

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

In Re:

ArcelorMittal Cleveland Inc.

Permit No. OH0000957

NPDES Appeal No. 11-01

**ARCELORMITTAL CLEVELAND INC.'S BRIEF IN OPPOSITION
TO U.S. EPA REGION 5'S MOTION FOR LEAVE TO FILE SURREPLY**

I. INTRODUCTION

In its Motion for Leave to File a Surreply Brief ("Motion for Leave"), U.S. EPA Region 5 recites eight reasons as to why the Board should grant it leave to file a surreply in this appeal. At its core, however, Region 5 simply wants another bite at the apple, *without affording ArcelorMittal the same opportunity to supplement its briefing*. Indeed, there were no unreasonable "conditions" required by ArcelorMittal as Region 5 contends. Instead, prior to Region 5's filing of its Motion for Leave, ArcelorMittal advised Region 5 that ArcelorMittal would *not* oppose the Motion for Leave so long as Region 5 likewise would not oppose ArcelorMittal's same request for leave to supplement its Reply after the FOIA documents requested by ArcelorMittal have been received. Curiously, and without any explanation, Region 5 would not agree. See Email from T. Branigan, Counsel for US EPA Region 5, to L. Mantione, Counsel for ArcelorMittal (Nov. 9, 2011) (attached as Exhibit 1). Therefore, for the reasons set forth

below, ArcelorMittal opposes Region 5's Motion for Leave and files this timely response in opposition pursuant to the EAB Practice Manual.

II. LEGAL ARGUMENT

The Board has granted requests for leave to file a surreply when necessary to respond to new arguments identified in the opposing party's reply brief, *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, slip op., 11 (EAB Mar. 19, 2008), or where the information will otherwise aid the Board in resolution of the pending issues. *In re District of Columbia Water and Sewer Authority*, NPDES Appeal Nos. 05-07, 07-10, 07-11, 07-12, slip op., 1-2 (EAB Aug. 3, 2007). Neither situation is applicable here. Indeed, as detailed below, there are no new arguments raised in ArcelorMittal's Reply in Support of Informal Appeal ("Reply"), filed November 4, 2011, and no additional issues which necessitate the filing of a surreply by Region 5 in this appeal.

A. ArcelorMittal's Reply Brief Does Not Include New Arguments or Issues.

Region 5 had ample opportunity in its initial response brief to counter the legal arguments raised by ArcelorMittal in this appeal. In fact, ArcelorMittal agreed to a three-week extension for Region 5 to prepare and file its response brief. The response that Region 5 did file was a 23-page brief with a detailed recitation of EPA's position in this appeal. See generally Brief of EPA Region 5 in Opposition to Informal Appeal of ArcelorMittal Cleveland Inc., filed Oct. 21, 2011 ("Response").

Now, however, Region 5 claims that a surreply is necessary to address the statutory and regulatory history of Clean Water Act section 301(g) as well as Region 5's prior course of dealings on previously-approved section 301(g) variances. See Motion for Leave at 2-3. A surreply is not warranted on this basis. ArcelorMittal's informal

appeal clearly put Region 5 on notice regarding the legislative and regulatory history of section 301(g), EPA's own guidance, and Region 5's inconsistent prior determinations on section 301(g) variance modifications. See ArcelorMittal Cleveland Inc.'s Informal Appeal of NPDES Permit Denial, filed Aug. 26, 2011 ("Informal Appeal"). In fact, in its Response, ***Region 5 cited to the same Clean Water Act legislative history compendium that ArcelorMittal did in its reply.*** See Response at 12, n.12. ArcelorMittal's Reply simply rebuts Region 5's Response on these points.

The same is true of Region 5's claim that a surreply is necessary to "clearly distinguish" a variance renewal from a variance modification; the former of which Region 5 now asserts "fits within the scope of controlling legal authorities, while 'modification' of the sort ArcelorMittal seeks does not." See Motion for Leave at 2. Again, ArcelorMittal raised this very issue in its Informal Appeal filed August 26, 2011 stating: "EPA's characterization of an NPDES permit modification application that addresses effluent limits established by previously existing Section 301(g) variance as a new Section 301(g) variance request 'must independently meet the deadlines in CWA Section 301(j)(1)(B),' effectively results in all CWA Section 301(g) variances as 'one and done', ***with no renewals, amendments or modifications*** to the variance as ever possible." Informal Appeal at 8 (emphasis added). And, again, ArcelorMittal's Reply simply provided additional detail in rebuttal to Region 5's Response on this issue. Region 5 had every opportunity to "clearly distinguish" these concepts in its 23-page Response. It chose not to, and should not be afforded a second bite at the apple to do so now.

Region 5 also contends that a surreply is necessary to address claimed “mischaracterizations” in ArcelorMittal’s Reply regarding Region 5’s justifications for denial and “erroneous characterizations” of the section 301(g) legislative history. See Motion for Leave at 2-3. Not surprisingly, Region 5 disagrees with ArcelorMittal’s positions regarding the facts and controlling law in this case. That alone does not justify a surreply. Whether you characterize the justification for Region 5’s denial as shifting or not, the fact remains that ArcelorMittal simply rebutted the issues set forth in Region 5’s June 23, 2011 denial letter, Region 5’s August 18, 2011 denial of ArcelorMittal’s requested reconsideration, and in Region 5’s October 21, 2011 Response in this appeal.

Likewise, Region 5 had the opportunity in its Response to highlight the legislative history of CWA section 301(g) it believes supports the Region’s position. It chose not to. To grant Region 5’s Motion for Leave purely because it does not agree with ArcelorMittal’s “characterization” of this case would allow the Region to engage in endless rebuttal for rebuttal’s sake, which clearly does not establish “good cause” necessary for filing a surreply. To the extent Region 5 believes that any additional “clarifications” need to be addressed, such arguments can be reserved for oral argument in response to specific questions raised by the Board, which ArcelorMittal has separately requested.

