

**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
SUPPLEMENTAL BRIEF AS ORDERED BY THE BOARD**

Pursuant to the Board's March 1, 2012 Order Directing Supplemental Briefing, ArcelorMittal Cleveland Inc. submits this supplemental brief "*addressing the relevance and applicability of section 402(o) and the State of Ohio's antibacksliding and antidegradation statutes or regulations to Petitioner's request to raise (i.e., make less stringent) the currently applicable effluent limits for ammonia-nitrogen discharges in the National Pollutant Discharge Elimination System ["NPDES"] permit authorizing discharges into the Cuyahoga River from Petitioner's Cleveland, Ohio steel mill.*"

At oral argument, Region 5 incorrectly asserted that the antibacksliding provision in Clean Water Act ("CWA") §402(o) applies only to effluent limitations based on Best Professional Judgment ("BPJ") and is, according to Region 5, inapplicable to this case. See Oral Argument Transcript, p. 55 (Feb. 28, 2012).¹ To the contrary and as discussed

¹ As noted by the Board, Region 5 raised this argument for the *first time* at the oral argument despite clear opportunities to do so in its prior briefing. See Oral Argument Transcript at p. 57. ArcelorMittal Cleveland discussed antibacksliding in its Reply Brief to support its argument that less stringent limitations are specifically addressed and authorized under CWA §402(o). See ArcelorMittal Cleveland Inc.'s Reply in Support of Informal Appeal, p. 10 (Nov. 4, 2011). During briefing, Region 5's only response was a single footnote stating that the antibacksliding provision did not support ArcelorMittal Cleveland's appeal position. See Surreply Brief of Region 5, p. 12 n. 10 (Jan. 6, 2012). Region 5's Surreply contains absolutely no indication or statement that the antibacksliding provisions in CWA §402(o) only apply to effluent limits based on BPJ.

more fully below, both CWA §402(o) and the applicable State of Ohio regulations authorize the relaxation of two different kinds of effluent limitations: (1) technology-based limitations that were established on the basis of BPJ before the promulgation of applicable federal Effluent Limitation Guidelines (“EGLs”); **and** (2) 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). Furthermore, the exceptions 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 an 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). See CWA §402(o)(2)(D), 33 USC §1342(o)(2)(D); OAC rule 3745-33-05(F)(1)(e).

The antidegradation provisions in CWA §303(d)(4) may also apply to the renewal, reissuance, or modification of an NPDES permit independently of CWA §402(o). Pursuant to 40 CFR §131.12, each state must develop and adopt a statewide antidegradation policy to address any NPDES permitting action anticipated to degrade existing surface water quality within the State. To that end, Ohio promulgated antidegradation regulations at OAC rule 3745-1-05, which must be followed before Ohio EPA authorizes any increased activity on a surface water body that may result in a lowering of the existing water quality, including any net increase in the discharge of a regulated pollutant from existing sources. See OAC rule 3745-1-05(B)(1).

Here, ArcelorMittal Cleveland is seeking increased ammonia-nitrogen (“ammonia-N”) effluent discharge limits through the requested §301(g) variance modification at issue in this case. The requested increase meets the exception to the prohibition against antibacksliding by virtue of the CWA §301(g) variance and it also meets the requirements of Ohio’s antidegradation rule. ArcelorMittal Cleveland included a thorough antidegradation analysis as part of its application to modify its existing CWA §301(g) variance limits for ammonia-N.² ***Ohio EPA evaluated ArcelorMittal Cleveland’s antidegradation analysis and expressly recommended that Region 5 approve the requested §301(g) variance modification.***³

Region 5, by contrast, failed to evaluate **any** of the mandatory statutory criteria required for review of CWA §301(g) variances, see 33 USC §1311(g)(2),⁴ and instead summarily denied ArcelorMittal Cleveland’s modification application on the unsupported basis that the application constituted a new variance request that should have been submitted no more than 270 days after the May 27, 1982 promulgation date of the applicable effluent limits for ammonia-N. For all of the reasons set forth herein, in ArcelorMittal Cleveland’s prior briefing, and raised by ArcelorMittal Cleveland at oral

² ArcelorMittal Cleveland provided this analysis in its “Antidegradation Addendum” included as Attachment 2 to its application for modification of the ammonia-N limits. See ArcelorMittal Cleveland Inc.’s Informal Appeal, Exhibit 1 (Aug. 26, 2011). This is the standard form prescribed by Ohio EPA for demonstrating compliance with the Ohio’s antidegradation rule. See www.epa.ohio.gov/dsw/rules/antidegguide_2003.aspx.

