# AR-40

# IN RE ARCELORMITTAL CLEVELAND INC.

NPDES Appeal No. 11-01

***REMAND ORDER***

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Decided June 26, 2012

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## Syllabus

In April 2010, ArcelorMittal Cleveland Inc. ("Arcelor") requested that the Ohio Environmental Protection Agency ("Ohio EPA"), which administers the Clean Water Act ("CWA") National Pollutant Discharge Elimination System permit program in Ohio, approve an increase in the current permit limits for ammonia-nitrogen discharges from two iron blast furnaces at Arcelor's Cleveland steel mill. Ohio EPA agreed that Arcelor's proposed new limits would meet the water quality protection and other requirements of applicable law, and proposed to approve the requested increase.

The proposed increase in Arcelor's effluent limits also requires the approval of Region 5 ("Region") of the U.S. Environmental Protection Agency ("EPA"), which authorized the current permit limits in 2001 through a CWA section 301(g) "variance" that allows the discharge to exceed best available technology limits. On June 23, 2011, EPA determined that the request to modify the effluent limits in the variance was time-barred by CWA section 301(j)(1)(B). That provision requires section 301(g) variance applications to be submitted within 270 days of December 27, 1977, or the issuance of applicable effluent guidelines (May 1982 in this case), whichever is later. There is no dispute among the parties that predecessor owners of the Cleveland mill timely applied for the current variance.

On August 26, 2011, Arcelor appealed the Region's denial to the Environmental Appeals Board ("Board"). The question presented in the appeal is whether the plain language of the CWA precludes EPA from modifying the effluent limits in a previously approved section 301(g) variance, once the original 270-day statutory time limit for variance applications imposed by section 301(j)(1)(B) has passed.

Held: The Board holds that the Region clearly erred in concluding that the plain language of section 301(j)(1)(B) precludes EPA from modifying the effluent limitations in a previously granted section 301(g) variance. The statute is silent on the question presented. The Board notes that EPA has discretion to interpret the statute in a reasonable manner, but finds that the Agency has not issued an authoritative interpretation or policy on the question presented. The Board therefore remands the case to the Region for reconsideration and to make a prompt decision on Arcelor's application consistent with this opinion.

***Before Environmental Appeals Judges Catherine R. McCabe, Kathie A. Stein, and Anna L. Wolgast.***

***Opinion of the Board by Judge McCabe:***

## I. *STATEMENT OF THE CASE*

ArcelorMittal Cleveland Inc. ("Arcelor") seeks to modify certain effluent limitations in its Clean Water Act ("CWA" or "Act") National Pollutant Discharge Elimination System ("NPDES") permit for wastewater discharges from two blast furnaces at its Cleveland, Ohio, steel mill. The current permit's effluent limitations for ammonia-nitrogen ("ammonia-N") discharges from the furnaces are authorized by a "variance" granted by Region 5 of the U.S. Environmental Protection Agency ("EPA" or "Agency") under section 301(g) of the Act, 33 U.S.C. § 1311(g).

In 2010, following an interruption and restart of operations at the blast furnaces, Arcelor began to have difficulty meeting the current ammonia-N limits in its permit, and applied to the NPDES permitting authority, the Ohio Environmental Protection Agency ("Ohio EPA"), to modify those limits to make them less stringent. Ohio EPA proposed to grant Arcelor's request for a permit modification, which requires EPA's approval of a corresponding modification to the section 301(g) variance limits for ammonia-N. Ohio EPA concluded that the proposed modified limits will continue to satisfy the substantive section 301(g) requirements for variances, including protection of water quality, and recommended that Region 5 approve the variance modification.

Region 5 denied this request on the ground that it is time-barred by CWA section 301(j)(1), which requires section 301(g) variance applications to be submitted within 270 days of December 27, 1977, or the issuance of applicable industry effluent guidelines, whichever is later. In this case, the applicable effluent guidelines were issued in 1982. While acknowledging that the predecessor owners of the Cleveland mill timely applied for the original variance (which the Region granted in 2001), the Region concluded that it now lacks statutory authority to modify the effluent limits in the variance.

In this appeal, Arcelor contends that the Region has made a clear error of law in concluding that its request to modify the effluent limits in its previously granted section 301(g) variance is time-barred. Arcelor asks the Environmental Appeals Board ("Board") to reverse the Region's denial and direct initiation of permit modification proceedings to incorporate its proposed new ammonia-N effluent limits.

For the reasons explained below, the Board concludes that the Region's decision is based on a clear error of law, and remands this case to the Region for further action consistent with this decision.

## II. *ISSUE ON APPEAL*

The question presented in this appeal is whether the plain language of the statute precludes the Agency from modifying the effluent limits in a previously approved CWA section 301(g) variance, once the original 270-day statutory time limit for variance applications imposed by section 301(j)(1)(B) has passed.

## III. *SUMMARY OF DECISION*

The Board holds that the Region clearly erred in concluding that the plain language of CWA section 301(j)(1)(B) precludes the Agency from modifying the effluent limitations in a previously granted section 301(g) variance.

## IV. *JURISDICTION AND STANDARD OF REVIEW*

The Board has jurisdiction over appeals of variance decisions under 40 C.F.R. section 124.64(b). The Board will grant review of such decisions in cases where a petitioner demonstrates that the variance decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion or an important policy consideration that the Board should, in its discretion, review. 40 C.F.R. § 124.19(a). In this appeal, the Board considers the issue presented to determine whether it is based on a clearly erroneous conclusion of law.