Surprisingly, Region 5 further justifies its request to file a surreply with the claim that ArcelorMittal “argues for the first time” in its Reply that during Region 5’s course of dealings with ArcelorMittal regarding the 2010 modification application, “the Region did not raise the issue that the application may have been untimely.” See Motion for Leave at 3. This was not argued by ArcelorMittal “for the first time” as Region 5 contends. In

fact, ***ArcelorMittal dedicated an entire section of its Informal Appeal to this issue alone.*** See Informal Appeal at 9-10. Region 5 had the same access to all communications between the parties as ArcelorMittal. Yet, Region 5 chose not to address this argument in its Response. Region 5 should not be allowed to address it now just because ArcelorMittal re-emphasized these points in its Reply.

B. ArcelorMittal's Reply Brief Includes Facts Regarding the Status of the FOIA Requests and Responds to Arguments Raised by EPA.

Region 5 further asserts that a surreply is necessary to address two other "new" arguments. First, Region 5 wants to rebut ArcelorMittal's claim that the Region has impeded ArcelorMittal's right to obtain Freedom of Information Act ("FOIA") documents regarding the Region 5's handling of section 301(g) variance modifications and/or renewals. See Motion for Leave at 3. In its Reply, however, ArcelorMittal provided the irrefutable direct email communications between ArcelorMittal and the Regional FOIA Coordinator on this issue, as well as the personal accounting of telephone communications with Region 5 and other Regions regarding similar FOIA requests. This is not a new substantive issue raised by ArcelorMittal that justifies a surreply. Indeed, regardless of how the issue is framed, the fact is the additional time required by Region 5 (and other Regions) to respond to ArcelorMittal's pending FOIA request means that ArcelorMittal cannot fully brief the Board on EPA's precedent with respect to previously-approved section 301(g) variances until all responsive documents have been transmitted to and reviewed by ArcelorMittal. ***Tellingly, the Region 5 FOIA coordinator now estimates (after the filing of ArcelorMittal's Reply and the Region's Motion for Leave) that it will take an additional four months – until March 22, 2012 – for Region 5 to fully respond to ArcelorMittal's FOIA request.***

See Letter from A. Rzeznik, U.S. EPA Region 5, to L. Mantione, Counsel for ArcelorMittal (Nov. 15, 2011) (attached as Exhibit 2). See also Letter from P. Weber, U.S. EPA Region 3, to L. Mantione, Counsel for ArcelorMittal (Nov. 16, 2011) (requesting “an extension of ten working days” to respond to the FOIA request due to “the need to appropriately examine a voluminous amount of separate and distinct records involved in your request.”) (attached as Exhibit 3). Obviously, there is a lot more information that ArcelorMittal needs to review in order to fully and fairly address its argument related to EPA’s prior actions on section 301(g) modifications and/or renewals. This is why ArcelorMittal requested an opportunity to supplement its Reply once this FOIA information is provided. See Reply at 16.

Region 5 also contends that ArcelorMittal’s argument that Region 5 failed to follow the statutory mandates for considering variance requests under Clean Water Act section 301(g) was an argument newly made in ArcelorMittal’s Reply. In actuality, it was Region 5 who raised this issue rather than ArcelorMittal. In its Response, Region 5 noted that “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.” Response at 6. In the footnote following this statement, Region 5 quotes the specific statutory criteria that must be met in order for a section 301(g) variance to be granted. See id. at n.12. In Reply, ArcelorMittal pointed out that it had provided the support for its variance modification request required under the statute, that Ohio EPA sought Region 5’s concurrence with its approval of ArcelorMittal’s request based on those same statutory criteria, and that it

was Region 5 who had failed to address these substantive criteria in its denial. See Reply at 12-13.

III. CONCLUSION

Region 5 has not presented a single valid reason to justify granting its request for a surreply. Despite this, ArcelorMittal was willing to not oppose Region 5's Motion for Leave so long as ArcelorMittal was afforded the same courtesy with respect to its request to supplement its own briefing once documents are received from its pending FOIA requests. Without explanation, Region 5 would not agree.

Because a surreply is not justified, ArcelorMittal respectfully requests the Board deny Region 5's Motion for Leave to File a Surreply Brief. Should the Board determine that a surreply is warranted, ArcelorMittal requests that the Board grant ArcelorMittal an opportunity to supplement its own Reply with additional information when it is received in response to the pending FOIA requests.

Dated: November 21, 2011

Respectfully submitted,

/s/ Kendra S. Sherman

Dale E. Papajcik, Esq.
Lianne Mantione, Esq.
Squire, Sanders & Dempsey (US) LLP
4900 Key Tower, 127 Public Square
Cleveland, Ohio 44114
Ph: (216) 479-8500
dale.papajcik@ssd.com
lianne.mantione@ssd.com

Kendra S. Sherman, Esq.
Squire, Sanders & Dempsey (US) LLP
2000 Huntington Center,
41 South High Street
Columbus, Ohio 43215
Ph: (614) 365-2726
kendra.sherman@ssd.com

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November 2011, I served by email and regular mail **ArcelorMittal Cleveland Inc.'s Brief in Opposition to EPA's Motion for Leave to File Surreply** to the following:

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

Attorney for U.S. EPA/Region 5

/s/ Kendra S. Sherman
Dale E. Papajcik, Esq.
Lianne Mantione, Esq.
Squire, Sanders & Dempsey (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Ph: (216) 479-8500
dale.papajcik@ssd.com
lianne.mantione@ssd.com

Attorneys for ArcelorMittal Cleveland Inc.