³ See Email from E. Nygaard, Ohio EPA, to S. Yedavalli, Region 5 (Aug. 2, 2010), attached as Exhibit 4 to ArcelorMittal Cleveland’s Reply in Support of Informal Appeal (“The antidegradation calculations ... show that ArcelorMittal meets the requirements for a ‘de minimis’ increase under our rules.”); see also Letter from G. Elmaraghy, Ohio EPA, to K. Pierard, Region 5 (June 14, 2010), attached as Exhibit 2 to ArcelorMittal Cleveland’s Informal Appeal (recommending approval of ArcelorMittal Cleveland’s requested variance modification on the basis that “[t]he new limits meet BPT, the wasteload allocation for the Cuyahoga River, and the ‘de minimis’ requirements of Ohio’s Antidegradation Rule”).

⁴ See also ArcelorMittal Cleveland’s Reply Brief at p. 12 (Argument C: “Region 5 Failed to Follow the Statutory Mandates for Decision Making Under CWA §301(g) When Issuing Its Denial to ArcelorMittal”).

argument in this appeal, the Board should reverse Region 5's denial and direct the Region to commence the appropriate modification proceedings.

A. ARCELORMITTAL CLEVELAND'S REQUESTED CWA §301(g) VARIANCE MODIFICATION FALLS WITHIN THE EXCEPTIONS TO THE ANTIBACKSLIDING PROHIBITION.

The antibacksliding prohibition contained in CWA §402(o) and the implementing regulations contained in OAC rule 3745-33-05(F) bear directly on when, or if, a permittee can obtain less stringent effluent limitations in the context of renewing or modifying an existing NPDES permit. The antibacksliding rule essentially acts as a hard floor for a permittee's effluent limits that can only be softened by certain exceptions, including when a facility has been issued a CWA §301(g) variance. The ability of a permittee with modified effluent limitations pursuant to a CWA §301(g) variance to continue meeting the exceptions to the antibacksliding prohibition is also demonstrated in NPDES permits issued by Ohio EPA and approved by Region 5. Taken together, both the law and the facts eviscerate Region 5's contention that the antibacksliding provisions fail to support ArcelorMittal Cleveland's requested §301(g) variance modification.⁵

1. **The antibacksliding provision contained in CWA §402(o)(1) and Ohio's antibacksliding implementing regulations apply to effluent limits based on state water quality standards.**

The antibacksliding provision contained in CWA §402(o)(1), 33 USC §1342(o)(1), prohibits the renewal, reissuance, or modification of an NPDES permit "to contain effluent limitations that are less stringent than the comparable effluent limitations in a previous permit" for permits issued under §402(a)(1)(B), and for effluent limits based on

⁵ Region 5 never raised this antibacksliding contention until oral argument. See fn. 1 supra.

state water quality standards or TMDLs under §301(b)(1)(C) or §303(d) or (e). Section 402(a)(1)(B), which authorizes EPA to issue a permit containing “such conditions as the Administrator determines are necessary to carry out the provisions of this Act” is the authority for BPJ technology-based limits. Thus, in either case, the previous permit’s effluent limitations act as a hard floor for the renewed permit and prohibit the use of less stringent limitations.

CWA §402(o)(2) contains exceptions to this antibacksliding prohibition for “a permit with respect to which [§402(o)(1)] applies,” which includes ArcelorMittal Cleveland and several other facilities in Region 5 as discussed more fully below. Section 402(o)(2)(D) provides an exception to the antibacksliding prohibition for effluent limits based on state water quality standards where “the permittee has received a permit modification under section...[301(g)]....” See CWA §402(o)(2)(D), 33 USC §1342(o)(2)(D).

