorMittal's 2010 application or in Ohio EPA's letter. The percent increases were calculated by the following formula: (Requested Limit - Current Limit) ÷ Current Limit.

¹⁹ ArcelorMittal is correct that the June 23, 2011 decision document was misplaced and not sent until late July 2011. AR-39.

May 27, 1982 promulgation date of the applicable effluent limitations for ammonia-nitrogen, codified at 40CFR Part 420.” ArcelorMittal stated that an application for Section 301(g) variance had been timely submitted by the Cleveland plant on February 17, 1983, within the 270-day period for filing such application.” AM Ex. 5.

By letter dated August 18, 2011, Region 5 affirmed the decision in the June 2011

Decision, stating:

EPA acknowledges that a timely Section 301(g) variance application was filed in 1983 within the deadlines in CWA Section 301(j)(1)(B), 33 U.S.C. § 1311(j)(1)(B). EPA previously approved that application. The CWA, however, does not include special provisions for applications to modify alternate limits previously approved by EPA under CWA Section 301(g). EPA has determined that ArcelorMittal’s 2010 application is an application for a Section 301(g) variance that must independently meet the deadlines in CWA Section 301(j)(1)(B), 33 U.S.C. § 1311(j)(1)(B). In this case, the window for submitting such applications expired 270 days after May 27, 1982.

AM Ex 7.

IV. Standard of Review

The Board’s review of variance decisions by EPA is governed, pursuant to 40 C.F.R. § 124.64(b), by 40 C.F.R. § 124.19, the same provision that governs the Board’s review of EPA’s permitting decisions. The Board will not ordinarily review such decisions, unless the petitioner (in this case ArcelorMittal) demonstrates that the decisions were based on clearly erroneous findings of fact or conclusions of law, or involve important policy considerations that warrant review by the Board. *See In re: City & County of Honolulu Sand Island Wastewater Treatment Plant, Honouliuli Wastewater Treatment Plant*, NPDES Appeal No. 09-07, slip.op. at 3 - 4 (EAB August 12, 2010). The Board will also consider whether the petitioner has satisfied the

following threshold procedural requirements: i) petitions must be filed within thirty days after issuance of the decision for which review is sought; ii) each petitioner must have participated in the [corresponding] permit proceeding by either filing comments during the public comment period, or participating in a public hearing; and iii) the issues on review must have been preserved for comment by having been raised during the public comment period. *See In re Buena Vista Rancheria Wastewater Treatment Plant*, NPDES Appeal Nos. 10-05, 10-06, 10-07 & 10-13, slip.op. at 3-4 (EAB September 6, 2011). EPA Region 5 does not at this time challenge ArcelorMittal's Informal Appeal on the basis that ArcelorMittal has failed to demonstrate that these procedural requirements were satisfied.²⁰

Finally, for each issue raised in the petition, the petitioner bears the burden of demonstrating that review is warranted. *See Buena Vista Rancheria Wastewater Treatment Plant*, NPDES Appeal Nos. 10-05, 10-06, 10-07 & 10-13, slip.op. at 4.

V. Argument

Region 5 properly and reasonably denied ArcelorMittal's request for modified Section 301(g) limits on the basis that the request was not made within 270 days after the promulgation of the applicable effluent guidelines on May 27, 1982, and thus was not timely under Section

²⁰ As ArcerloMittal correctly notes, while EPA Region 5 formally denied ArcerloMittal's request by letter signed June 23, 2011, the letter was not actually placed in the mail for delivery by certified mail until on or after July 27, 2011. AR-39. The certified mail green card returned to EPA Region 5 indicates that the copy of June 2011 Decision was received by ArcelorMittal on August 3, 2011. ArcelorMittal's Informal Appeal, if treated as a petition for review under 40 C.F.R. §124.19, would be timely under these circumstances. With respect to whether ArcelorMittal participated in a public comment period, EPA Region 5 has no information that Ohio EPA has conducted a public comment period or accepted public comments regarding ArcelorMittal's request that the NPDES permit be modified. However, EPA's rules at 40 C.F.R. § 124.5(b) would not require public notice, comment or hearings in the event that a permit modification is denied (as might be expected given EPA Region 5's denial of the Section 301(g) request), and the State of Ohio's rules may be similar. In addition, *see* n. 4, *supra*.

301(j)(1)(B) of the Act, 33 U.S.C. 1311(j)(1)(B).

