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P-R-O-C-E-E-D-I-N-G-S

10:33 a.m.

MS. DUFF: All rise. The Environmental Appeals Board of the United States Environmental Protection Agency is now in session for oral argument.

ArcelorMittal Cleveland, Inc. Permit Number 3ID00003*OD (OH0000957), in NPDES Appeal Number 11-01. The Honorable Judges Anna Wolgast and Catherine McCabe presiding.

Please turn off all cell phones and no recording devices allowed. Please be seated.

JUDGE MCCABE: Good morning, I want to welcome all counsel and everyone else who is attending. We are very pleased to see you this morning and hope that you are well prepared to help us elucidate the important issues before us.

I regret to say that Judge Stein will not be able to join us this morning due

1 to a family emergency. However she is still a
2 member of the panel and very engaged and I
3 assure you that she will be reading not only
4 the papers but the transcript of this oral
5 argument as well.

6 The way we will proceed this
7 morning is we've allocated, I believe, one
8 hour for argument. For the first 30 minutes
9 will be the Petitioner. The Petitioner may
10 reserve five minutes for rebuttal. And
11 secondly we will hear from the Respondent.

12 I would like to ask you by a show
13 of hands before we start, if anyone has a
14 tight time schedule on the other end, in case
15 we get heavily engaged in questioning, is
16 anyone going to miss a plane?

17 Okay. Would Counsel for Petitioner
18 please introduce themselves and then you may
19 begin.

20 MR. PAPAJCIK: Hi, my name is Dale
21 Papajcik, and I'm a partner with Squire
22 Sanders and Dempsey in Cleveland. And I'm

1 here today representing ArcelorMittal.

2 JUDGE MCCABE: We've been wondering
3 how exactly to pronounce that, so we're very
4 glad that you've elucidated that for us.

5 MR. PAPAJCIK: Yes, it's like
6 middle of the road. And for some reason a lot
7 of people say Mittal I guess --

8 JUDGE MCCABE: It's very French.

9 MR. PAPAJCIK: -- it's sensitivity
10 to Indian culture, but it's just like middle
11 of the road. So Good morning, and I
12 appreciate the opportunity to be here. The
13 opportunity to work with Region 5 on this.

14 Of course I'd like to reserve my
15 five minutes although hopefully I can go
16 quicker than the full half hour.

17 So I live in the Cleveland area,
18 I've lived there all my life. And frankly I
19 have a long history with this mill. The
20 ArcelorMittal Mill in Cleveland. It used to
21 be Republic Steel Corporation and then it was
22 LTV Steel, it was International Steel Group.

1 Now it's ArcelorMittal.

2 And it's one of those old line
3 mills that's been there since about 1898, plus
4 or minus. And I'm from one of those families
5 where my immigrant grandfather worked there,
6 my father, my uncles, myself. Actually my son
7 has even worked at the mill.

8 So I have a lot of history with the
9 mill and really care about what happens there.

10 Also this mill is one of these classic steel
11 mills that set right, and frankly one of the
12 few that's left, that sit right in the middle
13 of the city.

14 You used to be able to have people
15 that would walk down the steps from the
16 neighborhood to the mill and work. It's
17 really one of those kinds of facilities.

18 It's big, about 800 acres right
19 along the Cuyahoga River in Cleveland. And I
20 guess perhaps it's appropriate to start
21 talking about this older mill that today we're
22 talking about a really old section of the

1 Clean Water Act.

2 Enacted in 1977, Section 301(g).

3 And it's clear to us that this provision of
4 the Act has been somewhat amorphous and
5 frankly Region 5 has kind of struggled its way
6 through how to deal with the Act over the last
7 30 years.

8 I thought what we would do, really,
9 because our view is we need to set the intent
10 of this statute because it really applies to
11 the context of this mill.

12 So with that after a few
13 preliminaries we'll start with what we view as
14 the key aspect of this discussion.

15 First, the basis of this request or
16 of the appeal is ArcelorMittal's request to
17 modify BAT limits for ammonia from the
18 discharge associated with ironmaking from a
19 blast furnace.

20 Frankly at the end of the day the
21 requested effluent limits at the Cleveland
22 plant will be about eight to ten times less

1 than the applicable wasteload allocation for
2 ammonia.

3 And so we're really not talking
4 about an environmental issue here. What we're
5 really talking about is an economic issue.
6 That's our view of this.

7 JUDGE WOLGAST: Well, one question
8 is, I understand from everything that's been
9 filed that, I understand that the limits, if
10 they were granted, the modification that you
11 seek would be more stringent than BPT and
12 would not go above the wasteload allocation.

13 MR. PAPAJCIK: Correct.

14 JUDGE WOLGAST: But one thing that
15 while it's hard to see that the statute or the
16 regs speak directly to this issue, we do
17 understand from the statute that Congress
18 intended for people to get to BAT.

19 MR. PAPAJCIK: Yes.

20 JUDGE WOLGAST: And so I'm trying
21 to understand what cabins your argument, how
22 will we not get everybody coming in to be just

1 above BPT, just more stringent than BPT.

2 Obviously there was no intent to
3 have a race to the bottom instead of trying to
4 attain what the statute set out as BAT. How
5 would you address that?

6 MR. PAPAJCIK: Well, I think the
7 point here is that what Congress intended was
8 that you apply the appropriate level of
9 treatment for the environmental setting.

10 And every time the agency would
11 look at one of these applications in
12 successive permits, that there should be a new
13 technical review of the appropriateness of the
14 modification to the BAT limit.

15 In some cases that might go up and
16 in some cases they might go down. And frankly
17 that's exactly what's happened in the various
18 permits and 301(g) modified limits that EPA
19 has addressed.

20 JUDGE WOLGAST: And you're talking
21 about the other Arcelor plant in the Wheeling,
22 the examples you gave us of where --

1 MR. PAPAJCIK: Actually there's one
2 called the ArcelorMittal Indiana Harbor West
3 Facility. And then also an AK Steel Facility
4 in Middletown, Ohio.

5 JUDGE WOLGAST: What's the most
6 analogous to this case of the examples that
7 you cite?

8 MR. PAPAJCIK: Would you mind if we
9 show a demonstrative, it will help. Okay,
10 what our view is that the statute allows EPA,
11 the administrator, to modify the BAT limit.
12 It doesn't say to what degree it can be
13 modified, that modification is based on a
14 technical analysis of parameters set out in
15 the statute. Okay. And I think
16 that's under 301(g)(2).

17 JUDGE MCCABE: Is there no floor?
18 Is there any floor to how much the limit can
19 be modified?

20 MR. PAPAJCIK: BPT and the water
21 quality standards, right?

22 MR. BRANIGAN: Your Honor, at this

1 point, if Region 5 might interject.

2 JUDGE WOLGAST: No.

3 JUDGE MCCABE: No, please wait.
4 Make a note to yourself and you can raise it
5 on your time.

6 MR. BRANIGAN: I'm sorry, Your
7 Honor.

8 MR. PAPAJCIK: This is a
9 demonstrative that we put together quite
10 frankly yesterday. Terry only saw it this
11 morning. Because we were waiting for some
12 FOIA information we thought we'd get. We
13 didn't get it so we had to chase this
14 information down separately.