During oral argument, counsel for Region 5 asserted, for the first time, that “we’ve [Region 5 and EPA Office of General Counsel] had discussions since filing the certified brief” that the antibacksliding “exception applies only to limits established by BPJ.” Oral Argument Transcript at p. 57. As discussed above, however, Region 5’s statement is erroneous and directly contradicts the plain language of the statute.⁶

⁶ Both CWA §402(o) and the applicable State of Ohio regulations authorize the relaxation of two different kinds of effluent limitations: (1) technology-based limitations that were established on the basis of BPJ before the promulgation of applicable federal Effluent Limitation Guidelines, **and** (2) water-quality based limitations that were established on the basis of state WQS or TMDLs as long as the change also meets antidegradation requirements. See CWA §402(o)(2)(D), 33 USC §1342(o)(2)(D); OAC rule 3745-33-05(F)(1)(e).

Moreover, it contradicts the legislative history of this provision. The Conference Report⁷ specifically states “***all of the circumstances under which BPJ permits may be adjusted to reflect less stringent effluent limitations may also lead to the same result for water quality based permits***, except for technical mistakes or mistaken interpretations of the law” in §402(o)(2)(B)(ii), which is explicitly reserved for BPJ permits alone. See H. Conference R. No. 99-1004, 99th Cong., 2d Sess., p. 155, *reprinted in* 1988 Leg. Hist. 844 (emphasis added).⁸ This includes the exception for less stringent effluent limitations based on §301(g) variances in §402(o)(2)(D). Id.

Region 5’s misguided position advocated during its oral argument presentation before this Board appears to stem from the fact that EPA never properly revised its NPDES permit regulations to incorporate all of the changes Congress made to previous existing law in its 1987 CWA Amendments. The federal antibacksliding policy was originally created not by Congress, but by EPA, in regulations that it promulgated in 1984, see 49 Fed. Reg. 37898, 38019 (Sept. 26, 1984), and codified in 40 CFR §122.44(l). That rule prohibited the modification of a permit with BPJ-based limits to include a less-stringent limit based on subsequently promulgated ELGs, unless one of a specific list of exceptions applied (including the exception for permittees that had received a §301(g) variance). In 1987, Congress incorporated this antibacksliding policy into the CWA, but it expanded the policy to prohibit backsliding from water quality-based

⁷ The conference report is generally the “most reliable evidence” of Congressional intent apart from the statute itself. See *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 147 (2d Cir. 2002) (citing *Disabled in Action v. Hammons*, 202 F.3d 110, 124-25 (2d Cir. 2000) (“The conference report stage is closest to final passage and is generally thus the best indicator of legislative meaning apart from the statute itself.”)).

⁸ Citations to the 1988 legislative history (“1988 Leg. Hist.”) are to the SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, 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, prepared by the Environment and Natural Resources Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1988).

limits as well as from technology-based BPJ limits. It also retained most, but not all, of the listed exceptions from the pre-existing EPA rule. ***It is absolutely clear from the plain language of the statute that all of the exceptions listed in CWA §402(o)(2) (apart from §402(o)(2)(B)(ii)) apply to both of the prohibitions in §402(o)(1) – the BPJ-based limits prohibition and the WQS-based limits prohibition.***

When EPA issued a new regulation in 1989 to implement the 1987 CWA amendments, it revised the list of exceptions to conform to those set forth in CWA §402(o)(2), but failed to expand the scope of its antibacksliding rule to incorporate the prohibition against relaxation of WQS-based limits in CWA §402(o)(1). See 54 Fed. Reg. 246 (Jan. 4, 1989). EPA stated at the time that it planned to propose rules to implement this provision “in the near future,” but it never did. Id. at 252. Consequently, to this day, the list of exceptions in 40 CFR §122.44(l)(2)(i), including the exception for permittees that have received a §301(g) variance, continues to apply only to permits with BPJ limits in direct contravention of the 1987 CWA amendments.

EPA’s failure to revise its outdated regulation cannot prevail over the direction of Congress as stated in the plain language of the CWA itself. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984) (courts and agencies “must give effect to the unambiguously expressed intent of Congress”); Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 779 n. 22 (1984) (agency’s statutory interpretation “cannot be sustained [when] it conflicts with the clear language and legislative history of the statute”). Moreover, the incomplete and obsolete provisions of the federal antibacksliding rule in 40 CFR §122.44(l) are not even relevant to this case, since they apply only to permits that are issued by U.S. EPA itself.