## V. *STATUTORY AND REGULATORY BACKGROUND*

### A. *The Statute*

Section 301(g) of the Clean Water Act provides the Administrator of EPA with the statutory authority to grant modifications (also known as "waivers" or "variances")[1] of the Act's stringent "best available technology" ("BAT") pollution

[1] As set forth above, the statute uses the terms "modify" and "modification" to refer to Agency actions allowing permit effluent limits to be set at levels that do not meet the treatment requirements otherwise prescribed by the statute. In the legislative history for § 301(g), Congress frequently used the term "waiver" to describe these modifications. EPA's regulations use the term "variance" to refer to
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control requirements[2] for certain "nonconventional pollutants," including ammonia.[3] Section 301(g) reads, in pertinent part, as follows:

> (1) The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section [i.e., BAT] with respect to the discharge from any point source of ammonia * * * .
>
> (2) A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that –
>
> (A) such modified requirements will result at a minimum in compliance with the ["best practicable technology" or "BPT"] requirements * * * ;
>
> (B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and
>
> (C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water[,] and such modifica-

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(continued)
"any mechanism or provision under section 301 * * * [that] allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA." 40 C.F.R. § 122.2. The terms "modification," "waiver," and "variance" frequently were used interchangeably in the briefs and statements at oral argument on this appeal. To avoid confusion, the Board will use the term "variance" throughout this opinion to refer to Agency determinations granting modifications under § 301(g).

[2] The CWA establishes several categories of technology-based effluent treatment standards, including a baseline "best practicable control technology currently available" or "BPT" category, along with a more stringent BAT category, which represents the "best available technology economically achievable." CWA § 301(b)(1)(A), (2)(A), 33 U.S.C. § 1311(b)(1)(A), (2)(A). The Act requires the imposition of progressively more stringent technology-based effluent limits through the years, to ensure "reasonable further progress toward the national goal of eliminating the discharge of all pollutants." CWA § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A); *see* CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1).

[3] The CWA establishes three categories of pollutants: (1) "conventional pollutants," which include biochemical oxygen demand, total suspended solids, pH, fecal coliform, and oil and grease; (2) "toxic pollutants," which cause death, disease, or severe physical impairment in organisms upon exposure, ingestion, or inhalation; and (3) "nonconventional pollutants," which are neither conventional nor toxic. *See* CWA §§ 304(a)(4), 307(a), 502(13), 33 U.S.C. §§ 1314(a)(4), 1317(a), 1362(13); 40 C.F.R. § 401.15-.16 (lists of toxic and conventional pollutants); *accord Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 110 n.5 (D.C. Cir. 1987).

> tion will not result in the discharge of pollutants in quantities [that] may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

CWA § 301(g)(1)-(2), 33 U.S.C. § 1311(g)(1)-(2).

Section 301(j) provides time deadlines for facilities to apply for section 301(g) variances. That section reads, in pertinent part, as follows:

> (1) Any application filed under [section 301] for a modification of the provisions of -
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> * * *
>
> (B) subsection (b)(2)(A) of this section [i.e., the BAT requirements] as it applies to pollutants identified in subsection (b)(2)(F) of this section [including ammonia] shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline * * * or not later than 270 days after December 27, 1977, whichever is later.

CWA § 301(j)(1)(B), 33 U.S.C. § 1311(j)(1)(B).

B. *Legislative History*

Congress added section 301(g) to the Clean Water Act in 1977. *See* Clean Water Act of 1977, Pub. L. No. 95-217, § 43, 91 Stat. 1566, 1583 (1977). The Senate Committee on Environment and Public Works ("Senate Committee" or "Committee") explained that the section 301(g) waiver bill "intends to give [EPA] a *safety val[v]e* in the event that the courts find [EPA] does *not* have flexibility in administering the 1983 [BAT] requirements for industries." S. Rep. No. 95-370, at 41 (1977) (emphases added). The bill "authorizes a case-by-case exemption for industries" that demonstrate, to EPA's satisfaction, that their discharges will fulfill all the qualifying criteria in the statute. *Id.* "This approach allows the discharger to demonstrate no adverse effect of pollutants in his discharge and have his requirement reduced." *Id.* The Committee also noted that section 301(g) is intended to allow modification of BAT requirements where water quality goals are otherwise being met, thereby preventing unnecessary "treatment for treatment's sake." *Id.* at 44.

In 1977, the statutory language of section 301(g) specified that the Agency "*shall modify*" BAT limits in cases where the owner or operator of a point source demonstrates, to the Administrator's satisfaction, that the modified limits meet the

required statutory conditions. In 1987, Congress changed this language to provide that EPA "*may modify*" the BAT requirements (rather than "*shall modify*") if it is satisfied that all the listed qualifying conditions (now set apart in a new subsection (g)(2)) are fulfilled. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 302, 101 Stat. 7, 30 (1987).

Congress included the 270-day deadline for variance applications in section 301(j)(1) at the same time it enacted section 301(g) in 1977. The Senate Committee explained that Congress was concerned that the BAT waiver process "not become a means for delay."[4] S. Rep. No. 95-370, at 42. Reflecting a continuing concern for timeliness, in 1987 Congress added a new provision that imposed a 365-day statutory deadline on EPA decisions to grant or deny section 301(g) variance applications. Pub. L. No. 100-4, § 302(c)(2), 101 Stat. at 32 (codified at CWA § 301(j)(4), 33 U.S.C. § 1311(j)(4)).