15 JUDGE MCCABE: Counsel have you had
16 an adequate opportunity to look at this
17 exhibit?

18 MR. BRANIGAN: We have not, Your
19 Honor.

20 JUDGE MCCABE: Do you object to
21 having it shown here as a result of that
22 inadequate opportunity?

1 MR. BRANIGAN: Yes, we do.

2 JUDGE MCCABE: I'm sorry, please
3 tell us in your words but don't use the
4 exhibit.

5 MR. PAPAJCIK: I'm sorry?

6 JUDGE MCCABE: Please explain the
7 point you're trying to make without using the
8 exhibit.

9 MR. PAPAJCIK: Stop using the
10 exhibit?

11 JUDGE MCCABE: Please don't use the
12 exhibit because you haven't shown opposing
13 counsel a fair opportunity to review it.

14 MR. PAPAJCIK: That's fine. Okay.
15 What we believe is the most appropriate
16 example here where EPA has approved the
17 variance has to do with AK Steel Middletown.
18 AK Steel Middletown operates an integrated
19 mill similar to the mill in Cleveland.

20 JUDGE MCCABE: Counselor, before
21 you go back to discussing the facility, let me
22 follow up on some points that Judge Wolgast

1 was suggesting.

2 One of the, or the congressional
3 purpose that you have been citing here in
4 support of your argument is that Congress
5 wanted to avoid treatment for treatment's
6 sake. Is that right?

7 What about other statutory goals,
8 what other statutory goals could be relevant
9 here? For example, what about the express
10 statutory goal of the Clean Water Act of
11 eliminating the discharge of all pollutants
12 eventually?

13 How does your argument fit with
14 that goal or other statutory goals?

15 MR. PAPAJCIK: I've been in this
16 business for 30 years and we're a long way
17 from eliminating the discharge of pollutants.

18 Most of the facilities that we represent
19 discharge hundreds if not thousands of pounds
20 of pollutants a year.

21 But the improvements that we've
22 seen in water quality are frankly tremendous.

1 And in fact in the Cuyahoga River, which is
2 the river at issue here, we have salmon that I
3 fish for, Coho Salmon, in the river far
4 upstream from the mill.

5 So I think we've achieved those
6 goals that the recreation is outstanding.
7 That's how I would respond to that.

8 JUDGE MCCABE: Is the segment of
9 the river into which this facility is
10 discharging meeting all water quality criteria
11 at this point?

12 MR. PAPAJCIK: I'm not exactly sure
13 if it meets water quality criteria for
14 dissolved oxygen during some periods of the
15 year because of combined sewer overflows. I
16 do believe it meets all other water quality
17 criteria.

18 JUDGE MCCABE: And does it meet the
19 water quality criteria for ammonia-N?

20 MR. PAPAJCIK: Absolutely.

21 JUDGE MCCABE: Do you see any
22 indication in Congress' imposition of a

1 specific 270 day deadline in the original 1997
2 statute as an indication that Congress did in
3 fact intend this variance process to be a, as
4 you call it in your papers, "one and done"
5 opportunity? Which would be consistent with
6 the goal of eliminating all discharges
7 eventually?

8 MR. PAPAJCIK: No, I think the
9 point of 301(g) is to eliminate economic
10 waste. And that's the expenditure of capital
11 where it's unnecessary to produce some other
12 benefit for the good of the city, good of the
13 company, good of society.

14 I think if you spend money where
15 it's not necessary to be spent that's a waste
16 of capital. And that's exactly the kinds of
17 situations that we've dealt with with these
18 mills. Where they've gone through
19 bankruptcies, where they've been shut down
20 because of economic conditions, where they're
21 in a constant fight for capital.

22 Frankly this mill used to be just

1 an American mill, now it's owned by one of the
2 largest steel companies in the world. This
3 mill fights with its brethren, sister
4 companies, however you want to call it, around
5 the world every day for capital. Every day
6 for survival.

7 And they have to spend capital on
8 the things that will make that mill the most
9 competitive in the economic environment, not
10 only for the survival of that mill, but for
11 the employment of people around the mill.

12 JUDGE MCCABE: Does the record
13 show, or is there any publicly available
14 information that we could take notice of to
15 understand what is the cost of installing the
16 pollution controls that would be required if
17 you did not obtain the variance you've sought?

18 MR. PAPAJCIK: In the application,
19 the 301(g) application itself that was filed,
20 I want to say around 2010. There's a
21 discussion about the need to install alkaline
22 chlorination treatment. The estimated cost of

1 that is from \$3 to \$5 million.

2 That is the capital cost, with an
3 annual operating cost of about \$1 million a
4 year. So you could probably say rough net
5 present value of calculation, maybe about a
6 \$20 million at present value investment.
7 That's significant investment, and that's just
8 off the top of my head.

9 JUDGE WOLGAST: And if you applied
10 that technology, say you expended that cost
11 and applied that technology, would you be able
12 to operate within the current 301(g) waiver
13 limits?

14 MR. PAPAJCIK: Yes. I believe that
15 to be the case.

16 JUDGE MCCABE: I wasn't quite clear
17 on your answer, Counsel, as to the cost. You
18 said three to five and then you said 20.

19 MR. PAPAJCIK: I said \$3 to \$5
20 million capital, up front installation cost,
21 with about \$1 million a year annual operating
22 costs.

1 JUDGE MCCABE: So 20 is over 20
2 years?

3 MR. PAPAJCIK: I'd say it's
4 probably around \$20 million.

5 JUDGE MCCABE: Okay. And that's
6 compared to an annual operating cost of this
7 plant of \$100 million? Did you say that?

8 MR. PAPAJCIK: Oh no, operating
9 costs of the plant are substantially more than
10 that.

11 JUDGE MCCABE: Roughly what
12 percentage of the facility's operating cost
13 would that represent?

14 MR. PAPAJCIK: I couldn't guess.

15 JUDGE MCCABE: Okay. Counsel, EPA
16 has suggested that perhaps the appropriate
17 procedure, if there is one, for you to seek a
18 modification of this variance limit would be
19 to do it in the normal course of seeking your
20 permit renewal every five years.

21 What is your response to that?

22 MR. PAPAJCIK: I think that's

1 basically the way they've proceeded. And I
2 think that's exactly what's happened with the
3 AK Steel Facility that I wanted to talk about.

4 Do you mind me explaining the AK
5 Facility?

6 JUDGE MCCABE: Go ahead.

7 MR. PAPAJCIK: I think in AK, and
8 this is the one that we believe is most
9 pertinent. There were three permits at issue,
10 a 1997 permit, a 2002 permit, and 2007 permit.

11 And our point here is that the authority in
12 301(g) is to make a modification to the
13 essentially the BAT limits.

14 So that modification, the result of
15 the situation is that you have a change to the
16 BAT limits with some evergreen 301(g)
17 limitation that's generated based on the
18 technical analysis as provided for in the Act
19 and in EPA's regulations.

20 In the case of AK Steel, their BAT
21 limits in their 1997 permit were, this is for
22 ammonia, 33.1 kilograms per day average and

1 98.8 kilograms per day, on a maximum level.

2 Their 301(g) limits were 205
3 kilograms a day average and 410 max. The
4 difference between BAT and 301(g) for 1997 was
5 172 kilograms per day on the average and 311
6 kilograms per day on the max.

7 In the 2002 permit their BAT limits
8 went down a little bit. They went to 31.3
9 kilograms per day average and 91.8 kilograms
10 per day max. But the 301(g) limits stayed the
11 same.

12 So the increment between BAT and
13 301(g) increased, essentially making the
14 301(g) limitations less stringent when
15 compared to BAT.

