

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

5 Post Office Square, Suite 100  
Boston, MA 02109-3912



February 5, 2021

**VIA ELECTRONIC FILING**

Eurika Durr  
Clerk of the Board  
U.S. EPA Environmental Appeals Board  
1200 Pennsylvania Avenue, NW (Mail Code 1103M)  
Washington, D.C. 20460-0001

**RE: Springfield Water and Sewer Commission  
NPDES Permit No. MA0101613; NPDES Appeal No. 20-07**

Dear Ms. Durr:

Please find a Motion for Leave to File Surreply in connection with *In re Springfield Water and Sewer Commission*, NPDES Appeal No. 20-07.

If you have any questions regarding this filing, please contact Mike Knapp of the Office of Regional Counsel at 617.918.1053.

Sincerely,

---

Mike Knapp  
EPA Region 1  
Office of Regional Counsel  
5 Post Office Square  
Boston, MA 02109  
Tel: 617.918.1053  
Fax: 617.918.0053  
E-mail: knapp.michael@epa.gov

cc:

Service List

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

In the Matter of:	)	
	)	
Springfield Water and Sewer Commission	)	
	)	NPDES Appeal No. 20-07
NPDES Permit No. MA0101613	)	
	)	

**EPA MOTION FOR LEAVE TO FILE SURREPLY**

Pursuant to 40 C.F.R. § 124.19(f), Region 1 of the United States Environmental Protection Agency (“EPA”) hereby moves the Environmental Appeals Board (“Board”) for leave to file a surreply in response to Petitioner’s Reply brief. The Board has discretion to grant requests to file surreply briefs and typically does so in cases where new arguments are raised in reply briefs. *E.g., In re Arcelor Mittal Cleveland, Inc.*, NPDES Appeal No. 11-01 at 1 (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); *In re D.C. Water & Sewer Auth*, NPDES Appeal Nos. 05-02, 07-10 to 12, at 1-2 (EAB Aug. 3, 2007) (Order Granting Leave to File Surreply and Accepting Surreply for Filing). This factor is applicable here and counsels in favor of accepting EPA’s surreply in this matter.

The grounds for this motion are as follows:

1. Petitioner filed its Reply brief on Wednesday, January 27, 2021.

2. Upon review, EPA has determined that Petitioner impermissibly raised two new arguments for the first time on reply, contrary to the Board's regulations. 40 C.F.R. § 124.19(c)(1)-(2). Specifically, Petitioner argued for the first time in Section A.2 (p. 7) of the Reply that its nitrogen limit was not "necessary" to address the impairments in LIS" because EPA assigned less stringent limitations to "smaller facilities serving higher-income, suburban populations," compared to those serving "economically challenged inner-city populations," even though the former, Petitioner contends, collectively contribute a greater proportion of the overall load; and, in Section B.1 (pp. 11-14), that it was deprived of a meaningful opportunity to comment under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, on the reclassification of Outfall 042 as a CSO in the Draft Permit because "in the Response to Comments issued with the Final Permit, EPA created an entirely new and different rationale for its reclassification of Outfall 042 as a CSO." Reply at 12.
3. This regulation only formalized what has been the Board's consistent practice on this procedural matter. The Board has long held that 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 sought to introduce for the first time in a reply brief). "[N]ew 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.” *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999).

4. To ensure adherence to the Board’s procedural regulations, and the rationales underlying them, EPA should be allowed to identify these arguments and to concisely respond to them. Providing an opportunity for EPA to respond would not only be equitable but would also promote efficiency and assist the Board in its decision making.
5. EPA has endeavored to analyze the Reply and to finalize a response as quickly as possible. EPA is prepared to file its surreply immediately upon the Board’s ruling on this motion.
6. EPA contacted Petitioner’s counsel to ascertain its position on this motion. Petitioner’s counsel objects to this Motion.

For the reasons set forth above, and in the interest of promoting efficiency, EPA respectfully requests that the Board grant this Motion for Leave to Submit a Surreply.

Dated: February 5, 2021

Respectfully submitted,

U.S. EPA – Region 1

---

Michael Knapp, Esq.  
Samir Bukhari, Esq.  
Kristen Scherb, Esq.  
US Environmental Protection Agency  
Office of Regional Counsel, Region 1

Of Counsel:

Pooja Parikh, Esq.

Peter Ford, Esq.  
Water Law Office, Office of General Counsel

Dated: February 5, 2021

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to File a Surreply, connection with *In re Springfield Water and Sewer Commission*, NPDES Appeal No. 20-07, was sent to the following persons in the manner indicated:

By Electronic Filing:

Ms. Eurika Durr  
Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1201 Constitution Avenue, NW  
U.S. EPA East Building, Room 3334  
Washington, DC 20004

By Electronic Mail:

*Attorneys for the City of Springfield*  
Fredric P. Andes  
Erika K. Powers  
Ashley E. Parr  
Barnes & Thornburg LLP  
One North Wacker Drive, Suite 4400  
Chicago, IL 60647  
(312) 357-1313  
[Fredric.Andes@btwlaw.com](mailto:Fredric.Andes@btwlaw.com)  
[Erika.Powers@btlaw.com](mailto:Erika.Powers@btlaw.com)  
[Ashley.Parr@btlaw.com](mailto:Ashley.Parr@btlaw.com)

*Attorney for Save the Sound, Inc.*  
Roger Reynolds  
Senior Legal Counsel  
Save the Sound, Inc.  
900 Chapel Street, Suite 2202  
New Haven, CT 06510  
(203) 787-0646 Ext. 105  
[rreynolds@savethesound.org](mailto:rreynolds@savethesound.org)

*Connecticut River Conservancy Representative*  
Andrea Donlon, River Steward  
Connecticut River Conservancy

15 Bank Row Greenfield, MA 01301  
(413) 772-2020 Ext. 205  
[adonlon@ctriver.org](mailto:adonlon@ctriver.org)

*Attorney for Connecticut Department of Energy and Environmental Protection*  
Scott N. Koschwitz  
Assistant Attorney General  
165 Capitol Avenue Hartford, CT 06106  
(860) 808-5250  
[scott.koschwitz@ct.gov](mailto:scott.koschwitz@ct.gov)

Dated: February 5, 2021

---

Michael Knapp, Esq.  
Samir Bukhari, Esq.  
Kristen Scherb, Esq.  
US Environmental Protection Agency  
Office of Regional Counsel, Region 1