In response, ArcelorMittal argues:

- i) the deadline in Section 301(j)(1)(B) of the Act applies only to the initial request for a Section 301(g) variance, citing EPA's regulations at 40 C.F.R. § 122.21.
- ii) Under EPA's implementing regulations pertaining to permit modifications at 40 C.F.R. § 122.62(a)(5), NPDES permits may be modified for a Section 301(g) variance as long as the permittee has filed an initial request for a variance under Section 301(g) of the Act within the times specified in 40 C.F.R. § 122.21 or § 125.27(a);
- iii) ArcelorMittal's predecessor timely filed an initial request for a Section 301(g) variance on February 17, 1983.

The unstated conclusion of ArcelorMittal's argument appears to be that the 1983 filing of an initial request by ArcelorMittal's predecessor means that the permittee has filed a timely request for a variance that acts to allow ArcelorMittal to seek repeated modifications of the variance in perpetuity.

Acceptance of ArcelorMittal's conclusion would allow a discharger to seek an unlimited number of variances over an unlimited period of time to the BAT effluent limitations that would otherwise be applicable to its discharges, based on a single initial request. In this case, ArcelorMittal seeks to justify a request made in April 2011 for increases in discharges of ammonia-N at its Cleveland plant of as much as 259%, based on an initial request filed by ArcelorMittal's predecessor nearly thirty years ago.

ArcelorMittal's argument is in error because i) it misinterprets the filing requirements and deadlines for requesting Section 301(g) variances under the Act and EPA's implementing regulations, and ii) it erroneously assumes that EPA's implementing regulations at 40 C.F.R. § 122.62 provide a basis to modify – independent of the requirements of Sections 301(g) and 301(j) of the Act – effluent limitations established by a Section 301(g) variance previously granted by EPA.

A. Applications for Modifications Under Section 301(g) Must Be Filed Within 270 Days After the Promulgation of an Applicable Effluent Limitation Guideline

Section 301(j) of the Act, 33 U.S.C. § 1311(j), unambiguously specifies that “[a]ny *application* filed under [Section 301] for a modification of the provisions of . . . (B) [the BAT effluent limitation requirements] as it applies to [non-conventional pollutants] shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under [Section 304 of the Act], or not later than 270 days after December 27, 1977 [i.e., September 25, 1978], whichever is later.” [*Emph. added.*]

EPA's implementing regulations elaborate on the deadlines specified in the Act by requiring that dischargers seeking such modifications under Section 301(g) of the Act must submit an *initial request* to the EPA Regional Administrator, and to the state permitting authority in states with NPDES programs that have been approved by EPA, within 270 days after promulgation of an applicable effluent limitation guideline, and must submit a *completed request* not later than the close of the public comment period under 40 C.F.R § 124.10 for the draft

permit in which the modified limits would be incorporated.²¹ 40 C.F.R. § 122.21(m)(2).²² In addition, 40 C.F.R. § 122.21(m)(2)(i)(B) requires that “[n]otwithstanding this provision, the *complete application* for a request under section 301(g) shall be shall be filed 180 days before EPA must make a decision . . .” 40 C.F.R. § 122.21(m)(2)(i)(B).

The terms “initial request” and “completed request” are not defined in either the Act or in EPA’s implementing regulations. As explained below, the history of development of 40 C.F.R. § 122.21(m)(2) makes it clear that the complete application required by Section 301(g) of the Act includes both the initial request and the completed request, and that the complete application must be submitted to EPA before it makes a decision on a request for any modification under Section 301(g) of the Act. In the event of a revised BAT effluent limitation guideline, subsequent requests for modifications under Section 301(g) of the Act must be made by submitting another complete Section 301(g) variance application, including another initial request and another completed request, within 270 days after promulgation of the revised guideline and 180 days before EPA is required to make a decision on that complete application.

The phrases “initial request” and “completed request” are not included in what appears to be the earliest version of EPA’s proposed regulations pertaining to applications for variances under Section 301(g), published on August 21, 1978. *See* 43 Fed. Reg. 37078, 37113 (August 21, 1978). In the preamble to EPA’s “Interim Final Rule,” published less than a month later on September 13, 1978, however, EPA attempted to address a problem that had been identified for

21 EPA assumes that requests for Section 301(g) variances will be processed as part of the permit issuance process. See n. 16 above.

22 The federal implementing regulations discussed in this Section V.A, including 40 C.F.R. §§ 122.21, 122.62, and 124.10, are also requirements for approved state NPDES programs. *See* 40 C.F.R. § 123.25.

industries for which effluent limitation guidelines were published before the date of enactment of the 1977 Clean Water Act amendments on December 27, 1977. *See generally* 43 Fed. Reg. 40859 (September 13, 1978), as described below.