For permits that are issued by Ohio EPA (as the Board noted during oral argument), it is the State's own implementing regulations that are pertinent. In Ohio, the applicable rule is OAC rule 3745-33-05(F), which reads as follows:

(F) Antibacksliding.

(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:

(a) Material and substantial additions or alterations to the permitted facility occurred after permit issuance that justify the application of a less stringent effluent limitation;

(b) Information is available that was not available at the time of permit issuance (other than revised regulations, guidance or test methods) and that would have justified the application of a less stringent effluent limitation at the time of permit issuance;

(c) For technology-based limitations, the director determines that technical mistakes or mistaken interpretations of law were made in issuing the permit;

(d) A less stringent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy provided that the revised limitation is a WQBEL limitation or is a limitation based on effluent limitation guidelines that was formerly based on best professional judgment;

(e) The permittee has received a modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n) or 316(a) of the act or rule 3745-33-04 of the Administrative Code;

(f) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations. In this case the limitations in the renewed, reissued, or modified permit may reflect the level of pollution control actually achieved, but shall not be less stringent than required by the effluent guidelines in effect at the time of permit renewal, reissuance or modification; or

(g) For water quality-based effluent limitations,

(i) If the water quality standard is attained and applicable antidegradation requirements of rule 3745-1-05 of the Administrative Code are met; or

(ii) If the water quality standard is not attained and the cumulative effect of changing wasteload allocations or total maximum daily loads will assure attainment of the water quality standard or the designated use not being attained is removed, and applicable antidegradation requirements of rule 3745-1-05 of the Administrative Code are met.

In Ohio's regulation, the list of exceptions in (a) through (g) is treated exactly the same as in the Clean Water Act. Exception (e), which applies to permittees that have received a §301(g) variance, is among those that apply to all permits, including the permit at issue in this case.

Thus, as ArcelorMittal Cleveland noted in its Reply Brief at p. 10, both CWA §402(o) and the State of Ohio's implementing regulations at OAC rule 3745-33-05(F) unambiguously contemplate that existing NPDES permits may be modified to contain less stringent effluent limitations where the permittee has been granted a variance under CWA §301(g). Therefore, Ohio's regulation specifically contemplates that less stringent limits may be incorporated in NPDES permit renewals or modifications based on a §301(g) variance and those less stringent limits are not prohibited by the antibacksliding rule.

2. **The ability of a permittee with modified effluent limitations pursuant to a CWA §301(g) variance to continue meeting the exceptions to the antibacksliding prohibition is demonstrated in NPDES permits issued by Ohio EPA and approved by Region 5.**

Region 5 has historically approved the renewal of NPDES permits that rely on the §301(g) exception to the antibacksliding prohibition for ammonia-N. Examples occur at the ArcelorMittal Cleveland facility, the AK Steel Middletown facility, the ArcelorMittal Burns Harbor facility, and the ArcelorMittal Indiana Harbor facility.

The Fact Sheet to the current ArcelorMittal Cleveland NPDES Permit states that “[s]ection 301(g) of the Clean Water Act allow[s] variances from BAT [Best Available Technology Economically Achievable] treatment technology standards for ammonia and certain other pollutants if the discharge can meet BPT [Best Practicable Control Technology Currently Available] treatment standards and water quality based effluent conditions.” ArcelorMittal Cleveland 2006 NPDES Permit Fact Sheet, p. 2 (Feb. 5, 2008) (attached hereto with 2008 ArcelorMittal Cleveland NPDES Permit as Exhibit 1). The ArcelorMittal Cleveland NPDES Permit Fact Sheet also states the facility made the demonstration that it can meet BPT treatment standards and WQS-based effluent conditions and that “USEPA concurs with Ohio on this variance renewal.” Id. at p. 21.⁹

The AK Steel Middletown NPDES Permit, which the parties cited in their briefs and which ArcelorMittal Cleveland discussed extensively during oral argument, contains similar statements concerning the impact of §301(g) on the facility’s ammonia-N effluent limitation. The Fact Sheet for AK Steel Middletown’s 2008 NPDES Permit states that “[s]ection 301(g) ... allows a facility a variance from Best Available Treatment requirements for ammonia and certain other pollutants.” AK Steel Middletown 2008 NPDES Permit Fact Sheet, p. 20 (attached hereto with 2008 AK Steel Middletown NPDES Permit as Exhibit 2). As with ArcelorMittal Cleveland, “to be approved under this variance, a facility must be able to show that it can meet both BPT treatment standards and water quality standards.” Id. At AK Steel Middletown, the facility met the

