

**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
REPLY IN SUPPORT OF INFORMAL APPEAL**

I. INTRODUCTION

U.S. EPA Region 5's purported justification for denying ArcelorMittal Cleveland Inc.'s Clean Water Act ("CWA") §301(g) variance modification application continues to be a moving target. Notably absent from its Response Brief is any substantive, technical, or environmental justification for disapproving ArcelorMittal's requested variance modification. In fact, unlike Ohio EPA's approval, Region 5's denial wholly ignores the substantive statutory criteria for assessing variances under CWA §301(g).

First, Region 5 denied ArcelorMittal's request as untimely because the 2010 modification application had not been submitted 270 days after EPA's May 27, 1982 promulgation of BAT effluent limitations for ammonia-nitrogen ("ammonia-N") for iron blast furnaces in the iron and steel manufacturing point source category, pursuant to CWA §301(j)(1)(B), 33 U.S.C. §1311(j)(1)(B). See Administrative Record ("AR"), Doc. AR-39, submitted concurrently with the Brief of EPA Region 5 in Opposition to Informal Appeal of ArcelorMittal Cleveland Inc. ("Response Brief"). When presented with clear

evidence of compliance with the 270-day rule,¹ Region 5 conceded that the initial variance application was timely (and in fact had been approved), but then denied ArcelorMittal's §301(g) variance modification application on the basis that the CWA "does not include special provisions for applications to modify alternate limits previously approved by EPA under CWA Section 301(g)." See Ex. 7 to ArcelorMittal's Informal Appeal of NPDES Permit Modification Denial ("Informal Appeal").

In its Response Brief, Region 5 moved the target yet again by claiming that the §301(g) variance modification application was denied because ArcelorMittal did not submit its application directly to EPA, but rather submitted the application to the State who forwarded it to EPA. See Response Brief at 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.") This argument is wholly spurious because ArcelorMittal expressly complied with EPA's own implementing regulations at 40 CFR §124.62(e) which recognize that EPA may grant or deny a variance request "***that is forwarded by the State.***"² In fact, it is only in those limited instances "where EPA is the permitting authority" (which is not the case here) that the variance request should be submitted directly to EPA. See 40 CFR §124.62(f).

Despite its bulk, EPA's Response Brief fails to cite a single statutory or regulatory provision prohibiting the modification of §301(g) variances where, as here, the initial and

¹ ArcelorMittal's predecessor Republic Steel Corporation submitted its initial request for the Cleveland facility on September 21, 1978 and a complete §301(g) application on February 17, 1983, both prior to the 270-day deadline of February 21, 1983. See Exs. 8 & 9 to ArcelorMittal's Informal Appeal of NPDES Permit Modification Denial.

² Region 5 cites 40 CFR §124.62 in its Response Brief (see p. 8) but then glosses over the regulatory authority entirely. Moreover, Region 5 recognized in its denial letter that ArcelorMittal's April 2010 application was "forwarded to EPA" by the State. ArcelorMittal clearly followed the proper procedure set forth in 40 CFR §124.62(f) by submitting its application to Ohio EPA on April 13, 2010 who forwarded it to U.S. EPA on May 3, 2010.

completed variance request was timely submitted. In fact, as detailed below, the legislative history and Congressional intent behind CWA Section 301(g), EPA's own published guidance, and the Agency's long-established practice of renewing or modifying previously approved §301(g) variances during NPDES permit renewal, all support ArcelorMittal's position in this appeal. Moreover, while Ohio EPA appropriately determined that ArcelorMittal's 2010 variance modification request satisfies all regulatory requirements under CWA Section 301(g), Region 5 failed to address any of the required statutory criteria. Furthermore, Region 5's denial is untimely because it was issued more than 365 days after the filing of the application. Accordingly, this Board should reverse Region 5's June 23, 2011 denial and direct EPA to initiate the appropriate modification proceedings.

Finally, as described below, Region V has thwarted ArcelorMittal's ability to timely obtain relevant documents through the FOIA process for use in this appeal. Accordingly, ArcelorMittal respectfully requests an opportunity to supplement this Reply with additional information received once EPA submits a complete response to ArcelorMittal's pending FOIA requests.