C. *Regulatory History*

EPA's regulations for section 301(g) variances are found at 40 C.F.R § 122.21(m)(2). That provision establishes a two-stage application process for variance requests. In the first stage, an applicant must submit a brief "initial request," supplying minimal information such as the facility name, permit and outfall numbers, and applicable effluent limitation guideline. 40 C.F.R. § 122.21(m)(2)(i)(A). In the second stage, the applicant must submit a "completed request," which sets forth site-specific facts and data needed to demonstrate that all section 301(g)(2) criteria are fulfilled. *See id.* § 122.21(m)(2)(i)(B).

EPA developed this two-stage process to address a practical dilemma that developed after enactment of the 1977 amendments. Congress' initial 270-day deadline for section 301(g) waiver applications (for sources in industries for which effluent guidelines already had been issued) fell on September 25, 1978. By early September 1978, however, the Agency had not promulgated final criteria instructing dischargers how to comply with the application requirements. EPA published an Interim Final Rule on September 13, 1978, to inform dischargers of the fast-approaching deadlines for filing section 301(g) applications and to give them at least some rudimentary guidelines on how to apply for modifications. 43 Fed. Reg. 40,859 (Sept. 13, 1978). EPA justified these rules (which were not subject to prior notice and comment) on the ground that once the relevant 270-day application windows closed, dischargers would be ineligible for section 301(g) variances. *Id.* at 40,859. The Agency also stated that it was in the process of de-

[4] The Committee observed that "great abuse" of a "very limited" thermal exception provided in the 1972 Clean Water Act had, in essence, caused heat to become an unregulated pollutant, which "clearly [was] not the intent of Congress." S. Rep. No. 95-370, at 7-8.

veloping more-detailed regulatory criteria to implement section 301(g). *Id.* at 40,860.

The more-detailed regulatory criteria EPA promised in 1978 never materialized. On August 7, 1984, EPA proposed a rule that would have established procedures, standards, and criteria for implementing section 301(g). *See* NPDES Water Quality Variances, 49 Fed. Reg. 31,462 (proposed Aug. 7, 1984). EPA never finalized this rule or reproposed a modified version.

In 1985, about a year after EPA issued the proposed (but never finalized) section 301(g) rules, the Agency issued a manual to guide implementation of those rules. *See* 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)* (undated) ("Manual"). The Manual mainly addresses technical issues such as biomonitoring, mixing zones, pollutant fate and transport modeling, and related matters. *See, e.g., id.* at 16-17, 28-35.

D. *The State of Ohio's Role*

In the State of Ohio, Ohio EPA operates the NPDES permit program under a March 1974 grant of authority from EPA. *See* 39 Fed. Reg. 26,061 (July 16, 1974); Ohio Admin. Code ch. 3745-33 (2011) (Ohio NPDES Individual Permits). In situations where, as here, a state is the NPDES permitting authority, that state may deny the applicant's request for a section 301(g) variance or forward the completed request to EPA with a written concurrence. 40 C.F.R. § 124.62(e)(2); *see* Ohio Admin. Code 3745-33-04(D)(2). EPA has final authority to grant or deny the request. CWA § 301(g)(1), 33 U.S.C. § 1311(g)(1); 40 C.F.R. § 124.62(f). Appeals of the Agency's section 301(g) decisions may be made to the Board, in accordance with the permitting regulations at 40 C.F.R. § 124.19. 40 C.F.R. § 124.64(b).

## VI. *FACTUAL AND PROCEDURAL HISTORY*

Arcelor owns and operates a large steel manufacturing facility at 3060 Eggers Avenue in Cleveland, Ohio. The facility is situated on approximately 800 acres along the Cuyahoga River, about five miles upstream from the confluence of the Cuyahoga River with Lake Erie. The steel mill was originally constructed in the late 1800s and began manufacturing operations around 1898. Over the years, the mill has been owned and operated by a series of steel companies, including Republic Steel Corporation, Jones & Laughlin Steel Corporation, LTV Steel Company, Inc., ISG Cleveland Inc., and now ArcelorMittal Cleveland Inc. *See, e.g.*, Administrative Record ("AR") -1 to -13.

Each of these companies has, in its turn, taken steps to obtain and/or continue section 301(g) variances for ammonia-N discharges from Outfall 604, which serves two iron blast furnaces at the mill. Republic Steel began the effort when, on September 21, 1978, it filed a brief initial request for section 301(g) variances for discharges from eleven separate outfalls at the steel mill, including Outfall 604. *See* Letter from D.H. Clark, Vice President Operations, Republic Steel Corp., to Regional Administrator, EPA Region 5 (Sept. 21, 1978) (AR-1).

On May 27, 1982, EPA promulgated final effluent limitations guidelines for the Iron and Steel Manufacturing Point Source Category. *See* 47 Fed. Reg. 23,258 (May 27, 1982), *as amended*, 47 Fed. Reg. 41,738 (Sept. 22, 1982). The effluent guidelines included new BAT standards for, among other things, the Ironmaking Subcategory. *See id.* at 23,291 (codified as amended at 40 C.F.R. § 420.33(a)) (iron blast furnace BAT limits). Approximately 270 days later, on February 17, 1983, Republic Steel filed a more detailed request for section 301(g) variances for ammonia and phenol discharges from three blast furnace-related outfalls at the mill, including Outfall 604. *See* Letter from William L. West, Director, Environmental Control, Republic Steel Corp., to EPA Region 5 (Feb. 17, 1983) (AR-2). Republic Steel submitted further information to supplement its request on March 31, April 19, and June 9, 1983. Ten years later, on February 18, 1993, Jones & Laughlin Steel, the new owner of the facility, submitted additional information. *Id.* at 1 n.6.