⁹ The preceding paragraph in this Fact Sheet also states that the zinc limit was based on BPJ limits and could not be relaxed due to antibacksliding rules presumably because there was no applicable exception under CWA §402(o)(2) or OAC rule 3745-33-05(F)(1). Id. This further supports the argument that the §301(g) exception to antibacksliding is applicable to the ArcelorMittal Cleveland facility and this case.

demonstration, Ohio EPA recommended the variance limits to Region 5, and Region 5 proposed to “approve the variance with this permit.” Id.

In approving this variance, Region 5 also permitted an incremental increase between the approved §301(g) variance effluent limits and the calculated BAT limits. In fact, as shown in the table below, there has been a steadily increasing difference between §301(g) and BAT for Outfall 613 at the AK Steel Middletown facility since at least 1997, which have been historically approved by Region 5:

AK Steel Middletown								
		BAT Limits		Approved §301(g) Limits		Increment Between BAT and §301(g)		Units
Outfall	Source	Avg.	Max.	Avg.	Max.	Avg.	Max.	
613	1997 NPDES Permit ¹⁰	33.1	98.8	205	410	+172	+311	kg/day
	2002 NPDES Permit ¹¹	31.3	93.8	205	410	+174	+316	kg/day
	2008 NPDES Permit ¹²	19.0	57.1	205	410	+186	+353	kg/day

This incremental increase between BAT limitations and §301(g) variance limits at the AK Steel Middletown facility achieves a result no different, i.e. a less stringent effluent limitation, from that approved by Ohio EPA for the ArcelorMittal Cleveland facility. In actuality, as shown in the table below, the incremental increase between the BAT “maximum” limitations and the §301(g) “maximum” limitations at the ArcelorMittal

¹⁰ See Technical Support Document for Proposed NPDES Permit Effluent Limitations, AK Steel Corporation – Middletown Works (Feb. 1997), p. 13 and Attachment A (for BAT limits) and 1997 NPDES Permit, p. 17 (for §301(g) limits) (The Technical Support Document and 1997 NPDES Permit are collectively attached as Exhibit 3).

¹¹ See Technical Support Document for Proposed NPDES Permit Effluent Limitations, AK Steel Corporation – Middletown Works (Oct. 2001), p. 13 and Attachment A (for BAT limits) and 2002 NPDES Permit, p. 7 (for §301(g) limits) (The Technical Support Document and 2002 NPDES Permit are collectively attached as Exhibit 4).

¹² See Exhibit 2 at Fact Sheet, Appendix – Effluent Guideline Calculations for AK Steel-Middletown Works (for BAT limits) and 2008 NPDES Permit, p. 10 (for §301(g) limits).

Cleveland facility will be significantly lower than that which was approved for the AK Steel Middletown facility:

ArcelorMittal Cleveland								
Outfall	Source	BAT Limits		Approved §301(g) Limits		Increment Between BAT and §301(g)		Units
		Avg.	Max.	Avg.	Max.	Avg.	Max.	
604	2008 NPDES Permit (summer) ¹³	24.5	73.5	62.4	85.6	+38	+12	kg/day
	2008 NPDES Permit (winter) ¹³	24.5	73.5	81.6	211	+57	+138	kg/day
	Proposed Modification ¹⁴	24.5	73.5	224	294	+200	+221	kg/day

The point of comparing the AK Steel Middletown to the ArcelorMittal Cleveland facility as reflected in the tables above is to incontrovertibly show that U.S. EPA has heretofore approved on numerous occasions increases in §301(g) variances. This fact is simply inescapable for Region 5.

