

**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)
)
_____)

EPA/REGION 5'S MOTION FOR LEAVE TO FILE A SUR-REPLY BRIEF

Region 5 of the U.S. Environmental Protection Agency respectfully requests that the Environmental Appeals Board (“Board”) grant it leave to file a sur-reply brief in this matter, responding to the Reply Brief submitted by ArcelorMittal Cleveland Inc., on November 4, 2011. Region 5 proposes to file its sur-reply brief not later than 14 days following the date of the Board’s order granting this motion.

Counsel for Region 5 has consulted with counsel for ArcelorMittal about whether ArcelorMittal would or would not oppose this motion for leave to file a sur-reply brief. ArcelorMittal has advised counsel for Region 5 that ArcelorMittal would not oppose this motion, but only upon conditions to which Region 5 could not agree. Region 5 therefore advises the Board that ArcelorMittal may oppose this motion.

Although the rules governing NPDES permit appeals, which also govern petitions to review variance decisions made by EPA, do not specifically provide for the filing of replies or sur-replies, the EAB Practice Manual allows interested parties to seek leave to file a reply brief upon “motion explaining why a reply brief is necessary,” and further states that “[i]f a reply brief has been filed, the EAB may similarly, upon motion, allow the filing of a surreply brief.” EAB Practice Manual (September 2010), at 48. The Board has, in other cases, granted leave to file a sur-reply for good cause shown *See, e.g. In re District of Columbia Water and Sewer Authority*, NPDES Appeal Nos. 05-02, 07-10, 07-11, 07-12, slip op. (EAB August 3, 2007). .

Specifically, Region 5 believes that addressing the following new arguments, new issues, and mischaracterizations that appear in ArcelorMittal’s Reply Brief is necessary to clearly and

fully present to the Board the issues raised in this matter:

1. ArcelorMittal's Reply Brief erroneously argues that EPA/Region 5 has offered differing justifications for denying ArcelorMittal's application to modify its variance under § 301(g) of the Clean Water Act, creating a "moving target." Its argument mischaracterizes not only EPA/Region 5's position, but also the regulations that establish the process by which applications under §301(g) are to be made. A sur-reply brief is necessary to rebut such mischaracterizations.
2. The Reply Brief repeatedly and mistakenly conflates two separate and distinct concepts: (i) "renewal" of a previously granted variance under Section 301(g) of the Clean Water Act, which is not at issue in this matter, and (ii) "modification" of a previously granted variance under Section 301(g) of the Clean Water, which is at issue. The conflation of these concepts causes confusion and leads ArcelorMittal to interpret and apply the relevant legal sources erroneously. A sur-reply brief is necessary to clearly distinguish "renewal" from "modification" and explain how "renewal" fits within the scope of controlling legal authorities, while "modification" of the sort ArcelorMittal seeks does not.
3. The Reply Brief erroneously argues that the legislative history of the Clean Water Act, EPA's own guidance, and the preambles to the promulgated regulations "support the conclusion that existing § 301(g) variances can be modified." Reply Brief at 5. While ArcelorMittal asserted in its Informal Appeal, with little elaboration or argument, that it is contrary to Congressional intent to interpret 301(g) in a way that results in a situation in which variances are frozen in time and could not be modified to account for changing circumstances, its Reply Brief argues this position in significantly greater detail and discusses legal authorities that it erroneously alleges support its position. A sur-reply brief is necessary to address the erroneous characterizations of legislative history, EPA guidance and EPA's regulatory preambles.
4. The Reply Brief erroneously argues that EPA's "long-established practice of renewing or

modifying previously approved § 301(g) variances . . . support[s] the conclusion that existing § 301(g) variances can be modified.” Reply Brief at 5. ArcelorMittal’s Informal Appeal included the simple statement that Region 5’s denial of the modification application is “expressly contrary to . . . Region V’s own prior acts and decisions with respect to variances,” Informal Appeal at 5, but the Reply Brief significantly expands ArcelorMittal’s argument on this issue to such an extent as to effectively constitute a new issue. A sur-reply is necessary to rebut this new issue and ArcelorMittal’s new arguments.

5. The Reply Brief introduces a new issue by erroneously alleging - with absolutely no basis in fact or law - that Region 5 has delayed and thwarted ArcelorMittal’s right to obtain relevant information under the Freedom of Information Act that is necessary for its prosecution of its appeal. A sur-reply is necessary to address this new issue.
6. ArcelorMittal’s Informal Appeal included a description of communications between EPA/Region 5 and ArcerlorMittal prior to EPA/Region 5’s decision to deny the § 301(g) variance application, including the statement that EPA/Region 5 did not during this period raise the issue that the application may have been untimely. The Reply Brief states that EPA/Region 5 was also, during the same period, actively seeking data from ArcelorMittal to complete its evaluation of the § 301(g) application before issuing its denial decision, and argues for the first time that these factors are “wholly inconsistent with Region 5’s current position that the 2010 application constitutes an untimely ‘new’ variance.” Reply Brief, at 5. A sur-reply is necessary to address this new argument.
7. ArcelorMittal erroneously argues for the first time in the Reply Brief that Region 5 failed to follow the statutory mandates for decision-making under CWA § 301(g) when issuing its denial to ArcelorMittal. A sur-reply is necessary to address this new argument.
8. ArcelorMittal’s Reply Brief included a request for oral argument. EPA/Region 5 proposes to respond to ArcelorMittal’s request for oral argument in a sur-reply brief, if the Board grants this motion.

EPA/Region 5 believes that a sur-reply brief that addresses these issues will materially assist the Board in resolving ArcelorMittal's Informal Appeal.

For good cause shown, counsel for EPA/Region 5 respectfully requests that this Motion be granted, and that the Board grant leave to EPA/Region 5 to submit a sur-reply brief within 14 days following the date of the Board's order.

Respectfully submitted,

Counsel for EPA/Region 5

11/10/11
Date

Terence Branigan
Terence Branigan
Associate Regional Counsel (C-14J)
U.S. EPA/ Region 5
77 W. Jackson Boulevard
Chicago, IL 60604
(312) 353-4737 (voice)
(312) 385-5500 (fax)
branigan.terry@epa.gov

OF COUNSEL

Richard Witt
Office of General Counsel
Water Law Office
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
(202) 564-5496

CERTIFICATE OF SERVICE

I certify that on this 10th day of November, 2011, I sent copies of the foregoing "EPA/Region 5's Motion For Leave To File a Sur-Reply Brief," dated November 10, 2011, in the following manner to the addressees listed below:

PDF copy, by CDX

Environmental Appeals Board

Copy by UPS Next Day Air

Mr. Dale E. Papajcik
Ms. Lianne Mantione
Squire, Sanders & Dempsey LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44144

Ms. Kendra S. Sherman
Squire, Sanders & Demsey LLP
2000 Huntington Center
41 South High Street
Columbus, OH 43215

Mr. Scott J. Nally, Director
Ohio Environmental Protection Agency
50 West Town St., Suite 700
Columbus, OH 43215

Mr. George Elmaragy, P.E., Chief
Division of Surface Water
Ohio Environmental Protection Agency
50 West Town St. Suite 700
Columbus, OH 43215

Dated: 11/10/11



Terence Branigan
Associate Regional Counsel
U.S. Environmental Protection Agency/Region 5