In 2001, the Region recommended approval of the ammonia-N variance for LTV Steel Company, the then-owner/operator of the Cleveland mill.[5] *See* Letter from David A. Ullrich, Acting Regional Administrator, EPA Region 5, to Lisa Morris, Chief, Division of Surface Water, Ohio EPA, & attach. (Mar. 14, 2001) (AR-8). Ohio EPA proceeded to incorporate modified effluent limits in LTV Steel's September 2001 NPDES permit for ammonia-N discharges through Outfall 604. *See* Ohio EPA, NPDES Permit No. 3ID00003*LD (OH0000957), LTV Steel Company, Inc., Cleveland Wastewater Treatment Works pt. I.A, at 5 (Sept. 27, 2001) (AR-9).

After Arcelor purchased the steel mill, Ohio EPA subsequently issued that company an NPDES permit on June 30, 2008, which continued the existing modified ammonia-N limits issued to LTV Steel. *See* Ohio EPA, NPDES Permit No. 3ID00003*OD (OH0000957), ArcelorMittal Cleveland Inc., Cleveland Was-

[5] In this interim twenty-odd-year period before EPA Region 5 approved the ammonia variance, Ohio EPA issued administrative orders that directed the steel mill owners/operators to comply with the proposed modified ammonia effluent limits. *See* AR-8 attach. at 1-2 & nn.3-7. In this way, Ohio EPA essentially allowed the variance to go into effect even though the Region had not acted one way or the other on the variance request. To the Board's knowledge, the Region has not provided any explanation for the twenty-year delay in decisionmaking on this steel mill's requested ammonia-N variance.

tewater Treatment Works pt. I.A, at 24 (June 30, 2008) (AR-15). The June 2008 permit is presently in effect, with a scheduled expiration date of January 31, 2013. *Id.* at 1.

On April 13, 2010, Arcelor submitted to Ohio EPA an "Application for Modification of Ohio NPDES Permit," in which Arcelor requested an increase under its section 301(g) variance of the allowable ammonia-N loading at Outfall 604.[6] *See* ArcelorMittal Cleveland Inc., *NPDES Permit Modification Request, Section 301(g) Variance for Ammonia-N, Outfall 604* (Apr. 13, 2010) (AR-17). In 2008, Arcelor had for economic reasons idled the two iron blast furnaces discharging to Outfall 604, but the company resumed those furnaces' production when ironmaking demand rose again in late 2009. The effluent from the restarted furnaces contained unusually high ammonia-N concentrations, which placed Arcelor in jeopardy of exceeding the long-standing variance-based effluent limits at Outfall 604. *See id.* attach. 1, at 3-4. Arcelor investigated but failed to determine the cause of the increased ammonia concentrations. It therefore requested the less stringent ammonia-N effluent limits, asserting that "the relevant NPDES permit regulations allow such an increase in limits." *Id.* summary at 1.

Ohio EPA reviewed Arcelor's proposed new ammonia-N limits and determined that they were at least as stringent as BPT limits, met the wasteload allocation assigned the steel mill for discharges into the Cuyahoga River, and fulfilled all other applicable CWA requirements. *See* Letter from George Elmaraghy, Chief, Division of Surface Water, Ohio EPA, to Kevin Pierard, EPA Region 5 (June 14, 2010) (AR-21). Accordingly, on June 14, 2010, Ohio EPA forwarded Arcelor's application to EPA Region 5, seeking concurrence with its determination that Arcelor's request met the requirements of section 301(g). *Id.*

A year after Ohio EPA forwarded Arcelor's application, on June 23, 2011, the Region issued a letter denying Arcelor's request to increase the ammonia-N limits authorized under its variance. *See* Letter from Susan Hedman, Regional Administrator, EPA Region 5, to Scott J. Nally, Director, Ohio EPA (June 23, 2011) (AR-39). The Region noted that applications for modified limits must be

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[6] The present and requested ammonia-N limits are as follows:

| Season | Current Ammonia-N Limits (kg/day) | Requested Ammonia-N Limits (kg/day) | Percent Increase |
|---|---|---|---|
| Summer | 62.4 (30-day average)<br>85.6 (daily maximum) | 224 (30-day average)<br>294 (daily maximum) | 259%<br>243% |
| Winter | 81.6 (30-day average)<br>211 (daily maximum) | 224 (30-day average)<br>294 (daily maximum) | 175%<br>39% |

AR-21; EPA Region 5, Brief in Opposition to Informal Appeal 10 (Oct. 21, 2011).

submitted within 270 days of EPA's promulgation of applicable effluent guidelines and, because the Agency had last promulgated relevant BAT limits for ammonia-N discharges from iron blast furnaces on May 27, 1982, variance applications would have been due in February 1983. *Id.* The Region explained that Arcelor's application, coming in twenty-seven years later than the statutory deadline, is time-barred. *Id.*

On August 4, 2011, Arcelor sought reconsideration of the Region's decision, and on August 18, 2011, the Region affirmed its denial. *See* Letter from Tinka G. Hyde, Director, Water Division, EPA Region 5, to Stan Rihtar, Environmental Manager, ArcelorMittal Cleveland Inc. (Aug. 18, 2011). The Region acknowledged that Arcelor's predecessor (Republic Steel) had filed a timely variance application for ammonia-N discharges from the Cleveland facility in 1983, but it pointed out that it had "previously approved that application." *Id.* at 2. The Region explained that the outcome is different this time because the CWA "does not include special provisions for applications to modify alternate [i.e., variance-based] limits previously approved by EPA under CWA Section 301(g)." *Id.*