As with the NPDES permits discussed above, the Fact Sheet for the ArcelorMittal Burns Harbor facility contains a lengthy discussion on the history of the §301(g) variance at that facility. Page 28 of the Fact Sheet, which is attached hereto with the 2011 ArcelorMittal Burns Harbor NPDES Permit as Exhibit 5, sets forth the 1988 modified limits for ammonia-N. Subsequently, the Fact Sheet notes that ArcelorMittal Burns Harbor requested continuation of proposed modified effluent limitations (“PMELs”) for the §301(g) variance and the Indiana Department of Environmental Management

¹³ See Exhibit 1 at Fact Sheet, Attachment – Effluent Guideline Calculations and 301(g) Variance Analysis (for BAT limits) and Fact Sheet, p. 93 Table 51; 2008 NPDES Permit, p. 24 (for §301(g) limits). The attached unsigned copy of this permit reflects the publicly available document. See <http://wwwapp.epa.ohio.gov/dsw/permits/doc/3ID00003.pdf> (last viewed March 23, 2012).

¹⁴ See ArcelorMittal Cleveland Inc.’s NPDES Permit Modification Request (April 13, 2010), attached as Exhibit 1 to ArcelorMittal Cleveland’s Informal Appeal.

("IDEM") reviewed the request to continue the ammonia-N limits "in the context of Indiana's currently applicable water quality standards and IDEM's procedures for wasteload allocations" in tentatively approving the continuance of the §301(g) variance. See Exhibit 5 at NPDES Fact Sheet, p. 29. See also 2011 ArcelorMittal Indiana Harbor Fact Sheet at pp. 17-21, attached hereto with 2011 ArcelorMittal Indiana Harbor NPDES Permit as Exhibit 6. Interestingly, the Fact Sheet also states that IDEM "explored the possibility of modifying the PMELs for ammonia as N based on the §301(g) variance issued to Bethlehem Steel with the issuance of the existing NPDES permit in 1988. **U.S. EPA** and IDEM have...determined that a *new application for a 301(g) variance needs to be submitted for approval by the U.S. EPA and IDEM before the PMELs based on the existing 301(g) variance **may be modified.***" Exhibit 5 at NPDES Fact Sheet, p. 29 (emphasis added). The position stated in the ArcelorMittal Burns Harbor Fact Sheet is directly contrary to the position that Region 5 has taken during the course of this appeal.

All four of these permits reflect alternate effluent limits for ammonia-N and a continuation of a §301(g) variance based on whether or not the alternate effluents continue to meet the water quality standards established by the Ohio and Indiana regulations. Thus, all four permits reflect the applicability of the §301(g) variance exception to the antibacksliding prohibition for those instances where the alternate effluent limits are based on water quality standards.

Similar to the NPDES permits discussed above, the current §301(g) variance limits and PMELs in ArcelorMittal Cleveland's existing NPDES permit are not alternate technology-based effluent limits developed to reflect subsequently issued effluent limitations guidelines that would result in less stringent effluent limits that were based on

BPJ. The underlying effluent limitations guidelines for ammonia-N for blast furnaces at 40 CFR Part 420 have not been modified since they were promulgated initially in 1982, and the current §301(g) variance limits and the PMELs requested by ArcelorMittal Cleveland are based on water quality assessments for the Cuyahoga River, not technology-based assessments. Thus, the first CWA prohibition related to BPJ standards is not applicable. Rather, the PMELs for ammonia-N at Outfall 604 are based on consideration of Ohio water quality standards. As such, the second CWA §402(o)(1) prohibition applicable to state water quality standards would have to be addressed in the context of CWA §303(d)(4), but for the applicable exception to antibacksliding for §301(g) variances. See OAC rule 3745-33-05(F)(1)(e). Neither the CWA nor the applicable State implementing regulations prohibit modifications of existing §301(g) variances. Consequently, the same exception to Ohio's antibacksliding regulation should apply to ArcelorMittal Cleveland's request for less stringent ammonia-N limits pursuant to a modified §301(g) variance.

B. ARCELORMITTAL CLEVELAND'S REQUESTED 301(g) VARIANCE MODIFICATION INDEPENDENTLY SATISFIES ANTIDEGRADATION REQUIREMENTS.

ArcelorMittal Cleveland is not required to satisfy the antidegradation provisions in CWA §303(d)(4) to avoid the antibacksliding prohibition of §402(o) in light of the exception to this prohibition for §301(g) variances. However, antidegradation review is applicable in this case independent of §402(o) because of the incremental increase in ammonia-N discharges that would result from ArcelorMittal Cleveland's requested §301(g) variance modification.