II. LEGAL ARGUMENT

A. For More Than a Year, Region 5 Was Thoroughly Involved in Reviewing ArcelorMittal's §301(g) Variance Modification Application and Never Once Raised the Issues Cited in EPA's Response Brief.

Between August 2010 and July 2011, Region 5 was in direct contact with ArcelorMittal on numerous occasions regarding the pending variance modification application. In fact, during the past year, Region 5 was involved in at least twenty-four email exchanges, a phone conference, and an in-person meeting at the Cleveland

facility. Even Region 5 counsel has been involved in the process for at least the past year. Curiously, at no time during these communications did Region 5 ever advocate that the §301(g) variance could not be modified. In fact, to the contrary, Region 5 was thoroughly involved in reviewing technical issues in the application and all indications suggested that EPA's approval would be forthcoming.³ If Region 5 truly believed that the variance could not be modified, why did the Agency lead ArcelorMittal down the path of reviewing and discussing technical issues regarding the variance application for more than a year?

Region 5 was also clearly aware of ArcelorMittal's existing §301(g) variance during its evaluation of ArcelorMittal's application and did not assert during the past year that the modification sought by ArcelorMittal would be considered by the Agency as untimely. For example, in 2001 Region 5 solicited an analysis of the Section 301(g) variances for ammonia-N sought by ArcelorMittal's predecessor in its 1983 variance application and proposed for approval by Ohio EPA.⁴ Region 5 also requested and received information from Ohio EPA in August 2010 detailing the history of ArcelorMittal's §301(g) outfall effluent limits when analyzing ArcelorMittal's current modification request.⁵ In fact, even as late as February 2011, Region 5 was evaluating the 2010 modification request application and actively seeking data from ArcelorMittal to

³ See, e.g., Email from Rich Zavoda, ArcelorMittal, to Sreedevi Yedavalli, U.S. EPA Region 5, requesting an update "of the expected approval date" (Jan. 5, 2011) (attached as Exhibit 1), and Email from Stan Rihtar, ArcelorMittal, to Sreedevi Yedavalli, U.S. EPA Region 5, inquiring about the status of EPA's review and noting: "In our meeting on March 16 it was stated that we should expect approval by June, 2011." (July 26, 2011) (attached as Exhibit 2).

⁴ See Letter from Gary A. Amendola to Irvin J. Dzikowski, U.S. EPA Region 5, forwarding attached "Review of LTV Steel – Cleveland Works Section 301(g) Variances for Ammonia-N, Ohio EPA Permit No. 31D00003*LD, NPDES No. OH 0000957" (Feb. 14, 2001) (attached as Exhibit 3).

⁵ See Email from Eric Nygaard, Ohio EPA, to Sreedevi Yedavalli, U.S. EPA Region 5, re: ArcelorMittal limits history and antidegradation info (Aug. 2, 2010) (with attachments) (attached as Exhibit 4).

complete its evaluation.⁶ Requesting this information with full knowledge of ArcelorMittal's existing §301(g) variance is wholly inconsistent with Region 5's current position that the 2010 application constitutes an untimely "new" variance.

B. Congress and U.S. EPA Expected Previously Approved CWA §301(g) Variances to be Renewed and/or Modified.

As detailed below, EPA fails to recognize that the legislative history of the CWA, EPA's own published guidance, and the Agency's long-established practice of renewing or modifying previously approved §301(g) variances at the time of permit renewal, all support the conclusion that existing §301(g) variances can be modified.

During the 1977 amendments to the Federal Water Pollution Control Act, Congress recognized that requiring Best Available Technology ("BAT") for all sources was not necessary to achieve the water quality goals of the Act. Accordingly, Congress included the new Section 301(g) to the Act to allow an exemption from the BAT requirements in cases where an exemption would not compromise these goals. See S. REP. No. 95-370, 95th Cong., 1st Sess., 41-44 (1977), *reprinted in* 1977 Leg. Hist. 674-677.⁷ Congress' determination was based on an awareness that Best Practicable Technology ("BPT") had, in some cases, been more effective than expected, and Congress explicitly wanted to avoid "treatment for treatment's sake" as long as water quality and human health were being fully protected. See id. at 43-44, 1977 Leg. Hist.