On August 26, 2011, Arcelor filed this appeal with the Board. ArcelorMittal Cleveland Inc., Informal Appeal of NPDES Permit Modification Denial (Aug. 26, 2011) ("ArcMitt Appeal"). The Region filed a response to the appeal on October 21, 2011, per a Board scheduling order. *See* EPA Region 5, Brief in Opposition to Informal Appeal (Oct. 21, 2011) ("R5 Response"). Arcelor filed a reply on November 4, 2011. ArcelorMittal Cleveland Inc., Reply in Support of Informal Appeal (Nov. 4, 2011) ("ArcMitt Reply"). With permission of the Board, the Region filed a surreply on January 6, 2012, addressing specific issues identified by the Board. EPA Region 5, Surreply Brief (Jan. 6, 2012) ("R5 Surreply"). On January 20, 2012, Arcelor filed a reply to the Region's surreply. ArcelorMittal Cleveland Inc., Reply to EPA Region 5 Surreply (Jan. 20, 2012) ("ArcMitt 2d Reply"). The Board heard oral argument in this case on February 28, 2012, and subsequently requested supplemental briefing. *See* Oral Argument Transcript ("OA Tr."). On March 23, 2012, the parties filed supplemental briefs in accordance with the Board's order.[7] *See* ArcelorMittal Cleveland Inc., Supplemental Brief as Ordered by the Board (Mar. 23, 2012) ("ArcMitt Supp. Br."); EPA Region 5, Supplemental Brief (Mar. 23, 2012) ("R5 Supp. Br.").

## VII. *ANALYSIS*

The issue presented in this appeal is whether the plain language of the statute precludes the Agency from modifying the effluent limits in a previously ap-

[7] The Board denies the Region's motion to strike part of Arcelor's supplemental brief or, in the alternative, to file a reply brief.

proved CWA section 301(g) variance, once the original 270-day statutory time limit for variance applications imposed by section 301(j)(1)(B) has passed.[8] For the reasons explained below, the Board concludes that the plain language of the statute does not preclude the Agency from granting such a modification. In denying Arcelor's application on this basis, the Region made a clear error of law. Whether or not to grant a modification of a previously issued section 301(g) variance remains within the Agency's discretion.

A. *The Statute Is Silent on the Question of Whether Previously Granted Section 301(g) Variances May Be Modified*

The starting point for interpreting any statute is the language of the statute itself. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("[the] first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case"); *In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 512 (EAB 2004). On its face, section 301(g) grants broad discretion to the Agency, by providing that the Administrator, with the concurrence of the state, "may modify" otherwise-applicable BAT treatment requirements whenever the Administrator is satisfied that the conditions of section 301(g)(2) have been demonstrated. *See* CWA § 301(g)(1)-(2), 33 U.S.C. § 1311(g)(1)-(2). Congress' 1987 decision to amend the operative language of this statutory provision from "shall modify" to "may modify" plainly evidences an intent to invest the Agency with discretion in making this determination. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005) ("[t]he word 'may' customarily connotes discretion"); *In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 142 (EAB 2005) ("if the Agency lacked such discretion one would expect that the mandatory word 'shall' would appear instead of the permissive word 'may'").

In this case, EPA Region 5 has not exercised its discretion to determine whether the statutory criteria of section 301(g)(2) have been met and whether the modification of variance limits sought by Arcelor and recommended by Ohio EPA should be granted. Instead, as a threshold matter, Region 5 views the plain language of the statutory time bar of section 301(j)(1)(B) as precluding the

[8] In its reply briefs, Arcelor also argued that Region 5 exceeded the statutory deadline of CWA § 301(j)(4), which requires decisions on variance applications to be made within 365 days. ArcMitt Reply at 12 n.16; ArcMitt 2d Reply at 9-10. The Region denies that it took more than 365 days to deny Arcelor's request. R5 Surreply at 18-20. At oral argument, Arcelor essentially dropped this claim, noting, *inter alia*, that the statute specifies no particular consequence for missing this deadline in any event. *See* OA Tr. at 72-73. Since Arcelor raised this issue for the first time in its first reply brief, the issue was not properly preserved for appeal. *E.g., In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 724 (EAB 2006); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 220 n.62 (EAB 2000); *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). Therefore, the Board declines to reach this issue.

Agency from granting any modification of the effluent limits established by the previously granted variance.

Region 5 does not dispute that the predecessor owners of the Cleveland mill timely filed the original applications for the section 301(g) variance, beginning in 1978, or that the Region granted that variance in 2001. However, the Region contends that the original 270-day statutory deadline applies anew to Arcelor's current request to modify the effluent limits in the variance. In effect, the Region argues that section 301(g) variances, once timely applied for and granted, cannot be modified. The parties have referred to this argument as the "once and done" interpretation of the statute. *See* ArcMitt Appeal at 8; ArcMitt Reply at 7; R5 Surreply at 10; OA Tr. at 16, 33; R5 Supp. Br. at 1.