The statutory deadline for filing application for Section 301(g) variances for such industries was September 25, 1978, just 12 days from the date of publication of the Interim Final Rule. EPA, however, had not completed substantive criteria for determinations under Section 301(g). Thus, dischargers in such industries were required by statute to file applications for variances under Section 301(g) by September 25, 1978, but EPA had not yet advised such industries about what information to include in the application. In order to resolve this problem, EPA issued the Interim Final Rule and required for the first time that dischargers requesting modifications under Section 301(g) must file an “initial application” by the statutory deadlines.

The Rule included the following comment:

Comment: This section deals only with initial applications for section 301(c) and 301(g) modifications. No substantive criteria have yet been promulgated for determining whether to grant or deny such an application. Once such substantive criteria have been promulgated, initial applications will have to be supplemented to provide sufficient information to determine whether the criteria are met and this section will be amended accordingly

43 Fed. Reg. at 40860-40861.

When EPA published the final NPDES rule on June 7, 1979, the regulations required that an “initial application” be filed, followed by a “completed request” not later than the close of the public comment period for the draft permit. EPA explained:

The statute requires applications for variances under section 301(c) and under section 301(g) to be submitted 270 days after the promulgation of the relevant effluent guidelines or by September 25, 1978, whichever is later. However, since EPA has not yet issued

criteria for such applications, it clearly would have been unreasonable to have required a complete application by last September. Accordingly these regulations incorporate the requirements of previous interim final regulations stating that applicants need only have submitted a very brief notice by September 25, 1978 (or within 270 days of promulgation of an applicable effluent guideline) to qualify under that deadline.

See 44 Fed. Reg. 32854, 32882 (June 7, 1979).²³

It is thus clear from the regulatory history that EPA had no intention of fundamentally changing the unambiguous statutory requirement that applications for modifications under Section 301(g) must be filed by September 25, 1978 or within 270 days of the promulgation of the applicable effluent limitation guidelines, whichever was later. Under EPA's implementing regulations, the complete application for a Section 301(g) variance consists of an initial request that must be filed by the deadline specified in Section 301(j) of the Act, followed by a completed request with detailed information in support of the initial request for a Section 301(g) variance.

EPA's regulatory response to the statutory requirements of the Water Quality Act of 1987, P.L. 100-4 (Feb. 1987), makes it clear that the complete application for a section 301(g) variance, including the initial request and the completed request, must be made before EPA renders a decision about the application. The 1987 WQA amended Section 301(g) to add a requirement that EPA make a final decision regarding applications for Section 301(g) variances within 365 days after an application for a variance is filed. 33 U.S.C. § 1311(j)(4). Within the

²³ By the time EPA published its consolidated permit regulations on May 19, 1980, 45 Fed. Reg. 33290 (May 19, 1980), the familiar current terms "initial request" and "completed request" were used. See 45 Fed. Reg. at 33338 ("Certain requirement from Part 124 of the final NPDES regulations for . . . requests for variances were moved to . . . Subpart D in the proposal . . . Final §§ 122.53 . . .(i) ["Variance requests by non-POTWs"] . . .include[s] these requirements with some rewording, but no substantive changes;" the word "proposal" refers to the consolidated permit regulations that were published for comment on June 14, 1979 (44 Fed. Reg. 34244).

framework of the statute, the operation of such a provision is straightforward: an application for a modification under Section 301(g) must be filed within 270 days after promulgation of an applicable effluent limitation guideline, and EPA is required to approve or deny the application within 365 days after the application is filed. Under the EPA's regulations, however, which differentiate between initial requests and completed requests, the operation of the statutory period for EPA's decision was more complicated. EPA recognized that in some cases in which an initial request for a Section 301(g) variance was timely filed, the 365-day period for EPA's decision could expire before the completed request was required to be filed. In such cases, EPA would not have all the information that it needed to approve or deny an application. EPA therefore amended 40 C.F.R. § 122.21 m)(2)(i)(B) to add a requirement that a complete application for a Section 301(g) variance must be submitted 180 days before EPA is required by new Section 301(j)(4) of the Act, 33 U.S.C. § 1311(j)(4), to make a decision, *notwithstanding* the provision in 40 C.F.R. § 122.21(m)(2)(i)(B) that the completed *request* be submitted by the end of the public comment period.²⁴ See 54 Fed. Reg. 246, 250 (January 4, 1989). EPA explained this revision as follows:

The WQA specifies deadlines for EPA decisionmaking. For example section 301(j)(4) requires EPA to make a final decision on 301(g) applications within 365 days of filing a submission under 301(g). Because an application may be filed without being complete, the deadline for decisionmaking could pass without a complete application ever being filed. It is only logical to imply a deadline for completion of the application before EPA's decision must be made. Therefore, EPA is revising § 122.21(m)(2)(i)(B) to clarify