The federal antidegradation policy was incorporated into the CWA through the 1987 CWA amendments, and requires satisfaction of antidegradation requirements

before making changes in NPDES permits that would lower existing water quality. See CWA §303(d)(4). The NPDES regulations at 40 CFR §131.12 require each State to develop and adopt a statewide antidegradation policy to address these types of permitting actions. Per U.S. EPA: “The antidegradation implementation procedures specify how a State will determine on a case-by-case basis whether, and to what extent, water quality may be lowered.”¹⁵

Ohio’s antidegradation policy for surface waters of the State is contained in Ohio Revised Code (“ORC”) §6111.12(A)(3) and OAC rule 3745-1-05. Both the statute and the regulation contain specific provisions that must be followed before Ohio EPA can authorize any increased activity that may result in a lowering of water quality. Here, because ArcelorMittal Cleveland is seeking to increase its discharge through the modified §301(g) variance, an independent antidegradation analysis was required.

ArcelorMittal Cleveland addressed Ohio’s antidegradation regulatory requirements point-by-point in its application for the §301(g) variance modification. See ArcelorMittal Cleveland Inc.’s NPDES Permit Modification Request (April 13, 2010), attached as Exhibit 1 to ArcelorMittal Cleveland’s Informal Appeal. Most notably, ArcelorMittal Cleveland demonstrated that the applicable Ohio wasteload allocation for ammonia-N for the Cuyahoga River is approximately 8 to 11 times greater than the requested PMELs. As a result, the proposed increases in effluent limits associated with the PMELs for ammonia-N at ArcelorMittal Cleveland’s facility were determined by Ohio EPA to be *de minimis* under Ohio’s antidegradation rule at OAC rule 3745-1-05(D)(1)(b)(i), which reflects the statutory authorization for *de minimis* increases in ORC

¹⁵ U.S. EPA Water Quality Standards Handbook: Second Ed., EPA 823-B94-005a, Section 4.3 (Aug. 1994), excerpt attached as Exhibit 7.

§6111.12(A)(3). See Email from E. Nygaard, Ohio EPA, to S. Yedavalli, Region 5 (Aug. 2, 2010), attached as Exhibit 4 to ArcelorMittal Cleveland's Reply in Support of Informal Appeal ("The antidegradation calculations ... show that ArcelorMittal meets the requirements for a 'de minimis' increase under our rules."); see also Letter from G. Elmaraghy, Ohio EPA, to K. Pierard, Region 5 (June 14, 2010), attached as Exhibit 2 to ArcelorMittal Cleveland's Informal Appeal (recommending approval of ArcelorMittal Cleveland's requested variance modification on the basis that "[t]he new limits meet BPT, the wasteload allocation for the Cuyahoga River, and the 'de minimis' requirements of Ohio's Antidegradation Rule"). Region 5 similarly has the authority – and is required by the CWA – to make its own individual technical analysis as to the appropriateness of ArcelorMittal Cleveland's requested §301(g) variance modification.

C. CONCLUSION

In response to the Board's question, yes, the CWA and Ohio's statutes and regulations governing antibacksliding and antidegradation are relevant to ArcelorMittal Cleveland's request to increase the currently applicable §301(g) variance ammonia-N effluent limits in its NPDES Permit. As set forth here and in its prior briefing in this appeal, there is no prohibition on relaxed §301(g) effluent limits for ammonia-N at ArcelorMittal Cleveland's facility under §402(o)(1) or §303(d)(4) of the CWA, or under the implementing State NPDES permit antibacksliding or antidegradation regulations. In fact, there is simply no legal or factual justification for denying ArcelorMittal Cleveland's requested §301(g) variance modification. The deliberate expansion of the antibacksliding exception in CWA §402(o)(2)(D) to cover the relaxation of water-quality based effluent limitations where a §301(g) variance has been granted demonstrates the

clear expectation of Congress that such modifications would be made during the modification or renewal of existing NPDES permits. Region 5's statements to the contrary are both legally and factually incorrect. Therefore, 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: March 23, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2012, I served by email and regular mail **ArcelorMittal Cleveland Inc.'s Supplemental Briefing as Ordered by the Board** to the following:

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