The Board does not agree with the Region that the plain language of section 301(j)(1)(B) provides a clear bar to the Agency's authority to modify variances, once timely applied for and granted. Rather, section 301(j)(1)(B), as set forth in Part V.A above, is silent on this issue. The Region points to the statutory language requiring "*[a]ny application*" for a variance to conform to the statutory deadline. *See* R5 Response at 14; R5 Surreply at 6, 20. However, this very general language does not answer the question of whether a request to modify limits in an existing variance constitutes an application for a *new* variance, as the Region contends, retriggering the original statutory deadline, or whether it is simply a request to modify an existing variance that was granted pursuant to a prior, timely application. The use of the words "any application" sheds no meaningful light on that issue.[9]

Moreover, the Region's argument that "any application" must include requests to modify existing variance effluent limits is somewhat inconsistent with the Region's opposite approach to requests to *renew* variances. The Region admits that it routinely grants requests to renew variances when permits expire, without raising the original 270-day deadline of section 301(j)(1)(B) as a bar. *See* R5 Surreply at 4, 18. The Region explains its authority for routinely granting variance renewals by pointing out that the statute does not provide a termination date for variances. Thus, the Region effectively interprets the statutory silence on this issue as authority to grant renewals. In contrast, the Region emphasizes that there is no specific statutory authorization for modification of previously granted variances – in effect, interpreting statutory silence in that case to *preclude* its author-

[9] The Board recognizes that the word "any" can have a very broad meaning. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (quoting Webster's Third New International Dictionary 97 (1976)). However, its use in this statutory context can be read in a number of ways and does not require the result the Region urges.

ity to grant such requests. The Region has not provided a reasonable explanation for this inconsistency in its interpretation of statutory silence.

The Region also contends that it has the authority to modify variance limits to make them more stringent, but not less stringent. *See* OA Tr. at 33-47. This position likewise seems inconsistent with the Region's argument that there is no statutory authority for modifications of previously granted variances under the time bar of section 301(j)(1)(B).

The Board concludes that the Region has failed to provide a reasonable explanation for its determination that the plain language of section 301(j)(1)(B) precludes its authority to grant modifications to existing variances once the original 270-day time deadline of that section has expired.

B. *The Legislative History Sheds Little Light on the Question Presented*

In light of the statutory silence on the issue of whether the Agency may modify previously granted section 301(g) variances, the Board turns to the legislative history to see whether those records shed any light on Congress' intent with respect to this issue. *See, e.g., Babbitt v. Sweet Home Chapter of Cmtys.*, 515 U.S. 687, 695, 704-05 (1995) (considering legislative history in case where statute did not define critical terms); *Meyers v. United States*, 96 Fed. Cl. 34, 50 (2010) (where statute is silent or ambiguous on precise question at issue, court will examine legislative history to discern congressional intent); *In re N. Mich. Univ.*, 14 E.A.D. 283, 312-14 (EAB 2009) (same).

The Region acknowledges that there is no legislative history clearly stating that Congress intended to preclude modification of a previously granted section 301(g) variance. R5 Surreply at 9. However, the Region contends that the statutory language, "when read together with the legislative history, supports EPA's position that Congress did not intend to allow modifications of the terms of a 301(g) variance in the manner requested by ArcelorMittal."[10] *Id.* Yet, the only specific legislative history the Region calls to the Board's attention is a statement of the Senate Committee regarding renewal of variances, which provides: "If a modification is granted under [section 301(g)], the applicant is expected to make a new demonstration each time the applicable permit expires, for such modification to be granted in the future." S. Rep. No. 99-50, at 18 (1985), *cited in* R5 Surreply at 10-11.

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[10] The Region's brief does not specify what it meant by using the phrase "in the manner requested by Arcelor." The Board inquired at oral argument whether the Region argues that the Agency lacks authority to grant *any* modifications to variance limits, or whether the Agency lacks only the authority to grant the more relaxed effluent limits that Arcelor has requested in this case. OA Tr. at 33. The Region replied that "EPA's position * * * is that once a variance is granted, it can't be modified." *Id.*

This passage was first cited by Arcelor to support its contention that Congress intended that 301(g) variances could be "renewed and/or modified." ArcMitt Reply at 7. The Region argues that, on the contrary, the Senate Committee's use of the term "*such* modification" (emphasis added by Region) shows that the Committee was contemplating only renewal of a variance with the same limits, but not a variance with modified limits. The Board does not agree that, standing alone, the Committee's use of the term "such" compels such a narrow interpretation. The term "such modification" in this context equally well could be a general reference to the prior decision to grant the facility a variance.

The Board finds that both the Region and Arcelor are reading too much into the language of this passage from the legislative history. The passage indicates that the Committee anticipated that section 301(g) variances could be continued into the future, as permits are renewed, so long as the Agency determines that the conditions in section 301(g)(2) continue to be satisfied. It gives no indication that Congress intended to preclude the modification of the variance limits when the section 301(g)(2) conditions are met. At the same time, it falls short of the express congressional endorsement of authority for such modifications that Arcelor suggests.

Neither party has pointed to any other specific legislative history that directly supports their positions or explicitly addresses the question of whether section 301(g) variances may be modified once the original statutory deadline has passed. The Region cites the general statutory and legislative background of the CWA, beginning with the general objectives "'to restore and maintain the chemical, physical, and biological integrity of the Nation[']s waters'" and "'[to eliminate] the discharge of pollutants into the navigable waters * * * by 1985.'" R5 Response at 3 (quoting CWA § 101(a), 33 U.S.C. § 1251(a)). The Region also points out that the 1987 amendments required point sources discharging nonconventional pollutants, including ammonia, to meet applicable BAT-based effluent limitation guidelines by March 31, 1989, *id.*at 4, and emphasizes that "the CWA requires that all discharges of pollutants by industrial point sources must achieve BAT effluent limitations in order to ensure 'reasonable further progress toward the national goal of eliminating the discharge of all pollutants.'" R5 Supp. Br. at 5 (quoting CWA § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A)). The Region observes that "[r]epeated modification of 301(g) limitations to make them less stringent is generally at odds with that objective." *Id.*

Arcelor, for its part, emphasizes the legislative history indicating that Congress' specific purpose in enacting section 301(g) was to enable facilities to "avoid treatment for treatment's sake," when water quality can be adequately protected without meeting BAT standards. *See, e.g.*, ArcMitt Reply at 5-7 (citing S. Rep. No. 95-370, at 44); ArcMitt 2d Reply at 6-7.