⁶ See Email from Sreedevi Yedavalli, U.S. EPA Region 5, to Rich Zavoda, ArcelorMittal, re: ArcelorMittal Cleveland – Additional Information Request (Feb. 15, 2011) (attached as Exhibit 5).

⁷ Citations to the 1977 legislative history ("1977 Leg. Hist.") are to the SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1978).

676-677.^{8,9} As noted by the Senate: “This approach allows the discharger to demonstrate no adverse effect of pollutants in his discharge and have his requirement reduced.” *Id.* at 41, 1977 Leg. Hist. 674.

Indeed, both the Senate Report and the House Debate in the legislative history to CWA Section 301(g) often referred to §301(g) variances as “exemptions” or “waivers” rather than conventional variances. See generally S. REP. NO. 95-370, 40-44, 1977 Leg. Hist. 674-675 ; 123 Cong. Rec. H 38961, 1977 Leg. Hist. 331 (Rep. Roberts). In other words, Congress determined that if an industrial discharger was meeting the applicable Waste Load Allocation (“WLA”) and the BPT standards, that discharger need not worry about BAT or any specific number in between BAT and the fully-protective WLA and BPT levels. See *Oklahoma v. EPA*, 908 F.2d 595, 614 n. 24 (10th Cir. 1990), *rev’d sub nom. on other grounds, Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (“The 1977 amendments added a ‘waiver’ provision in section 301 of the Act (33 U.S.C. §1311(g)) allowing for the use of ‘best practicable technology’ instead of ‘best of available technology’ if the 1983 water quality standards could be met ... to avoid ‘[effluent] treatment for the sake of treatment.’”) (citing S. REP. No. 95-370 at 43-44).

The United States Supreme Court likewise acknowledged that §301(g) represents a fairness exception to the nationwide effluent standards, by “seek[ing] to

⁸ “Many industrial dischargers have testified that the best practicable technology effluent limitations required in 1977 have provided a high degree of water quality improvements with the result that BAT requires treatment of conventional pollutants not deemed necessary to meet the 1983 water quality goals of the act. The intent of this section [301(g)] is to allow modification of BAT requirements in cases where this may be true. ***In this way treatment for the sake of treatment would be prevented.***” S. REP. No. 95-370 at 43-44, 1977 Leg. Hist. 676-677 (emphasis added).

⁹ This sentiment was echoed in EPA’s technical guidance manual for implementing section 301(g). See U.S. EPA, TECHNICAL GUIDANCE MANUAL FOR THE REGULATIONS PROMULGATED PURSUANT TO SECTION 301(G) OF THE CLEAN WATER ACT OF 1977 at 3 [hereinafter 301(G) GUIDANCE MANUAL] (“***The enactment of section 301(g) was the result of an effort to eliminate ‘treatment for treatment’s sake’ for nonconventional pollutants.***”) (emphasis added).

ensure that a firm not be forced to comply with the categorical standards when no environmental benefit would accrue from such compliance.” *Chemical Manufacturers Assn. v. Natural Resources Defense Counsel, Inc.*, 470 U.S. 116, 162 fn. 21 (Marshall, dissent, joined by Blackmun and Stevens) (1985) (internal citation omitted). Justice Marshall aptly noted:

[I]n the case of §301(g) water-quality modifications, Congress decided not to force dischargers to meet standards higher than those that could be justified by legitimate environmental considerations. Thus, as long as a discharge did not interfere with the attainment of water quality, a discharger would not be forced to expend additional resources in pollution control merely because a higher standard was “economically achievable.” Cf. 123 Cong. Rec. 38960 (1977), 1977 Leg. Hist. 326 (Rep. Roberts).

Id. at 143.