16 The increment in that case was 174
17 kilograms per day and 318 kilograms per day.

18 JUDGE MCCABE: Are these numbers in
19 the record?

20 MR. PAPAJCIK: They should be
21 because they were cited by U.S. EPA in their
22 briefs, not the numbers, but the fact of the

1 permit changes. We've extracted these numbers
2 from the permits.

3 JUDGE MCCABE: Are those permits in
4 the record?

5 MR. PAPAJCIK: Yes. Okay. In the
6 2007 permit at AK Steel, the BAT limits went
7 down again, they went from --

8 JUDGE WOLGAST: Counselor, if I may
9 interrupt you just briefly here, I don't want
10 to use up too much of your time on this one
11 point because I think we understand your
12 general point. That the AK Steel Facility in
13 fact represented a downward modification of
14 the BAT limit. Is that correct?

15 MR. PAPAJCIK: No, that's not my
16 point. My point is that the difference
17 between BAT and 301(g) over the course of
18 these permits got bigger at AK. Which is
19 exactly the case at Cleveland, the increment
20 gets bigger.

21 JUDGE WOLGAST: Meaning that the
22 effluent limits in the revised permits, moving

1 from '97 to '07 got less stringent?

2 JUDGE MCCABE: It gets very
3 confusing when we speak of upward and
4 downward.

5 JUDGE WOLGAST: What was in the
6 301(g)?

7 MR. PAPAJCIK: 301(g) limits
8 remained the same. With respect to AK Steel,
9 the 301(g) limit, the alternative limit that
10 was established via the variance remained the
11 same. But the BAT limits went down, basically
12 giving greater relief from the BAT
13 limitations. The increment got larger.

14 JUDGE MCCABE: Oh, I see.

15 JUDGE WOLGAST: I understand that
16 point, is there an example where the variance,
17 the 301(g) variance was modified to be less
18 stringent?

19 MR. PAPAJCIK: Modified to be less
20 stringent, no. No, not that we've found.

21 JUDGE WOLGAST: You're saying then
22 when it became less protective, less stringent

1 at AK Steel, that was accomplished through a
2 change to the BAT itself?

3 MR. PAPAJCIK: I'm saying that the
4 variance that was granted to AK Steel, became
5 an expansion of the variance, because it
6 expanded the difference between the applicable
7 BAT limit which is the base and the
8 alternative limit generated through a
9 technical analysis.

10 JUDGE MCCABE: So in effect the
11 variance allowed more pollution, if you will.

12 MR. PAPAJCIK: If BAT is the floor,
13 the variance allowed more pollution in
14 successive permits.

15 JUDGE MCCABE: Counsel, are you
16 familiar with the anti-backsliding provisions
17 of the statute or the regulations?

18 MR. PAPAJCIK: Yes, Judge McCabe.

19 JUDGE MCCABE: Do you they have any
20 applicability or relevance here?

21 MR. PAPAJCIK: Absolutely.
22 Absolutely. Section 402(o) basically says you

1 can't have less stringent limits in successive
2 permits. But it provides an exception, and
3 that exception says that if a facility has
4 been granted, there's a number of exceptions.

5 But if a facility has been granted
6 a 301(g) application then a less stringent
7 limit can be applied in successive permits.

8 We think frankly, that if EPA
9 follows --

10 JUDGE MCCABE: Is that exactly what
11 it says?

12 MR. PAPAJCIK: Do you want me to
13 read it?

14 JUDGE MCCABE: Yes.

15 MR. PAPAJCIK: Okay.

16 JUDGE MCCABE: I would ask you also
17 here, we have statutory provisions, we also
18 have regulatory provisions and this actually
19 applies to both, Counsel.

20 You have been citing in submissions
21 to us the CFR regulations. But we understand
22 that the Ohio regulations are actually the

1 ones that are applicable here.

2 MR. PAPAJCIK: Right.

3 JUDGE MCCABE: So if you know
4 please, when citing regulations, please cite
5 the parallel Ohio regulation. Now I assume
6 you're looking for statutory language there.

7 MR. PAPAJCIK: Okay. With respect
8 to 402(o), the statute, U.S. EPA's
9 regulations, and Ohio EPA's regulations are
10 effectively identical. They are effectively
11 identical.

12 Provision of 402 anti-backsliding.
13 402(o)(1) says this. "In the case of
14 effluent limitations established on the basis
15 of subsection (a)(1)(b) of this section, a
16 permit may not be renewed, reissued, or
17 modified on the basis of effluent guidelines
18 promulgated under Section 304(b) subsequent to
19 the original issuance issue of such permit to
20 contain effluent limitations which are less
21 stringent than comparable effluent limitations
22 in the previous permit. The case of effluent

1 limitations established on the basis of
2 Section 301(b)(1)(c) or Section 303(d) or
3 (e)."

4 "A permit may not be renewed,
5 reissued, or modified to contain effluent
6 limitations which are less stringent than the
7 comparable effluent limitations in the
8 previous permit except in compliance with
9 Section 304(3)(d)(4). Exceptions, a permit
10 with respect to which Paragraph 1 applies may
11 be renewed, reissued, or modified to contain a
12 less stringent effluent limitation applicable
13 to a pollutant if -- " and then there are
14 several exceptions, (a), (b)(i), (b)(ii), (c),
15 and (d), which is the one that is pertinent
16 here. And (d) says "the permittee has received
17 a permit modification under Section 301(c),
18 301(g), 301(h), (i), (k), (n), or 316(a)."

19 JUDGE MCCABE: So you are reading
20 that language to say any permit modification
21 under 301(g), regardless of whether you're
22 asking for a new one or not, covers the

1 exception. The exception applies as long as
2 you had any modification.

3 MR. PAPAJCIK: Not with respect to
4 some new source. But with respect to existing
5 sources, yes.

6 JUDGE MCCABE: The renewal of a
7 permit for an existing source then if you have
8 ever had a 301(g) variance at any level you
9 think is exempt from the anti-backsliding
10 rule?

11 MR. PAPAJCIK: In this provision,
12 yes. But of course then the 301(g) limit is
13 cabined, as was the term you used, is cabined
14 by a technical analysis that U.S. EPA is
15 obligated to make at every turn of every
16 permit renewal.

17 So that's our view, the
18 environmental protectiveness of that provision
19 is covered by U.S. EPA's obligation to re-
20 analyze every request, we should say every
21 updated request.

22 JUDGE WOLGAST: Do you know what

1 Ohio EPA's position is on whether this
2 exemption to 402(o) applies in this case?

3 MR. PAPAJCIK: Well, they approved
4 the limitation modification. They recommended
5 that this limitation modification be approved
6 by U.S. EPA.

7 JUDGE MCCABE: Did you have any
8 explicit discussions or submissions on the
9 anti-backsliding issue?

10 MR. PAPAJCIK: Yes, this issue was
11 specifically addressed in the application.

12 JUDGE MCCABE: Did Ohio make a
13 finding as to that particular issue that was
14 expressed?

15 MR. PAPAJCIK: They agreed with our
16 application and recommended that it be
17 approved to U.S. EPA, so I assume they made
18 the proper finding.

19 JUDGE MCCABE: You're saying that
20 the implied analysis there is that the
21 exception covers them. Okay.

22 What about Ohio's anti-degradation

1 statute; are you familiar with that?

2 MR. PAPAJCIK: I can't speak to
3 that. I know that the anti-degradation issue
4 is dealt with in the application. I could
5 read what our technical consultant gave me,
6 but I wouldn't be helpful in responding.

