

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

In the Matter of:

City of Manchester

NPDES Permit No. NH0100447

NPDES Appeal No. 25-04

**EPA REGION 1’S MOTION FOR LEAVE TO FILE SUR-REPLY**

Pursuant to 40 C.F.R. § 124.19(f), Region 1 of the United States Environmental Protection Agency (“the Region”) hereby moves the Environmental Appeals Board (“Board” or “EAB”) for leave to file the attached sur-reply identifying new arguments raised improperly for the first time in Petitioner’s reply brief. Consistent with 40 C.F.R. § 124.19(f)(2), the Region has ascertained that Petitioner objects to the motion and Permittee City of Manchester concurs with the relief requested in the Motion.

The grounds for the motion are as follows:

1. Petitioner filed its Reply brief on March 16, 2026 (“Reply”).
2. The Reply raises arguments that were not raised in the Petition:
  - a. “. . . the Region’s concurrence with the limited [reasonable potential analysis] – conducted by NHDES... – does not remedy the Region’s clear error and abuse of discretion in failing to conduct its own [reasonable potential analysis] . . . .” (Reply, 7);

- b. “. . . as the permitting authority for a state without a delegated NPDES Program, the Region cannot defer to NHDES’s 401 certification analysis.” (Reply, 7);
  - c. “. . . the Region relies heavily on an NHDES decision that is not yet final.” (Reply, 8);
  - d. “. . . whether to conduct an independent [reasonable potential analysis] is a question of federal regulation . . . not state law.” (Reply, 8);
  - e. “. . . the Region’s concurrence with the state’s [reasonable potential analysis] is *not* equivalent to the Region conducting its own independent analysis.” (Reply, 9) (emphasis in original);
  - f. “. . . the narrative standards, Env-Wq 1703.21(a) and Env-Wq 1703.01(b) account for bioaccumulation, while the numeric criteria do not.” (Reply, 10);
  - g. “. . . the Permit’s [WET] requirement does not account for bioaccumulation of PFAS under state narrative criteria.” (Reply, 10);
  - h. “. . . new industrial users may discharge additional amounts of PFAS to the WWTF, increasing PFAS discharges to the Merrimack River and increasing PFAS in sludge.” (Reply, 22).
3. The Board’s regulations unequivocally prohibit petitioners from raising new issues or arguments in reply briefs. 40 C.F.R. § 124.19(c)(2); *see also, e.g., In re Springfield Water and Sewer Commission*, 18 E.A.D. 430, 457 n.12 (“It is well settled that petitioners may not raise new issues or arguments in their reply briefs.”).
4. This regulation formalized the Board’s long-standing practice on this procedural issue: new arguments and new issues may not be raised in reply briefs submitted after

the permitting authority has responded to a petition for review. *See, e.g., In re BP Cherry Point*, 12 E.A.D. 209, 216 n.18 (EAB 2005) (rejecting new legal argument petitioner introduced for the first time in a reply brief); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) (“... new issues raised for the first time at the reply stage of these proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness.”).

5. The Board has exercised its discretion to grant motions for leave to file sur-reply briefs in cases where new arguments are raised in reply briefs. *E.g., In re City of Keene*, NPDES Appeal No. 21-03 (Feb. 2, 2022) (Order Granting Motion for Leave to File Surreply); *In re Springfield Water & Sewer Commission*, NPDES Appeal No. 20-07 (Feb. 9, 2021) (Order Granting Motion to File Surreply); *In re Arcelor Mittal Cleveland, Inc.*, NPDES Appeal No. 11-01 (EAB Dec. 9, 2011) (Order Granting in Part EPA's Motion to File Surreply, Denying Petitioner's Request to Provide Additional Information, and Granting Oral Argument).

For the reasons set forth above, the Region respectfully requests that the Board grant this Motion and accept for filing the attached sur-reply.

Respectfully submitted,

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Attachment: Sur-reply

**STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS**

I hereby certify that the foregoing Motion contains fewer than 7,000 words in accordance with 40 C.F.R. § 124.19(f)(5).

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**CERTIFICATE OF SERVICE**

By electronic filing, authorized by the Board's Sept. 29, 2025 standing order:

Tommie Madison, Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1201 Constitution Avenue, NW  
U.S. EPA East Building, Room 3332  
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By email, authorized by the Board's Sept. 29, 2025 standing order:

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