The legislative history further makes clear that Congress did not intend for §301(g) to be a “one and done” modification. Rather, it was expected that §301(g) variances could be renewed and/or modified as long as the applicant submitted a new demonstration each time the permit expired for the modification to be granted in the future. See S. REP. No. 99-50, 99th Cong., 1st Sess., 18 (1987), *reprinted in* 1987 Leg. Hist. 1439.¹⁰ While the 1987 Amendments were intended to tighten the requirements for §301(g) variances (see 133 Cong. Rec. S 736, 1987 Leg. Hist. 365 (Sen. Chafee), Congress recognized that EPA had developed sufficient information about ammonia and several other nonconventional pollutants to continue granting variance (see S. REP.

¹⁰ Citations to the 1987 legislative history (“1987 Leg. Hist.”) are to the SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1988).

No. 99-50 at 17, 1987 Leg. Hist. 1438). Thus, the legislative history demonstrates that Congress expected §301(g) variances to be re-visited every time a permit was renewed. See id. at 18, 1987 Legis. Hist. 1439.

Similarly, the preamble to the proposed implementing regulation for §301(g) demonstrates that EPA also contemplated extension or renewal of §301(g) variances in subsequent NPDES permits, stating that they will be continued if the State has promulgated a WLA for the pollutant in question. See 49 Fed. Reg. 31462, 31467 (Aug. 7, 1984). Further, as explained in EPA's §301(g) Variance Technical Guidance Manual:

With regard to receiving waters where WLAs and TMDLs are absent, the section 301(g) regulation requires that once a section 301(g) variance has been granted, the State must establish numerical water quality standards for the nonconventional pollutant and WLAs and TMDLs for the section 301(g) source and the other dischargers in the vicinity. ***This must be done within the 5 year permit term for the section 301(g) permittee and before the permit containing the section 301(g) variance is reissued.*** The rationale for this requirement is that many of the factors considered in a section 301(g) review are also considered in the development of water quality standards (under section 303(c) of the Clean Water Act).¹¹

Here, ArcelorMittal's April 2010 variance modification application satisfies this prerequisite as it relates to a non-conventional pollutant (ammonia-N) for which Ohio EPA has established a WLA, which includes the earlier LTV / Republic Steel variance. See OAC rule 3745-1-26, Table 26-1. In fact, the antidegradation analysis contained in ArcelorMittal's April 2010 application – and approved by Ohio EPA -- demonstrates that the requested modified discharge limits would still be ***over ten times lower*** than the

¹¹ U.S. EPA TECHNICAL GUIDANCE MANUAL FOR THE REGULATIONS PROMULGATED PURSUANT TO SECTION 301(G) OF THE CLEAN WATER ACT OF 1977 40 CFR PART 125 (SUBPART F), p. 12 (attached as Ex. 6 to ArcelorMittal's Informal Appeal) (emphasis added).

State’s daily WLA for this source and otherwise meets the statutory criteria for continued §301(g) variance approval.¹² See AR-17 (ArcelorMittal application) and AR-21 (Ohio EPA recommendation for approval).

The preamble to EPA’s 1979 final NPDES regulatory modification rulemaking also supports modification of an existing §301(g) variance over time. In the 1979 notice, U.S. EPA compared an “initial grant of a variance” to the initial NPDES permitting of a facility:

The first decision on a statutory or administrative variance granted to a source will be the first occasion on which EPA will be applying the policy of that particular provision of the statute or authorizing regulation to the given discharge. Very often the factual and policy considerations relevant to a decision on that variance will be just as wide-ranging, and just as incapable of precise resolution, as the considerations bearing on the initial grant of the basic permit. For example, variances under sections 301(g), 301(h) and 316(a) of the Act depend on predicting the impact of the uncontrolled discharge on the entire relevant ecosystem....

44 Fed. Reg. 32854, 32889 (June 7, 1979). Thus, the logic for renewing and modifying NPDES permits justifies a similar treatment of section 301(g) variances.