The parties' citations to the legislative history highlight the conflicting statutory policy goals that must be reconciled to resolve the question of whether modifications to existing section 301(g) variances should be granted. However, resolution of this issue is a question that neither the plain language of the statute nor the legislative history resolves.[11]

In cases where the statute is silent and where legislative history does not clarify congressional intent, the administrative agency tasked with implementing the statute has some discretion to interpret it. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies * * *.'") (citations omitted); *see Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) ("the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"). The analysis then essentially shifts to an inquiry into the reasonableness of the agency's interpretation. *Chevron*, 467 U.S. at 844-45, 865; *see Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 500 (1998); *In re Deseret Power Elec. Coop.*, 14 E.A.D. 212, 233 (EAB 2008).

### C. *The Agency's Regulations Do Not Address the Question Presented*

The Agency regulation that implements CWA section 301(g), found at 40 C.F.R. section 122.21(m)(2), does not address the question of whether previously granted variances can or should be modified by the responsible Agency decisionmakers.[12] As explained above, that regulation created a two-step application process in 1978 to address the practical problem that arose when the original 270-day deadline imposed by the 1977 amendments was about to expire. Since the Agency had not yet issued final criteria instructing dischargers how to comply with the application requirement, the two-step application process was necessary

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[11] In searching for indications of congressional intent on the question of whether previously granted variances can be modified, the Board considered the potential applicability and interpretive implications of the "antibacksliding" provision of CWA § 402(o), 42 U.S.C. § 1342(o). That provision prohibits relaxation of the effluent limits in certain types of permits, unless specified conditions are met. In their supplemental briefs, both parties argue that § 402(o) is not applicable to this case, for different reasons. Neither party addresses the further question of whether Congress' express prohibition on backsliding in permits carries any interpretive implications for deducing congressional intent with respect to backsliding in variances.

[12] The Administrator has delegated her statutory authority to make determinations under § 301(g) in most cases to the EPA regional administrators. *See* 51 Fed. Reg. 16,028, 16,029-30 (Apr. 30, 1986); EPA Delegations Manual § 2-25 (Apr. 17, 1986).

to preserve dischargers' ability to apply for a variance within the original statutory deadline.

Both parties spend considerable time in their briefs addressing the two-stage variance application process prescribed by section 122.21(m)(2).[13] However, the Board finds nothing in the regulatory language of section 122.21(m)(2) that addresses or bears on the question of whether previously granted section 301(g) variances can or should be modified, once the original statutory deadline for variance applications has passed. The regulation was issued and structured to address a different issue. This provision sheds no meaningful light on the question of whether previously granted variances can be modified.

Arcelor argues that the regulatory provision governing permit modifications, at 40 C.F.R. section 122.62(a), expressly authorizes permit modifications to include section 301(g) variances. ArcMitt Appeal at 7-8. That section includes, among the list of potential causes for permit modification, situations where "the permittee has filed a request for a variance under CWA section * * * 301(g) * * * within the time specified in § 122.21 or § 125.27(a)."[14] 40 C.F.R. § 122.62(a)(5). The Region responds that this provision provides "neither an independent source of authority to approve Section 301(g) variances nor a method of modifying variances previously approved under Section 301(g)." R5 Response at 22. Instead, in the Region's view, Arcelor must apply separately for the section 301(g) variance modification. *See id.* at 20, 22 (arguing that permittees must file requests for variances *under* section 301(g), *within the time* specified in 40 C.F.R. § 122.21, before Ohio EPA can find cause for a permit modification under section 122.62(a)(5)). The Region then reiterates its argument that Arcelor's request for modification of a previously granted variance should be considered a new application and, as such, is untimely under section 301(j)(1)(B).

The Board agrees with the Region that section 122.62(a)(5) authorizes permit modifications but does not specifically authorize variance modifications. The section's title ("Modification or revocation and reissuance of permits") makes that plain. While section 122.62(a)(5) includes applications for section 301(g) variances as one potential cause for a permit modification, it does not expressly authorize section 301(g) variance modifications or provide any procedures expressly governing requests for variance modifications. Nonetheless, section 122.62 is not entirely irrelevant to consideration of requests to modify previously granted vari-

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[13] Arcelor argues that it met the statutory deadline of § 301(j)(1)(B) with its "initial" application. The Region argues that the initial application does not satisfy the § 301(j)(1)(B) deadline as applied to Arcelor's "new" application to modify the effluent limits in its variance.

[14] The time limit specified in § 122.21 is the time limit for permit applications (generally, 180 days before commencing discharge). Section 125.27(a) does not exist in the current regulations.

ances. The causes for permit modification listed in section 122.62(a) (e.g., material and substantial alterations to the permitted facility or activity, or new information) could reasonably be applied to requests to modify variances, as well as requests to modify permits. The Agency could reasonably decide to use the section 122.62 permit modification procedures to provide a merged process for considering both types of requests simultaneously. However, the Agency has not clearly made that choice in its current interpretation of the language of section 122.62.

In sum, the Board finds that the Agency's current interpretation of its regulations does not clearly address the question of whether, or under what conditions, previously granted section 301(g) variances can or should be modified.

