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

In the Matter of:	
City of Keene	NPDES Appeal No. 21-03
NPDES Permit No. NH0100790	

EPA REGION 1'S REPLY TO PETITIONER'S OPPOSITION TO THE REGION'S MOTION FOR LEAVE TO FILE SURREPLY

Respectfully submitted,

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Dated by electronic signature

I. THE REGION'S REPLY

In moving for leave to file a surreply, the Region does not seek to commence "another round of briefing." *Petitioner's Opposition to the Region's Motion* ("*Opposition*"), 2. Much to the contrary, the Region seeks to bring this briefing to an orderly and proper conclusion, in accordance with EPA regulations and Board precedent.

As identified in the Motion, Petitioner raises three new arguments on Reply. All three were reasonably ascertainable earlier in this appeal – some even as early as the public comment period on the draft permit. Instead of raising them in public comment or in the Petition, Petitioner waited until its Reply brief. Petitioner may not circumvent 40 C.F.R. § 124.19(c) by framing its new arguments as "simply responsive" to the Region's Response Brief.[1] *Opposition* at 2, 3, 4. That rhetoric may have superficial appeal but would undermine the Board's regulations and case law. Under Petitioner's logic, the Region could make Assertion X in a Fact Sheet and an appellant may ignore it *once* by failing to comment on it, *twice,* by failing to raise it in its Petition and then, after the Region repeats and elaborates upon Assertion X in its Response brief, properly take a *third* bite at the apple and introduce its concerns at that time. Allowing new arguments in a Reply that could have easily been raised in a Petition, perhaps even in public comment, simply does not square with operative NPDES regulations. *See* 40 C.F.R. §§ 124.13 (Obligation to raise issues and provide information during the public comment period), .19(a)(4) ("…a petition for review must identify the contested permit condition or other specific challenge

[1] Petitioner's *Opposition* vaguely references "new documents" introduced in the Response Brief and, with respect to pH, asserts "Keene must be permitted to address new information EPA relied upon and which EPA includes in its filing of the administrative record." *Opposition*, 2, 4. The Region understands the alleged "new documents" to be Exhibit C, a 303(d) impairment list, and Exhibit O, an email from NHDES to EPA. Not only is Exhibit C publicly available, it was specifically referenced in the Fact Sheet issued with both the draft permit and the final permit. *Ex. B,* 7. The pertinent portions of Exhibit O – including attribution to NHDES – were reproduced, as Petitioner correctly identifies, "verbatim" in the Response to Comments. *Ex. O*; *Ex. D,* 22; *Opposition,* 4.

to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed."), 19(c) ("Petitioner may not raise new issues or arguments in the reply.").

Also as identified in the Motion, the Reply attempts to revise, post-hoc, Petitioner's original request for a copper special condition by asserting that "Keene is requesting a special condition that automatically implements the permit modification **process**, not the **outcome**" (Reply at 15) (emphasis in original), a statement belied by the plain text of Petitioner's Comments on the draft permit ("Keene… respectfully requests that additional language be included in the Final Permit indicating that the **results** of a site-specific approach will be accepted…") (emphasis added) (*Ex. D*, 28) and the Petition for Review ("Keene's Draft Comments requested that EPA include language in the Final Permit specifying that the **results** of a site-specific approach to establish a copper effluent limit (WER or BLM) be incorporated into the Final Permit.") (emphasis added) (*Petition*, 25). This recharacterization, like Petitioner's insufficient justification for its late-arriving arguments, contravenes Board regulations and case law. *See* 40 C.F.R. §§ 124.13, 124.19(a)(4)(ii); *see also, e.g., In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999) ("The effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final.")

The Region's proposed Surreply will facilitate the Board's deliberations by identifying the Reply's facial mischaracterization of a comment on the draft permit and by narrowly and concisely demonstrating why three arguments appearing for the first time on Reply are untimely. The Region is prepared to file this Surreply upon the Board's grant of the motion.

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below a copy of the foregoing Reply to Petitioner's Opposition to the Motion for Leave to File Surreply, 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
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By email, as authorized by the Board's standing order dated Sept. 21, 2020:

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