¹² In its Response Brief, Region 5 highlights the fact that ArcelorMittal’s requested variance modification would result in an increase in its approved ammonia-N discharge. See Response Brief at 13. This is a red herring: The appropriate focus is whether the requested variance limit would continue to meet the statutory criteria under section 301(g) for approval, which ArcelorMittal has demonstrated – and Ohio EPA has approved. The table below demonstrates that ArcelorMittal’s discharges would remain well below applicable water quality based effluent limitations:

Season	Requested Ammonia Limits (kg/day)	Ohio EPA WLA (Cuyahoga River)
Summer	224 (30-day) 294 (daily)	N/A (30-day) 3,135 (daily)
Winter	224 (30-day) 294 (daily)	N/A (30-day) 2,427 (daily)

In fact, antibacksliding authority specifically contemplates less stringent standards in NPDES permit renewals based on §301(g) (and other) variances. CWA Section 402(o)(2)(D) contains an explicit exception to the rule requiring renewal NPDES permit effluent limitations, standards or conditions to be at least as stringent as those terms in the previous NPDES permit by allowing permits to “be renewed, reissued or modified to contain a less stringent effluent limitation applicable to a pollutant if (D) the permittee has received a permit modification under section ... 301(g)” 33 U.S.C. §1342(o). The implementing regulations governing reissued permits at 40 CFR §122.44(l)(1)(i)(D) mirror this language, as do the antibacksliding regulations in the NPDES regulations for States with EPA-delegated authority. See, e.g., OAC rule 3745-33-05(F)(1)(e) and 327 IAC 5-2-10(11)(B)(iv).

Finally, EPA’s own established practice has been to authorize the renewal and modification of §301(g) variances. For example, Region 5 approved a modification of the §301(g) variance contained in the 1993 NPDES permit for Wheeling-Pittsburgh’s Steubenville, Ohio facility during the facility’s 2006 NPDES permit renewal.¹³ And, just this year, Region 5 implicitly acknowledged that an initial section §301(g) variance can be modified when Region 5 approved the modification of a previously-issued §301(g)

¹³ Changes in Section 301(g) effluent limits referenced in Wheeling-Pittsburgh’s NPDES permits are highlighted below:

	Ammonia-N (kg/day)		Phenols (4AAP) (kg/day)	
	Monthly Average	Daily Maximum	Monthly Average	Daily Maximum
1993 Permit, p. 9	113.4	226.8	0.45	0.90
2006 Permit, p. 20	113.4	226.8	0.11	0.22

The 2006 NPDES renewal permit, approved by EPA Region 5, also added an annual average effluent limit for ammonia-N of 95 kg/day. See Excerpts of Wheeling-Pittsburgh’s 1993 and 2006 NPDES Permits, attached as Exhibit 6.

variance during renewal of NPDES Permit No. IN0000205 for the ArcelorMittal Indiana Harbor West facility located in East Chicago, Indiana.¹⁴ See Letter from Kevin Pierard, Chief NPDES Programs Branch, U.S. EPA Region 5, to Bruno Pigott, IDEM (Aug. 9, 2011) (attached as Exhibit 7). Strikingly, ***this modified §301(g) variance was approved by Region 5 despite being submitted in precisely the same format as the April 2010 modification application submitted by ArcelorMittal Cleveland*** that Region 5 now contends is an untimely new variance request.

EPA also has repeatedly extended or continued existing §301(g) variances in prior NPDES permits for ArcelorMittal's Cleveland, Ohio and East Chicago and Burns Harbor, Indiana facilities; Weirton Steel Corporation in Weirton, West Virginia; and AK Steel's Middleton, Ohio and Ashland, Kentucky facilities.¹⁵ In doing so, EPA is inherently re-evaluating and re-approving the §301(g) variance modification limits, without arguing, as here, that such renewals are untimely "new" variances.

Accordingly, the legislative and regulatory history of §301(g) in conjunction with the Administrative Record in this case demonstrates that the basis for Region 5's denial of ArcelorMittal's requested §301(g) variance modification – Region 5's contention that the application constitutes a new untimely variance request – is unsupported and should be reversed.

¹⁴ Indiana Harbor West's section 301(g) variance modification resulted in 406% and 324% increases in the monthly average and daily maximum ammonia-N variance limits respectively and a 150% increase in the daily maximum phenols limit for the facility's Outfall 009, which discharges to the Indiana Harbor Ship Canal, while decreasing these limits at the facility's Outfall 010 and Outfall 011, which discharge to Indiana Harbor. *Compare* 1986 NPDES Permit to 2011 NPDES Permit.