24 As amended, 40 C.F.R. § 122.21(m)(2)(i)(B) states:

B) Submitting a completed request no late than the close of the public comment period under § 124.10 demonstrating that the requirements of § 124.13 and the applicable requirements of Part 125 have been met. *Notwithstanding this provision, the complete application for a request under section 301(g) shall be filed 180 days before EPA must make a decision . . . [Emph. added].*

that the complete application must be filed in sufficient time . . . to allow compliance with the decision timing requirement contained in section 301(j)(4) of the CWA. Generally, this period will require submission of the complete application no later than 180 days before the deadline for EPA to issue a decision.

See 54 Fed. Reg. 246,250-251 (January 4, 1989).

Thus as a result of this revision, *notwithstanding the provision which allows a completed request to be filed by the close of the public comment period for the draft permit in which the modified limits would be incorporated*, the complete application, including both the initial request and the completed request, must be submitted to EPA within 180 days before EPA is required to make a decision on the filed application. Because EPA is required to render a decision within 365 days after the Section 301(g) request is filed, 33 U.S.C. § 1311(j)(4), the complete application, including both the initial request and the completed request must be filed within 185 days after the initial request is filed (subtracting 180 days from 365 days).

Thus, ArcelorMittal misconstrues the filing deadlines included in the Act, as elaborated in EPA's regulations. While ArcelorMittal is partially correct in asserting that the 270-day deadline imposed by Section 301(j)(4) strictly applies under EPA regulations only to the initial request, it is clear from the discussion above, that the initial request and the completed request form the complete application for a Section 301(g) variance, and the complete application (including the initial request and the completed request) must be filed not later than 185 days after the initial request is filed.

Thus there is no support in the Act or in EPA's regulations for ArcelorMittal's claim that only one initial request for a Section 301(g) variance must be timely filed. The Act and the

regulations make clear that each time EPA is asked to make a decision for a modification under Section 301(g) of the Act, the requestor must file an initial request within the 270-day deadline imposed by Section 301(j) of the Act and a completed request not later than 185 days date after the initial request was filed.

Because ArcelorMittal's 2010 application was not filed until April 2010, the application was untimely and Region 5 correctly denied it.²⁵ As explained below, EPA's regulations at 40 C.F.R. § 122.62 do not authorize EPA to modify effluent limitations established by a previously-granted Section 301(g) variance, except as authorized by Section 301(g) and 301(j) of the Act, and EPA's regulations at 40 C.F.R. § 122.21(m).

B. EPA Regulations at 40 C.F.R. 122.62²⁶ Do Not Provide an Independent Basis for Requesting a Modification Under Section 301(g) of the Act

ArcelorMittal characterizes as "erroneous" EPA's statement in its letter of August 18, 2011, that the Act "does not include special provisions for applications to modify alternate limits previously approved by EPA under CWA Section 301(g)." AM Ex 7. ArcelorMittal does not argue (and thus does not rebut EPA's statement) that the Act provides for modifying variances previously granted under Section 301(g). Rather, ArcelorMittal argues instead that its "NPDES permit modification application is expressly authorized to include Section 301(g) variances

25 This is correct whether ArcelorMittal's 2010 application is considered to be an initial request, a completed request, or a complete application under the applicable regulations.

26 As noted *supra*, EPA is not the permitting authority in Ohio, and the state regulations included in Ohio's approved NPDES program would supply the rule for modifying NPDES permits issued by the State of Ohio. However, the NPDES program operated by the State of Ohio is required to include the requirements of 40 C.F.R. § 122.62 in the state program. *See* 40 C.F.R. § 123.25. Thus, this brief cites to the federal rule because it establishes the parameters for the state rule and because ArcelorMittal's Informal Appeal cites to the federal rule.

pursuant to 40 CFR § 122.62.” Informal Appeal, p. 8. ArcelorMittal thus argues that EPA’s regulations provide a basis to modify a previously granted Section 301(g) variance without complying with the requirements for applications under Section 301(g) imposed by the Act and EPA’s regulations. ArceloreMittal’s argument is erroneous for the following reasons.