7 JUDGE MCCABE: Okay. Thank you.
8 And one final question, who is monitoring the
9 time, Eurika are you?

10 MS. DURR: Yes.

11 JUDGE MCCABE: How many minutes
12 does --

13 MS. DURR: He has 40 seconds.

14 JUDGE MCCABE: Okay. One last
15 question then. Does the record show whether
16 the facility is currently in compliance with
17 its current variance limit?

18 MR. PAPAJCIK: I don't know, does
19 the record show we're in current compliance
20 with the limitation? We can supplement the
21 record, I can't tell you whether it does or
22 not.

1 JUDGE MCCABE: Okay. Thank you.
2 And you have reserved five minutes of your
3 time. Counselor, for EPA, that's Mr.
4 Branigan?

5 MR. BRANIGAN: Yes, Your Honor.
6 May it please the Board, I'm Terry Branigan,
7 I'm an Associate Regional Counsel with EPA
8 Region 5 in Chicago. And with me this morning
9 are Richard Witt, from Water Law office of
10 OGC, and also Robert Peachey, also of EPA
11 Region 5 in Chicago.

12 The case before the Board this
13 morning concerns Region 5's decision to deny
14 the 2010 application of the Petitioner to
15 modify a variance previously granted by Region
16 5 for discharges from the Petitioner's
17 Cleveland facility.

18 The specific issue for the decision
19 today is whether the statute authorizes the
20 second application for a different
21 modification of the BAT limits under Section
22 301(g) and (j) of the Clean Water Act.

1 Region 5 and OGC would like to make
2 the following points in the course of this
3 discussion. First the statutory deadline in
4 Section 301(j) is strict. It provides that
5 any application for a modification of the BAT
6 limits for nonconventional pollutants, shall
7 be filed within 270 days of the promulgation
8 of the applicable effluent limitation
9 guideline or it is prohibited under Section
10 301(j). In this case the Petitioner's
11 application for the nonconventional ammonia
12 was filed nearly 30 years after the expiration
13 of the deadline. Thus the second application
14 for this point source is prohibited by the
15 statute.

16 JUDGE MCCABE: But you do concede,
17 Counsel, that their original request for this
18 variance was timely filed?

19 MR. BRANIGAN: We concede that,
20 yes. And actually the original request was
21 submitted by ArcelorMittal's predecessor, in I
22 think it was 1983.

1 JUDGE MCCABE: Okay. Is it EPA's
2 position that the Agency has no authority to
3 modify a variance at all in either direction?

4 Or is it only that you have no authority to
5 modify it to be less stringent?

6 MR. BRANIGAN: EPA's position,
7 Region 5 and OGC's position is that once a
8 variance is granted, it can't be modified.

9 JUDGE MCCABE: One and done.

10 MR. BRANIGAN: One and done, by
11 operation by the statutory deadline in Section
12 301(j)(b).

13 JUDGE MCCABE: And is the plain
14 language of that statute what you're relying
15 on to show that one and done intent?

16 MR. BRANIGAN: (Nodding head yes)
17 It's the plain language. There is indication
18 in the legislative history that indicates
19 Congress intended that the deadline be strict.

20 JUDGE MCCABE: What is that
21 legislative history?

22 MR. BRANIGAN: It's cited in the

1 brief, and I can cite it here as well.

2 JUDGE WOLGAST: Is this the
3 language from the Senate Committee Report
4 dealing with potential continuances of the
5 variances?

6 MR. BRANIGAN: Yes, this was from
7 the Senate Report in 1985, considering the
8 statute, the 1987 Water Quality Act.

9 JUDGE WOLGAST: Well how do you
10 read anything beyond, at least someone, this
11 not the conference report, it's the Senate
12 Committee Report. Somebody thought that these
13 things had a life beyond five years. It's
14 hard for me to see how you read more into the
15 one or two sentences that you cited than that.

16 MR. BRANIGAN: Your Honor, I think
17 the answer of that is that the clear language
18 of the statute is very clear. That any
19 application for these kinds of modifications
20 shall be filed within 270 days.

21 JUDGE WOLGAST: Well in fact, it
22 doesn't speak to modifications at all does it?

1 The statutory language itself, it doesn't
2 reference modification.

3 MR. BRANIGAN: I think it does,
4 Your Honor, in Section 301(j).

5 JUDGE WOLGAST: It uses the word
6 modification?

7 MR. BRANIGAN: I'm sorry?

8 JUDGE WOLGAST: Does it use that
9 word?

10 MR. BRANIGAN: I believe it does.

11 JUDGE MCCABE: Did you create a
12 demonstrative exhibit that shows us the
13 statutory language?

14 MR. BRANIGAN: We did, Your Honor.

15 JUDGE MCCABE: Did you show it to
16 Counsel for ArcelorMittal in advance?

17 MR. BRANIGAN: We sent it to them
18 on Friday.

19 JUDGE MCCABE: Counselor for
20 ArcelorMittal did you receive it and have you
21 had an adequate opportunity to look at it?

22 MR. PAPAJCIK: We received the

1 statutory language and we've reviewed the
2 statutory language.

3 JUDGE MCCABE: If you think it will
4 be helpful to answer Judge Wolgast's questions
5 you can put that statutory language up.

6 MR. BRANIGAN: This is the text of
7 the pertinent language of Section
8 301(j)(1)(b). It says "any application filed
9 under this section for modification of the
10 provisions of Section (b)(2)(a)" and that's a
11 reference to the BAT.

12 JUDGE WOLGAST: Right.

13 MR. BRANIGAN: Effluent
14 limitations, as it applies to pollutants
15 identified in subsections (b)(2)(f), and
16 that's a reference to nonconventional
17 pollutants, shall be filed not later than 270
18 days after the date of promulgation of an
19 applicable effluent limitation guideline.

20 And in this case the applicable
21 limitation guideline was promulgated by the
22 Agency in, I believe, May 1982.

1 JUDGE WOLGAST: Right, but I mean,
2 it's, to me it's very hard to look at this
3 language and read anything more than the way
4 you get in to a 301(g) variance is that you
5 had to apply within 270 days of the time the
6 standard was, I don't remember if it was
7 promulgated or effected.

8 But to me this doesn't speak to
9 once you're within the scope of 301(g) what
10 happens after that?

11 And we have this slim little piece
12 of legislative history from one body that says
13 that they anticipated it would have a life
14 beyond five years. But it never spoke to, can
15 it go up or down after that.

16 MR. BRANIGAN: I think in the view
17 of Region 5 and OGC, we think that the
18 statutory language is very clear. That any
19 application for a modification of the BAT
20 limits under Section 301(g) must be submitted
21 within 270 days.

22 JUDGE WOLGAST: So if you have an

1 instance where you've found new information
2 and in fact you find that the 301(g) variance
3 now is not restrictive enough, under new
4 facts, you can never change that until you
5 come up to the next permit cycle?

6 MR. BRANIGAN: Your Honor, I think
7 Region 5's and OGC's view is that once a
8 variance is granted, it doesn't change. It's
9 just that the variance itself incorporates the
10 requirement that the ultimate BAT limits
11 granted under the variance continue to meet
12 the requirements in Section 301(g)(2).

13 JUDGE WOLGAST: In my hypothetical
14 they would. They could still meet them,
15 right? Because if you meet BPT and you're
16 under the waste load allocation, but the
17 circumstances in your process now show that
18 you don't need quite as large a variance as
19 you were originally granted. What do you do
20 about that?