¹⁵ As with the section 301(g) variance modification documents, ArcelorMittal is in the process of obtaining documents evidencing 301(g) variance renewals from the appropriate U.S. EPA Regions. Notably, most of these facilities are within Region 5, however, as discussed more fully infra, Region 5 has not yet provided responsive documents to ArcelorMittal's FOIA request.

C. Region 5 Failed to Follow the Statutory Mandates for Decision-Making Under CWA §301(g) When Issuing its Denial to ArcelorMittal.

The Board should also reverse Region 5's denial because the Agency completely failed to follow the statutory protocol for CWA §301(g) variance decisions. As described more fully below, Region 5's shifting explanations for its denial fail to address any of the statutory factors that the Agency must consider when evaluating a CWA §301(g) variance request.¹⁶

The United States Supreme Court has held that EPA must articulate satisfactory explanations for its actions, and its decisions must be based on the relevant factors. See, e.g., *Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). Here, the CWA identifies three specific criteria that must be evaluated by EPA in its review of a §301(g) variance modification: (1) whether the modification will result in compliance with CWA §301(b)(1)(A) or (C); (2) whether the modification will result in additional requirements on any other point or nonpoint source; and (3) whether the modification will interfere with the maintenance of water quality sufficient to assure protection of public water supplies, fish and wildlife, recreational activities, and human health and the environment. See CWA §301(g)(2), 33 U.S.C. §1311(g)(2).

¹⁶ Region 5's denial was also untimely. CWA section 301(j)(4) mandates: "An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing...." 33 U.S.C. 1311(j)(4). EPA acknowledged this 365-day requirement in its Response Brief on several occasions (see, e.g., Response Brief at 17, 18, 19), but conveniently failed to point out that it failed to act on ArcelorMittal's application within the required 365 days. ArcelorMittal properly submitted its application to Ohio EPA on April 13, 2010, and Ohio EPA subsequently forwarded the application to Region 5 on May 3, 2010. See Email from Eric Nygaard, Ohio EPA, to Sreedevi Yedavalli, U.S. EPA Region 5, FW: ArcelorMittal Cleveland NPDES Permit Modification Application (without attachment) (May 3, 2010), attached as Exhibit 8. Region 5 did not issue its denial until June 23, 2011 -- **437 days** after ArcelorMittal's application was filed. Even assuming *arguendo* that the clock didn't start until Ohio EPA forwarded ArcelorMittal's application to Region 5, Region 5's decision on that application was still provided well after the required 365 day deadline and was therefore untimely.

Ohio EPA addressed each of these three criteria in its letter to Region 5 where Ohio EPA recommended approval of ArcelorMittal's 301(g) modification. See AR-21 ("The new limits meet BPT, the wasteload allocation for the Cuyahoga River, and the 'de minimis' requirements of Ohio's Antidegradation Rule."). Moreover, Region 5 was clearly considering at least some of these criteria when evaluating ArcelorMittal's application, although the Agency failed to issue a substantive explanation with regard to any criteria. For example, the Region was actively seeking production and outfall data from ArcelorMittal during the application process.¹⁷ However, its June 23, 2011 denial of the variance application failed to address any of the applicable statutory criteria mandated by CWA §301(g)(2). The Agency "must be held to a standard of at least literal compliance with the language of a statute which it is authorized to implement." *American Petroleum Institute v. EPA*, 660 F.2d 954, 961 (4th Cir. 1981). The utter failure of Region 5 to address any of the enumerated statutory criteria in its denial letter alone warrants reversal of the Region's action in this appeal.

D. Region 5 Has Delayed and Thwarted ArcelorMittal's Right to Obtain Highly Relevant FOIA Information Necessary For ArcelorMittal's Prosecution of This Appeal.

ArcelorMittal believes that EPA has approved other §301(g) variance modifications in the past and counsel for ArcelorMittal has requested documentation relating to such modifications through Freedom of Information Act ("FOIA") requests which remain pending before each of the EPA Regions. See, e.g., Letter from Lianne Mantione, Squire, Sanders & Dempsey (US) LLP to FOIA Coordinator, EPA Region 5

¹⁷ See Exhibit 5 (Email from Sreedevi Yedavalli, U.S. EPA Region 5, to Rich Zavoda, ArcelorMittal, re: ArcelorMittal Cleveland – Additional Information Request (Feb. 15, 2011)) *and* Email from Sreedevi Yedavalli, U.S. EPA Region 5, to Rich Zavoda, ArcelorMittal, re: Monthly Production Data (Nov. 10, 2010), attached as Exhibit 9.