D. *The Agency Has Not Issued Any Guidance on the Question Presented*

The only EPA guidance document related to section 301(g) that has been brought to the Board's attention is the technical Manual issued in 1985. As described in Part V.C above, the Manual mainly addresses technical issues such as biomonitoring, mixing zones, pollutant fate and transport modeling, and related matters. *See, e.g.*, Manual at 16-17, 28-35. The Board notes, however, the following passage in the Manual, citing the 1977 legislative history to explain the purpose of section 301(g):

> The legislative history * * * makes it clear that Congress intended relief from promulgated BAT effluent limitations guidelines where warranted. Congress determined that it was possible that the BAT requirements might result in the application of excessive controls to certain kinds of pollutants. Where sufficient information could be generated on these pollutants to make a judgment concerning their effects on receiving water, appropriate relief from unnecessarily stringent limitations should be provided. Congress envisioned that [EPA] would develop a pollutant-specific waiver without affecting necessary BAT limitations on the remainder of the pollutants in the discharge. The enactment of section 301(g) was the result of an effort to eliminate "treatment for treatment's sake" for nonconventional pollutants.

*Id.* at 2-3.

This statement shows the Agency's recognition that Congress intended that "appropriate relief from unnecessarily stringent [BAT] limitations should be provided" when the Agency has sufficient information to make a judgment concerning the effect of less stringent limitations on the quality of the receiving waters.

*Id.* at 2. However, the Manual statement is essentially a reiteration of legislative history. It falls short of stating Agency policy. Moreover, neither this statement nor any other statement in the Manual specifically addresses the question of whether alternate effluent limits in a section 301(g) variance, once granted, should be considered set for all time ("once and done") or open for modification in the future as long as the water quality-related criteria of section 301(g)(2) continue to be met.

The Agency had an opportunity when it issued the 1985 Manual, and has had the opportunity ever since, to announce the "once and done" policy the Region urges as so important to the NPDES permitting program – or any other policy on this issue. Yet, EPA has not done so. The absence of such a policy pronouncement in the Agency's regulations, guidance, or any other document that has been brought to the Board's attention leads us to conclude that the Agency has not yet adopted an authoritative Agency interpretation of the statute with respect to the issue presented, or an Agency-wide policy on how this issue should be resolved.

E. *Conclusions*

1. *The Board Finds That the Region's Denial of Arcelor's Request to Modify the Section 301(g) Variance for the Cleveland Mill Was Based on a Clear Error of Law*

For the reasons explained above, the Board finds that the Region's determination that the plain language of section 301(j)(1)(B) of the Clean Water Act precludes the Agency from modifying the effluent limits in previously granted section 301(g) variances, once the statutory deadline for the original variance application has passed, was clearly erroneous.

2. *The Agency Retains Policy Discretion to Determine Whether Previously Granted Section 301(g) Variances Can or Should Be Modified in the Future*

In light of the absence of guidance in the plain language of the statute on the question of whether section 301(g) variances, once granted, can be modified in the future, the Agency retains discretion to interpret the statute and to develop appropriate policy and direction on this issue. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664-68, 673 (2007); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984). As a result of the Agency's failure to date to provide such guidance in regulations, guidance, or other policy documents, the Region must make a decision on Arcelor's application in this case without the benefit of Agency-wide guidance. The Board recognizes and appreciates the Region's caution, expressed at oral argument, that the decision in this case will set a important precedent for the Agency's entire CWA industrial point source permitting program. *See* OA Tr. at 47.

However, the Region cannot avoid making the decision by invoking the legal argument that the plain language of the CWA does not permit modifications of previously granted section 301(g) variances. As explained above, the plain language of the statute does not require that result. Therefore, the Agency and the Region retain the discretion and the responsibility to make a reasoned decision on Arcelor's application, consistent with all the applicable statutory goals and requirements and the current provisions of the Agency's regulations. As explained above, in using the term "may modify" in section 301(g), Congress afforded the Agency discretion in making this determination, provided the Agency is satisfied that the water-quality related conditions of section 301(g)(2) are met. Section 301(g) does not create a right to a variance upon demonstration of the section 301(g)(2) conditions.

The Board reminds the Agency and the Region that their exercise of policy discretion in making this decision is not unlimited. It must be reasonable and supported by the administrative record. *Chevron*, 467 U.S. at 844-45, 863. Moreover, the degree of deference that the courts will afford to the Agency's decision will vary with the regulatory vehicle chosen. *See United States v. Mead Corp.*, 533 U.S. 218, 227-38 (2001) (discussing deference standards applied to administrative interpretations of various kinds, including rulemaking, adjudication, guidance manuals, policy statements, and opinion letters); *Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000).

## VIII. *ORDER*

Accordingly, the Board remands this case to the Region for reconsideration, in a manner consistent with this decision, of Ohio EPA's recommended approval of Arcelor's request for modified ammonia-N discharge limits under its existing section 301(g) variance for the Cleveland facility.

The Board urges the Region to make its decision in this matter as expeditiously as possible. Arcelor's request for modification of the effluent limits in its section 301(g) variance and its permit has been pending since 2010, and its current permit will expire in January 2013.

After the Region completes its analysis on remand and issues an approval or denial of Arcelor's variance application pursuant to 40 C.F.R. § 124.62(f), anyone dissatisfied with the Region's decision must file a petition seeking the Board's review in order to exhaust administrative remedies pursuant to 40 C.F.R. § 124.19(f)(1)(iii). Any such appeal shall be limited to issues the Region addresses on remand.

So ordered.