

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

In the Matter of:

City of Keene

NPDES Permit No. NH0100790

NPDES Appeal No. 21-03

**EPA REGION 1'S MOTION FOR LEAVE TO FILE SURREPLY**

Pursuant to 40 C.F.R. § 124.19(f), Region 1 of the United States Environmental Protection Agency (“the Region”) hereby moves for leave to file a surreply in response to Petitioner’s Reply brief. The Environmental Appeals Board (“Board”) has discretion to grant leave 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 the Region’s surreply in this matter. The grounds for this motion are as follows:

1. Petitioner filed its reply brief (“Reply”) on January 6, 2022.

2. Upon review, the Region has determined that Petitioner’s Reply impermissibly raised three new arguments for the first time, contrary to the Board’s regulations. 40 C.F.R. § 124.19(c). Specifically, Petitioner argued for the first time:
  - a. The Region “improperly substituted NHDES's judgment for its own and ... [thus] wholesale defer[red] to a non-delegated state program...” *Reply* at 4; *see also id.* at 3, 8; and
  - b. The disputed aluminum special condition is proper because a similar condition “has been approved by the Board in other NPDES permits...” *Id.* at 13; and
  - c. “By not including ... a special condition tied to the current, but not yet effective, [aluminum] limit, a new effluent limit, if any, may be barred by anti-backsliding requirements.” *Id.*
3. Furthermore, the Reply improperly attempts to wholly recharacterize Petitioner’s original request for a copper special condition. *See Reply* at 15 *compared to AR Index No. A.2* (Response to Comments) at 28.
4. To adhere to the Board’s procedural regulations and their underlying rationales, the Region should be allowed to identify and concisely respond to the new arguments and the attempted recharacterization of Petitioner’s request. Providing this opportunity would promote equity and efficiency and would assist the Board’s decision-making.
5. To further support the Board’s efficient review of this appeal, the Region is prepared to file its surreply upon receipt of any order granting this motion.

- Pursuant to 40 C.F.R. § 124.19(f)(2), the Region contacted Petitioner's counsel to ascertain its position on this motion. Counsel represents that Petitioner objects to this Motion.

For the reasons set forth above, the Region respectfully requests that the Board grant this Motion for Leave to File Surreply.

*Dated by electronic signature:*

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date indicated below a copy of the foregoing Motion for Leave to File Surreply and attachments, in connection with *In re City of Keene*, NPDES Appeal No. 21-03, was sent to the following persons in the manner indicated:

By electronic filing:

Mr. Emilio Cortez  
Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1201 Constitution Avenue, NW  
U.S. EPA East Building, Room 3332  
Washington, DC 20004

By email, as authorized by the Board's standing order dated Sept. 21, 2020:

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*Dated by electronic signature*

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Office of Regional Counsel, Region 1