(Oct. 12, 2011) (attached as Exhibit 10). ArcelorMittal's counsel has received written or verbal acknowledgements of its requests from each Region. See Declaration of Lianne Mantione (Nov. 4, 2011) (attached as Exhibit 11). In some cases, the FOIA Coordinator or another Agency contact for a particular Region has called to talk through the FOIA request in order to aid his or her search for relevant documents. See id.

Only the Region 5 FOIA Coordinator responded to the FOIA request by (1) asserting that "the attorney told her" the request as written is too broad and vague, (2) requiring clarification of the requested information before the Region could process the request, (3) demanding a minimum of 30 days additional time in which to respond, and (4) denying ArcelorMittal's request for all internal communications on the basis that they are attorney-client privileged or attorney work product.¹⁸ See id. at Declaration Ex. B. EPA Region 5 is the only EPA Regional office that has raised any objections to ArcelorMittal's FOIA request. The attorney handling this appeal on behalf of EPA Region 5 is copied on Ms. Bryant's email memorializing the Region's request for clarification. See Declaration Ex. A.

Region 5's response to ArcelorMittal's FOIA request clearly frustrates ArcelorMittal's ability to fully brief the issues at the heart of this appeal. Not only would Region 5's internal documents shed more light on its historical decision-making with respect to ArcelorMittal's §301(g) variance, ArcelorMittal reasonably believes that several other existing §301(g) variances have been renewed and/or modified within the Region where Region 5 has never once asserted, as it has here, that such renewals or modifications constitute new, untimely variance requests.

¹⁸ ArcelorMittal has demanded that Region 5 produce a log identifying all FOIA documents withheld from ArcelorMittal's review and the basis for such withholding so that ArcelorMittal may challenge EPA's action.

Based on the highly relevant nature of the documents requested in the FOIA, ArcelorMittal requests that Region 5 expeditiously and fully comply with ArcelorMittal's pending FOIA request. ArcelorMittal acknowledges that, just yesterday, EPA Region 5 responded that it will forward some documents by November 10, but will not complete its gathering of documents responsive to ArcelorMittal's FOIA request until December 15, 2011. See id. at Declaration Ex. C. In light of the Region's specific requested extension, along with the fact that responses to ArcelorMittal's other FOIA requests also remain pending, ArcelorMittal further requests an opportunity to supplement this Reply with additional information received after the completion of the FOIA process.

III. CONCLUSION

It is undisputed that the initial and completed requests for a §301(g) variance were timely submitted and culminated in the existing §301(g) variance in effect at the ArcelorMittal Cleveland facility. However, Region 5's denial of ArcelorMittal's 2010 NPDES application for modification of that variance on the basis that it constitutes a new, untimely variance request is not supported in either the legislative or regulatory history of CWA Section 301(g), and is contrary to Congressional intent in establishing Section 301(g) variances and EPA's own prior actions. Moreover, while Ohio EPA has appropriately determined that the requested modification meets all regulatory requirements under CWA Section 301(g), Region 5's denial fails to address any of these required statutory criteria and is also untimely. Accordingly, ArcelorMittal respectfully requests the Board reverse the Region's June 23, 2011 denial and direct Region 5 to commence the appropriate modification proceedings.

Additionally, in light of the status of the pending FOIA requests, ArcelorMittal requests that Region 5 expeditiously and fully comply with the FOIA request; and the Board grant ArcelorMittal an opportunity to supplement this Reply with additional information when it is received in response to the pending FOIA requests.

Dated: November 4, 2011

Respectfully submitted,

/s/Lianne Mantione

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 4th day of November 2011, I served by email and regular mail ArcelorMittal Cleveland Inc.'s Reply in Support of Informal NPDES Appeal 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/Lianne Mantione
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.