When Ohio EPA, as the NPDES permitting authority in Ohio, receives a request to modify an NPDES permit, 40 C.F.R. § 122.62²⁷ authorizes Ohio EPA to determine whether or not one or more of the causes for modification listed in 40 C.F.R. § 122.62 (a) exists, and if cause does exist, Ohio EPA as the NPDES permitting authority in Ohio, may tentatively decide to modify the permit and prepare a draft permit under 40 C.F.R. § 124.6 incorporating the proposed modifications.²⁸ Such draft permits are subject to the notice and comment provisions in 40 C.F.R. § 124.10 and EPA’s right to review and object to state permits in 40 C.F.R. § 123.44.

Cause for modification under 40 C.F.R. § 122.62 includes at § 122. 62(a)(5) the following:

(5) When the permittee has filed a request for a variance under CWA section . . . 301(g) . . . *within the time specified in [40 C.F.R.] § 122.21 or § 125.27(a).*²⁹

In other words, if Ohio EPA determines that ArcelorMittal has filed request for a variance under Section 301(g) of the Act within the time specified by 40 C.F.R. § 122.21, then 40 C.F.R. §

27 Technically, the reference is to the Ohio regulation that implements the requirements of 40 C.F.R. § 122.62. See n. 26 *supra*.

28 40 C.F.R. § 122.62 states: “If cause exists, the [state permitting authority] may modify . . . the permit accordingly, subject to the limitations of [40 C.F.R.] § 124.5(c)” 40 C.F.R. § 124.5(c) states that “[i]f the [state permitting agency] tentatively decides to modify . . . a permit under 40 C.F.R. 122.62 . . . , he or she shall prepare a draft permit under [40 C.F.R.] § 124.6 incorporating the proposed changes.”

29 There is no promulgated EPA regulation corresponding to the citation “40 C.F.R. § 125.27.”

122.62 authorizes Ohio EPA to prepare a draft permit under § 124.6 to incorporate the variance.

Thus, in order for Ohio EPA to find cause for modification under 40 C.F.R. § 122.62(a)(5), a permittee must i) file a request for a variance *under* Section 301(g) of the Act, and ii) file the request *within the time specified in 40 C.F.R. § 122.21*.³⁰

The requirement in i) in the preceding paragraph means that the permit modification provisions in 40 C.F.R. § 122.62 provide neither an independent source of authority to approve Section 301(g) variances nor a method of modifying variances previously approved under Section 301(g). Cause for modification exists only if the permittee has filed a request under (or pursuant to) Section 301(g) of the Act. As discussed *supra*, ArcelorMittal's 2010 application was not filed in accordance with the requirements for applications under Section 301(g) of the Act. In addition, the requirement in ii) in the first sentence of the paragraph above means, as discussed *supra*, that the initial request for the 301(g) variance must have been submitted within 270 days of the promulgation of the applicable effluent limitation guideline (i.e., on or about February 21, 1983) and that the complete application, including the initial request and completed request, must have been filed not later than 185 days following February 21, 1983.

As discussed *supra*, ArcelorMittal's complete 2010 application was obviously not filed within 185 days of February 21, 1983.

VI. CONCLUSION

ArcelorMittal has not shown that the Region 5's denial of ArcelorMittal's application for a Section 301(g) variance was based on clear error of law or fact. On the contrary,

³⁰ Similarly, 40 C.F.R. § 122.63(f) provides that if the EPA approves a request for a modification under Section 301(g) of the Act, the state permitting authority (in state with approved NPDES programs) may prepare a draft permit incorporating the variance.

ArcelorMittal's Informal Appeal misinterprets the requirements of the Act and of EPA's implementing regulations. By correctly implementing the applicable statutory and regulatory requirements, the Region properly and reasonably determined that ArcelorMittal's 2010 application for a 301(g) variance should be denied.

Dated: October 21, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 21 day of October, 2011, I sent copies of the "Brief of EPA Region 5 in Opposition to Informal Appeal of ArcelorMittal Cleveland Inc.," dated October 21, 2011, "EPA Region 5's Submission of Certified Index to the Administrative Record," dated October 21, 2011, and "EPA Region 5's Submission of Relevant Portions of the Administrative Record," dated October 21, 2011, to the following persons in the manner specified:

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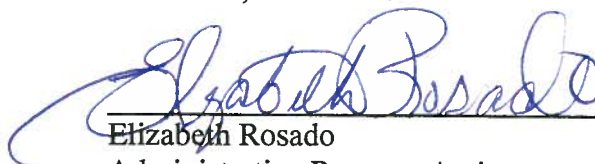
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CERTIFICATE OF SERVICE

I certify that on this 21st day of October, 2011, I electronically filed via the CDX portal a true copy of "Brief of EPA Region 5 in Opposition to Informal Appeal of ArcelorMittal Cleveland Inc.," dated October 21, 2011.

Dated: October 21, 2011



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