21 MR. BRANIGAN: The statute doesn't
22 provide a second chance to apply for a

1 modification.

2 JUDGE WOLGAST: So they can just
3 pollute more with no remedy?

4 MR. BRANIGAN: I'm sorry, Your
5 Honor. No once the variance is granted the
6 limits are set and that can't be changed.

7 Except that the variance provides also
8 that to the extent that water quality
9 standards or the water quality changes the BAT
10 limits need to be, would be adjusted to the
11 extent necessary to make sure that the BAT
12 limits continue to comply with the
13 requirements in Section 301(g)(2).

14 That wouldn't be a change in the
15 variance of that, simply implementing the
16 variance that was granted.

17 JUDGE MCCABE: So the only new
18 information that could change it is a change
19 in the water quality limits?

20 JUDGE WOLGAST: Or BAT.

21 MR. BRANIGAN: The information that
22 would change that could lead to a change in

1 the specific numbers being applied as
2 limitations, would be the requirement on the
3 part of the discharger to demonstrate
4 continued compliance under 301(g)(2).

5 The variance itself doesn't change
6 after it's granted.

7 JUDGE MCCABE: What congressional
8 policy goal are you trying to achieve?

9 MR. BRANIGAN: The deadline in the
10 variance itself are of limited applicability
11 and scope. The system that was --

12 JUDGE MCCABE: A deadline is not
13 what I mean when I say a statutory goal. I
14 mean an overarching objective. For example
15 ArcelorMittal has cited to us the, no
16 treatment for treatments sake, from the
17 legislative history. What are you trying to
18 achieve?

19 MR. BRANIGAN: The system
20 established in 1972 included uniform rules
21 that were intended to be the same for
22 everybody in a category, in an industrial

1 category. Creating a level playing field.

2 To soften sometimes harsh impact of
3 the national rules, the uniform rules, the
4 1977 Clean Water Act provided a limited
5 flexibility to adjust those tech based rules.

6 And the limited aspect of that is
7 that because of the short deadline, the
8 deadline insures that uncertainties about the
9 specific BAT limits are quickly resolved and
10 that brings about finality and certainty.

11 And so the limited nature of the
12 variance was intended to do as limited damage
13 to the system of uniform national rules that
14 were established by the 1972 Act.

15 JUDGE WOLGAST: Could I ask a
16 question just to make sure I understood what
17 you said just before Judge McCabe's question.

18 Are you saying that the reason that
19 with changed circumstance you aren't
20 necessarily in a situation where there's going
21 to be unnecessary pollution is because when
22 you do the NPDES review, in renewal, you could

1 reset the BAT limit for that facility?

2 MR. BRANIGAN: That's correct, but
3 it's not a resetting of the BAT limit. And
4 it's not a change in the variance, it's that
5 the variance when it establishes alternate BAT
6 limits, also requires that to the extent
7 necessary those alternate limits be adjusted
8 in order to ensure that they continue to meet
9 the water quality standards in Section
10 301(g)(2).

11 JUDGE WOLGAST: Those parameters,
12 you're referring to what, BAT or the
13 limitations of the variance? You said the
14 variance limitations never change, right?

15 MR. BRANIGAN: No, the variance
16 itself doesn't change. The specific numbers
17 of the limitations for discharges can change
18 from those initially established under the
19 variance.

20 And the way in which they can
21 change is that the discharger is under the
22 continuing obligation to demonstrate that the

1 alternate limits under the variance continue
2 to meet the requirements under Section
3 301(g)(2).

4 And those are, if I recall
5 correctly, that the alternate BAT limits will
6 continue to meet BPT, that they will not
7 result in additional limitations for other
8 sources, and that they will not interfere with
9 the attainment of or maintenance of water
10 quality standards. Water quality as judged by
11 various standards in 301(g)(2).

12 JUDGE WOLGAST: I'm still left
13 confused with how in my hypothetical where the
14 company could now meet more stringent, they
15 don't need the full leniency of their 301(g)
16 variance, how you, whether it's in an NPDES
17 review context or otherwise, tighten that up.

18 Are you saying you can't?

19 JUDGE MCCABE: Unless you need to
20 meet water quality standards or a new --

21 JUDGE WOLGAST: I mean, assuming
22 you are still meeting water quality standards

1 with your original variance, and waste load
2 allocation, and all the other requirements.

3 MR. BRANIGAN: Normally what would
4 happen in practice, if a discharger wanted to
5 request continuation of previously granted
6 alternate BAT limits at the time of permit re-
7 issuance, the discharger would make that
8 request along with the request to reissue the
9 permit.

10 And that would be included with the
11 application to the permitting authority. And
12 in this case in Ohio, the permitting authority
13 is Ohio EPA.

14 And then the state, Ohio EPA would
15 review the request for continuation of the
16 alternate BAT limits included in the previous
17 permit, and make a recommendation. The EPA
18 would review that and either agree or disagree
19 with that.

20 JUDGE WOLGAST: But could in that
21 context you just described, could Ohio EPA
22 change the effluent limits that are included

1 in the 301(g) variance?

2 MR. BRANIGAN: They would be able
3 to, it wouldn't be changing the variance.
4 Again, it would be possibly making a
5 recommendation to adjust the BAT limits that
6 were established, the alternate BAT limits
7 that were established under the variance.

8 And they could do that in order to
9 assure continued compliance with the
10 requirements in Section 301(g)(2). Or the
11 state can always under Section 510 of the
12 Clean Water Act, impose more stringent limits
13 than the Federal law would require.

14 JUDGE WOLGAST: So the variance is
15 the variance is the variance. And the numbers
16 themselves can move?

17 MR. BRANIGAN: Yes.

18 JUDGE WOLGAST: The alternative BAT
19 number, the effluent limits themselves, can go
20 up or down based on Ohio EPA's assessment of
21 the changed circumstances.

22 MR. BRANIGAN: We don't think that

1 the state would be able to recommend or
2 propose that the limits be made more
3 stringent.

4 JUDGE WOLGAST: Made less
5 stringent.

6 MR. BRANIGAN: Made less stringent,
7 yes.

8 JUDGE WOLGAST: What would dictate
9 that result?

10 MR. BRANIGAN: The limitations
11 would be, the variance, once granted
12 represents an outer bound for the limits.
13 They can't be made more stringent, less
14 stringent rather, than the original grant of
15 the variance.

16 JUDGE WOLGAST: And what says that?

17 MR. BRANIGAN: It's by the
18 operation of the statute. Again, Section
19 301(j)(1)(b) indicates that applications to
20 modify a previously granted variance, on, I'm
21 sorry, applications to modify BAT limits must
22 be made within 270 days after promulgation of

1 the ELG.

2 JUDGE MCCABE: So your argument
3 essentially is a plain meaning one.

4 MR. BRANIGAN: Yes.

5 JUDGE MCCABE: You're asking us to
6 read that plain meaning into a statutory time
7 deadline. Although you concede that the
8 Petitioner originally met that time deadline.

9 MR. BRANIGAN: The Petitioner's
10 predecessor, yes.

11 JUDGE WOLGAST: Yes. If we don't
12 agree with you that the plain language of the
13 statute dictates that result, what's the next
14 step?

15 MR. BRANIGAN: Your Honor, just to
16 remind the Board that the ruling in this case
17 doesn't apply simply to this case but applies
18 across the board to any discharger that may
19 have a variance.

