



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

In re:
City of Keene
NPDES Permit No. NH-0100790
NPDES Appeal No. 21-03

ORDER GRANTING MOTION FOR LEAVE TO FILE SURREPLY

On January 21, 2022, EPA Region 1 ("Region") filed a motion seeking leave to file a surreply in response to the reply brief filed by Petitioner City of Keene ("Petitioner"). EPA Region 1's Mot. for Leave to File Surreply (Jan. 21, 2022) ("Motion"). In support, the Region contends that Petitioner raises three new arguments in its reply, contrary to the regulations governing this appeal at 40 C.F.R. § 124.19(c) and that the Petitioner's reply "improperly attempts to wholly recharacterize Petitioner's original request for a copper special condition." Id. at 2. Petitioner opposes the Motion, contending that the arguments raised in its reply respond to the Region's arguments and supporting documents, and that there is no recharacterization related to the copper issue nor is it a basis for allowing a surreply. City of Keene, NH Objection to EPA Region One Mot. For Leave to File Surreply 2-6 (Jan. 25, 2022) ("Opp'n"). In reply, the Region asserts that Petitioner's arguments were reasonably ascertainable earlier in the appeal, and that Petitioner could have raised them in its comments or the petition. EPA Region 1's Reply to Pet'r's Opp'n to the Region's Mot. For Leave to File Surreply 1 (Jan. 31, 2022)

("Reply"). The Region states that it is prepared to file a concise surreply upon the granting of the Motion. Motion at 2; Reply at 2.

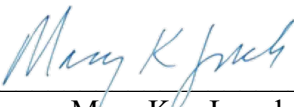
The Environmental Appeals Board ("Board") has discretion to grant a motion for leave to file a surreply. 40 C.F.R. § 124.19(n). The Board typically exercises its discretion to grant leave to file a surreply "where allegations arise that a reply brief raises new arguments or where further briefing would otherwise assist the Board in resolving disputed issues." *In re Granite Shore Power Merrimack L.L.C.*, NPDES Appeal No. 20-05, at 2 (EAB Nov. 24, 2020) (Order Granting Motion for Leave to File Surreply).¹

At this juncture in the case, the Board makes no determination as to whether the Region is correct that Petitioner's reply raises new arguments or improperly recharacterizes Petitioner's original request. However, based upon the current record, the Board finds that a surreply would assist the Board in its decisionmaking process and resolving disputed issues. Accordingly, the Board **GRANTS** the Region's Motion. The Board further **ORDERS** that the Region file its surreply as soon as possible but no later than **Friday, February 4, 2022**.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated:

By: 

Mary Kay Lynch
Environmental Appeals Judge

Feb 02, 2022

¹ The Petitioner incorrectly characterizes prior Board case law as standing for the proposition that the Board's discretion is "only properly exercised in cases where * * * new arguments or issues are raised in reply briefs." Opp'n at 1.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing **ORDER GRANTING MOTION FOR LEAVE TO FILE SURREPLY** in the matter of *City of Keene*, NPDES Appeal No. 21-03, were sent to the following persons by electronic mail:

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Dated: Feb 02, 2022



Emilio Cortes
Clerk of the Board