20 JUDGE WOLGAST: What percentage,
21 what is that universe, and can you give us any
22 sense of, are we talking about five percent,

1 ten percent, 50 percent of people holding
2 permits in Region 5?

3 MR. BRANIGAN: I'm sorry, Your
4 Honor, I don't have that.

5 JUDGE WOLGAST: In terms of 301(g)
6 variance universe of your NPDES permits issued
7 in Region 5. How many of those have 301(g)
8 variances, just roughly?

9 MR. BRANIGAN: Your Honor, I'm
10 sorry, I don't know that information, it's not
11 in the record. We didn't think it was
12 necessary to poll all of the NPDES permits in
13 the region to make this decision.

14 We thought that the statutory
15 deadline, the plain language of the deadline
16 was very clear. And we did not investigate
17 301(g) variances at other facilities.

18 And there's nothing in the record
19 for this decision regarding variance requests
20 at any other facility in Region 5 including
21 the AK Steel Middletown Facility.

22 JUDGE WOLGAST: I understand your

1 argument, I was just, you were saying this
2 applies beyond this facility. And I was just
3 trying to get a grip on it.

4 JUDGE MCCABE: Well thank you for
5 that reminder that we would be providing a
6 precedent here. It would be instructive to
7 know just how large a precedent that is, but
8 of course we must judge it based on the case
9 in front of us.

10 So let's go back to the plain
11 language of the statute. If we don't find
12 that the plain language of the statute
13 dictates the result that you are arguing for,
14 in other words, that it does not limit EPA's
15 authority, that EPA has some discretion in
16 interpreting this statute.

17 How could EPA implement that
18 discretion, what are its options?

19 MR. BRANIGAN: Your Honor, our view
20 is that the plain language of the statute is
21 very clear.

22 JUDGE MCCABE: Please bear with me,

1 Counselor, and hypothesize that if we were to
2 find that the plain meaning does not support
3 that interpretation, where do you go with your
4 next step of the legal analysis of the
5 Agency's discretion to interpret it this way?

6 Does the Agency have to issue
7 another interpretation in its regulations?
8 Does it issue guidance, or can it or should it
9 simply make the call on a permit by permit
10 basis?

11 MR. BRANIGAN: Your Honor, I don't
12 think that the Agency could make a call on a
13 permit by permit basis. I think it would
14 require a modification of EPA's implementing
15 regulations in 40 CFR Section 122.21(m)(2).
16 The provisions of that regulation lay out the
17 requirements for applying for modifications
18 under Section 301(g)(2).

19 They require first that an initial
20 request be filed within the statutory deadline
21 of 270 days after the promulgation of the
22 applicable ELG. Requires a completed request

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JUDGE MCCABE: Assume again for purposes of this question, Counselor, that we find that the 270 day limit was satisfied by the initial request. Where does EPA go next?

What happens with that analysis, under that section you're citing of the regs?

MR. BRANIGAN: That regulation also requires that a complete application be filed at least, not later than 180 days before EPA must make a decision. And under Section 301(j)(4), EPA is required to make a decision within 365 days after filing an application.

JUDGE MCCABE: If we find that EPA has the authority to modify the variance, can you achieve the statutory goals of the Clean Water Act that you were citing earlier, by using the judgment and discretion that the agency has to apply its regulations for modifications of permits?

MR. BRANIGAN: Your Honor, I don't believe that's the case. The 1977 Clean Water

1 Act was a re-calibration of the regulatory
2 burden imposed on various categories of
3 pollutants, based on an assessment of the
4 risks posed by those pollutants.

5 And in 1977, the Clean Water Act
6 accomplishes that re-calibration of the
7 regulatory burden by retaining BAT for toxics.
8 For conventional pollutants the BAT limits
9 were eliminated and BCT, the less stringent
10 BCT limitations were imposed instead for
11 conventionals.

12 And for nonconventional pollutants,
13 like the pollutant at issue in this case,
14 ammonia, the BAT limits were retained, but
15 with a limited opportunity to request a
16 modification.

17 And it's clear that the '77 act was
18 a careful re-calibration of regulatory burden.

19 A limited re-calibration so that the initial
20 system of uniform national rules of general
21 applicability would be retained with limited
22 flexibility for modifying the BAT limits.

1 JUDGE MCCABE: If we don't find
2 that congressional message, that you cannot
3 change the variance limit in the statute, what
4 is the best place in the legislative history
5 that you can point to for an indication of
6 that intent?

7 MR. BRANIGAN: I'm sorry, Your
8 Honor, could repeat the question?

9 JUDGE MCCABE: Assuming again, just
10 for argument's sake, that we don't find the
11 guidance from Congress that we're looking for
12 in the plain language of the statute. If the
13 statute is silent, the legislative history
14 might shed some light on that.

15 What is the best place in the
16 legislative history that we can look that
17 gives us the most information about whether
18 that was in fact Congress's intent that the
19 variance be frozen at that point in time?

20 MR. BRANIGAN: The idea that the
21 1977 Clean Water Act was intended to
22 accomplish a limited tweaking of the system

1 imposed by the 1972 act by again, adjusting
2 the tech based limits for various categories
3 of pollutants, is very clear in the House
4 debates on December 15th, 1977.

5 JUDGE MCCABE: So that's as close
6 as we can get that Congress was tweaking the
7 system to re-sort?

8 MR. BRANIGAN: As far as
9 legislative history I think that's correct.

10 JUDGE MCCABE: Let's go to the
11 anti-backsliding positions. You heard our
12 question to Counselor for ArcelorMittal. And
13 I'll repeat that question for you. Do you
14 think the anti-backsliding provisions of the
15 statute or the applicable regulations have any
16 applicability or relevance here?

17 MR. BRANIGAN: Yes, I think we do
18 think they have some relevance. Section
19 402(o) of the act however does not apply in
20 this situation. It's been the Agency's
21 interpretation that Section 402(o), applies
22 only to limits established by best

1 professional judgement, BPJ limits.

2 And that's the exemption in 402(o)
3 in situations where a 301(g) variance has been
4 granted applies only to limits based on BPJ.

5 And that's not the situation here because
6 these limits are BAT tech based limits.

7 JUDGE MCCABE: So when Congress
8 spoke to the exact issue that we're looking
9 at, which is whether a permit can become less
10 stringent years later, it was only prohibiting
11 that for limits that were based on BPJ?

12 MR. BRANIGAN: Again, my
13 understanding is that the statute addresses
14 BPJ, but EPA's regulations, I believe at
15 122.44(1) also applies in the situation.
16 122.44(1)(1) contains the general rule that
17 limits shall not be made less stringent when a
18 permit is reissued.

19 (1)(2) I believe addresses a
20 situation in which the applicable limits are
21 based on BPJ instead of BAT. And my
22 understanding is that that section is a

1 section that contains the exception for 301(g)
2 variances.

3 JUDGE WOLGAST: So the exception
4 would apply?

5 MR. BRANIGAN: Would not apply in
6 this case.

7 JUDGE WOLGAST: Because it's just
8 not in the world of BPJ's?

9 MR. BRANIGAN: The exception is in
10 the world of BPJ, and in this case the permit
11 and the variance are not in the world of BPJ.

12 JUDGE WOLGAST: So you're saying
13 that Section 402(o) and 40 CFR 122.44 apply to
14 this situation? But the exception does not
15 save ArcelorMittal?

16 MR. BRANIGAN: That's correct, Your
17 Honor.

18 JUDGE WOLGAST: Because?

19 MR. BRANIGAN: Because the
20 exception applies only to limits established
21 by BPJ. That's my understanding. And these
22 limits are not BPJ limits.

1 JUDGE MCCABE: What are they?

2 MR. BRANIGAN: These limits are
3 based on the tech based BAT limits. And the
4 applicable effluent limitation guidelines.

5 JUDGE WOLGAST: But you didn't
6 argue that this was their position was
7 contrary to the anti-backsliding position, why
8 is that?

9 MR. BRANIGAN: We've had
10 discussions since filing the certified brief
11 between Region 5 and OGC, and this is the
12 position that we've arrived at.

13 JUDGE WOLGAST: But it's not
14 reflected in your brief?

15 MR. BRANIGAN: It's not reflected
16 in the brief, no.

17 JUDGE MCCABE: And let me be sure
18 I'm understanding you. You're saying Section
19 402(o) applies, or does not apply?

20 MR. BRANIGAN: Does not apply to
21 this specific situation.

22 JUDGE MCCABE: So it doesn't matter

1 whether the exception is availing to
2 ArcelorMittal or not?

3 MR. BRANIGAN: That's correct, Your
4 Honor, yes.

5 JUDGE MCCABE: Do you think that
6 the Ohio anti-degradation rules apply here?

7 MR. BRANIGAN: Your Honor, I'm
8 sorry, I'm not able to speak about those
9 rules.

10 JUDGE WOLGAST: What about anti-
11 degradation, generally speaking. If it's the
12 Federal rules were applicable here?

13 MR. BRANIGAN: Region 5 and OGC
14 have not had a discussion about anti-
15 degradation, and I can't speak authoritatively
16 about that.

17 JUDGE MCCABE: Can I just ask you a
18 technical question here? And that is quite
19 simply, I note in both the filings by the
20 Region as well as the filings by ArcelorMittal
21 that you're not citing the Ohio regulations.
22 Why is that?

1 MR. BRANIGAN: Your Honor, our view
2 is very simple. Again, that the statutory
3 deadline in 301(j)(1)(b) prohibits
4 applications for modifications after the
5 statutory deadline has expired.

6 JUDGE MCCABE: I understand that
7 argument, Counselor, but you did have numerous
8 citations to the CFR.

9 MR. BRANIGAN: We had citations to
10 Section 122.21(m), which applies specifically
11 to the process for applying for variances and
12 so the Federal regulation would supply the
13 rule in that case.

14 We had references I believe to
15 124.64 and 122.62, which apply specifically to
16 the variance process. So the Federal rule in
17 that situation would supply the rule.

18 I think the only regulation that
19 might not be supplied by the Federal rule is
20 Section 122.62, which is the permit
21 modification regulation. We didn't cite that
22 as part of our case. We made reference to

1 that because the Petitioner had made the
2 argument that their application in 2010 was
3 authorized under 122.62.

4 JUDGE MCCABE: Okay. Following on
5 the notion of things that were not addressed
6 in the EPA submissions, you made the point
7 once, or perhaps twice, that perhaps we would
8 want to ask for additional briefing on the
9 issue of whether an application like this can
10 only be made in the course of a permit renewal
11 application every five years.

12 What is the basis for that
13 contention?

14 MR. BRANIGAN: Which contention,
15 I'm sorry?

16 JUDGE MCCABE: Well I believe your
17 brief argues in numerous points that you
18 should only make applications for variance
19 renewal perhaps in the course of the five year
20 permit renewal application cycle.

21 MR. BRANIGAN: Your Honor, the
22 regulations at 40 CFR Section 124.51 indicate

1 generally that variance decisions should be
2 processed in connection with permit issuance.

3 JUDGE MCCABE: Generally, is that
4 the word?

5 MR. BRANIGAN: I don't know if
6 that's the --

7 JUDGE MCCABE: Might it be
8 ordinarily?

9 MR. BRANIGAN: Ordinarily, I think,
10 yes, Your Honor. Thank you. However, we
11 think that Section 122.62(a)(5), in situations
12 where the Federal government is the permitting
13 agency or the corresponding state rule would
14 allow a permit modification to incorporate
15 alternate BAT limits, in the specific
16 situation where a discharger has an NPDES
17 permit and shortly after being issued the
18 permit EPA might revise the applicable
19 effluent limitation guidelines.

20 And rather than force the
21 discharger to wait five years until the permit
22 is reissued, we think that 122.62(a)(5) would

1 allow, or the corresponding state requirement,
2 would allow the discharger to incorporate
3 those limits.

4 To request a modification under
5 301(g) first, after the ELG is revised and
6 then to make a request of the permitting
7 authority to incorporate revised limits into
8 the permit.

9 JUDGE MCCABE: What is it that
10 prohibits the permit holder from coming in
11 sooner? In this case ArcelorMittal seems to
12 have done what many people would consider the
13 right thing, coming in when it noticed that it
14 was not complying with its variance and permit
15 limitations and seeking a modification, even
16 though their five year cycle isn't up yet.
17 Why would we want to discourage that and what
18 regulation or statute are you relying on to
19 say that they cannot come in sooner?

20 MR. BRANIGAN: Your Honor, we
21 haven't really made that argument under the
22 regulations. It's just again, that Section

1 301(j)(1)(b), prohibits applications for
2 modifications after the expiration of the
3 deadline.

4 JUDGE MCCABE: Again, frozen in
5 time.

6 MR. BRANIGAN: Frozen in time.

7 JUDGE MCCABE: Regardless of
8 whether if this limit needed to be changed in
9 the other direction more pollution is going
10 out under Judge Wolgast's example.

11 Or, in ArcelorMittal's case,
12 regardless of whether they need to seek a more
13 lenient limit in order to reflect the reality
14 that they are encountering. At least they're
15 being honest with us, we must give them that
16 much credit.

17 MR. BRANIGAN: We think the plain
18 language indicates that there's, in effect,
19 one chance to apply for a modification. And
20 once the variance is granted it doesn't change
21 except as necessary to make sure the ultimate
22 BAT limits continue to comply with the

1 requirements in Section 301.(g)(2).

2 JUDGE MCCABE: One last question
3 for you, my last question and then we'll go to
4 Judge Wolgast. Why were the Agency's Section
5 301(g) variance application requirements and
6 decision criteria that were proposed back in
7 1984, never finalized? And are there any
8 current plans to finalize them, if you know?

9 MR. BRANIGAN: I don't know that
10 information, and I have no idea if there are
11 current plans to finalize the proposed rule.

12 JUDGE MCCABE: Perhaps, Mr. Witt
13 could speak to that?

14 MR. WITT: I don't know.

15 JUDGE MCCABE: Thank you.

16 JUDGE WOLGAST: Back to anti-
17 backsliding just for a second because we had a
18 lot of back and forth. And I wanted to just
19 give you a chance to succinctly say what the
20 Agency's post brief position is on anti-
21 backsliding. And how it would or could apply
22 in reviewing the alternative BAT limits that

1 have been requested here?

2 MR. BRANIGAN: Your Honor, I think
3 the main point that we have is that, and this
4 is the position that OGC and Region 5 have
5 come to, is that once a variance is granted,
6 that functions as an outer bound for the
7 variance.

8 And while the alternate BAT limits
9 can be made more stringent in order to comply,
10 or as necessary to comply with the 301(g)(2)
11 limits, the variance originally granted
12 supplies the outer bounds for that variance.

13 We have had some discussions about
14 the application of the anti-backsliding rule.

15 I don't think that we have come to a
16 conclusion yet or a consensus between Region 5
17 and OGC about how that exactly would work.

18 But my understanding again, is that
19 Section 402(o) of the Act applies only in
20 situations where the basic limit applicable to
21 discharges is provided by best professional
22 judgement, and that's not the situation in

1 this case.

2 JUDGE WOLGAST: Okay.

3 JUDGE MCCABE: Just one followup on
4 that, have you had occasion to look at any of
5 the legislative history for the anti-
6 backsliding rule, to see whether Congress was
7 so narrow in its goal in enacting that
8 section?

9 MR. BRANIGAN: Unfortunately I have
10 not, Your Honor.

11 JUDGE MCCABE: Thank you,
12 Counselor, very much for your time.

13 MR. BRANIGAN: Thank you, very
14 much.

15 JUDGE MCCABE: And Mr. Papajcik,
16 you have your five minutes reserved.

17 MR. PAPAJCIK: Okay. I'll try to
18 make this quick, number one, I'm glad I read
19 that section on anti-backsliding for all of us
20 to hear. Because I don't see the kind of
21 limitation in it that the Region expresses may
22 exist with respect to best professional

1 judgement.

2 I asked my associate if there was
3 any legislative history to limit that 301(g)
4 application, and he advised me that there is
5 none and that the legislative history on that
6 particular provision is particularly sparse.

7 So I think the only thing we really
8 have to go on is the express language of the
9 statute itself, and it's pretty clear.

10 JUDGE MCCABE: Thank you for that,
11 Counselor.

12 MR. PAPAJCIK: I have a couple of
13 points and I'll get to them quickly. U.S.
14 EPA's Technical Guidance Manual for the
15 regulations promulgated pursuant to Section
16 301(g) says this.

17 "The legislative history of the
18 1977 amendments to Section 301(g), the Clean
19 Water Act, makes it clear that Congress
20 intended relief from BAT effluent limitation
21 guidelines, where warranted. Congress
22 determined that it was possible that the BAT

1 requirements might result in the application
2 of excess controls to certain kinds of
3 pollutants." These are EPA's own words.

4 "Where sufficient information could
5 be generated on those pollutants to make a
6 judgment concerning their effects on receiving
7 water, appropriate relief from unnecessarily
8 stringent limitations should be provided."

9 That's EPA's own words.

10 JUDGE WOLGAST: I'm sorry, but you
11 were reading from, what is the cite to that?

12 MR. PAPAJCIK: It's U.S. EPA's
13 Technical Guidance Manual for the regulations
14 promulgated pursuant to Section 301(g).

15 JUDGE MCCABE: This is cited in
16 your papers is it not?

17 MR. PAPAJCIK: Yes. U.S. EPA's
18 brief or Regions 5's brief also says while
19 there is a statutory deadline for applying a
20 Section 310(g) variance there was no time
21 limit specified in the statute for termination
22 of the variance.

1 Therefore if a permit is renewed
2 and the variance can be continued or renewed
3 in subsequent permits. Changes in conditions
4 in the receiving waters for the permittee's
5 discharges could change, such that the
6 permittee's discharges under Section 301(g)
7 variances could no longer meet the
8 requirements of Clean Water Act Section
9 301(g).

10 And then they go on to describe the
11 procedure. And they quote this, they say
12 that, "The procedure is consistent with the
13 statutory requirements to ensure that
14 alternative effluent limits established under
15 Clean Water Act, Section 301(g) meet the
16 requirements of the Clean Water Act, Section
17 301(g)(2).

18 Such an approach is also supported
19 by the legislative history of the Water
20 Quality Act of 1987. In discussing changes
21 that the Water Quality Act would make to Clean
22 Water Act, Section 301(g), the Senate report

1 states: "If a modification is granted under
2 301(g), the applicant is expected to make a
3 new demonstration each time the applicable
4 permit expires for such modification to be
5 granted."

6 Basically what I think that says is
7 that every time you renew the permit, and
8 every time you want to ask for an additional
9 301(g) alternative limitation, you go through
10 an independent analysis of the technical
11 considerations that support the alternative
12 limitations.

13 There's clearly no indication in
14 the statute whether those limitations can go
15 up or down. It's an independent analysis. So
16 I think if we look at this statute this way.
17 Number one, the desire to preserve economic
18 resources is universal. It doesn't change.

19 And U.S. EPA, according to the
20 statute, has the ability to make an individual
21 technical analysis as to the appropriate
22 difference, or appropriate modification from

1 BAT to alternative 301(g) limits.

2 They can go up, they can go down.
3 Economics change, water quality changes.
4 People change. The state of knowledge
5 changes. Everything changes.

6 And I think one thing we need to
7 pay attention to in this case is the original
8 301(g) application filed by Republic Steel,
9 which was several entities back, was filed in
10 1983. U.S. EPA's granted the variance for the
11 first time in 2001. Eighteen years later.
12 You think that application didn't change?

13 And in fact I was the engineer that
14 drafted the application and a lot changed
15 since then. So I think that's the point, all
16 of this should be evergreen. We don't live in
17 a static environment and I think that's
18 precisely what 301(g) does. It gives the
19 flexibility to evaluate economics, the
20 environment, and the state of knowledge all
21 together. Nobody loses any bites at any apple
22 in this context.

1 I'm done, you can have eight
2 seconds, I'm done. Thank you.

3 One thing I do need to clarify, I
4 did say that the AK Steel permits were in the
5 record. They're not, but the facility in the
6 301(g) variance were cited in Region 5's
7 surreply. We'd be glad to supplement the
8 record with those documents.

9 JUDGE MCCABE: Mr. Papajcik you
10 have argued in your submissions that EPA
11 missed its 365 day deadline for taking action
12 on the variance modification application here.

13 And you've also made reference to
14 the amount of time it took EPA to grant the
15 original variance. What consequence do you
16 think there should be if we were to agree with
17 you that EPA was over its 365 day limit?

18 MR. PAPAJCIK: Well frankly, I
19 think the EPA has to make a technical analysis
20 so they have to have the opportunity to make
21 the technical analysis. They miss deadlines
22 all the time and there's not a lot of

1 consequence. I think stepping up to the plate
2 and making the right analysis would be the
3 right thing for them to do.

4 JUDGE MCCABE: Thank you, very
5 much.

6 MR. BRANIGAN: Your Honor, if I
7 may. Region 5 and OGC would offer to make a
8 supplemental briefing regarding the joint
9 position between Region 5 and OGC regarding
10 anti-backsliding, if that would assist the
11 Board in making its decision.

12 JUDGE MCCABE: We'll take that
13 under advisement, thank you for the offer,
14 Counselor.

15 MR. BRANIGAN: Thank you.

16 JUDGE MCCABE: Thank you all very
17 much for excellent arguments here. There is a
18 lot of important policies and ramifications
19 involved in this one permit. As well as very
20 important ramifications for ArcelorMittal's
21 facility itself. So we appreciate the work
22 that you have done and any additional work we

1 might ask you to do after this.

2 So we wish you God's speed, safe
3 travels home, and thank you all for coming.

4 MS. DURR: All rise. This session
5 of the Environmental Appeals Board is now
6 stands adjourned.

7 (Whereupon, hearing in the above-
8 entitled matter was concluded at 11:43 a.m.)

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This is to certify that the foregoing transcript

In the matter of: ARCELORMITTAL CLEVELAND, INC.

Before: US EPA EAB

Date: 02-28-12

Place: Washington, DC

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