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

In the Matter of:	)	
	)	
City of Attleboro, Massachusetts	)	NPDES Appeal No. 08-08
Department of Wastewater	)	
	)	
NPDES Permit No. MA0100595	)	
	)	

REGION 1'S OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO REPLY TO REGION 1'S RESPONSE TO PETITION FOR REVIEW

Region 1 of the United States Environmental Protection Agency ("Region 1" or "Region") hereby opposes the City of Attleboro's ("City's") Motion for Leave to Reply to Region 1's Response to Petition for Review ("Motion"). For the following reasons, this case does not warrant a reply brief.

The EPA Environmental Appeals Board ("Board" or "EAB") Practice Manual ("Manual") states, "petitioners are advised that a petition for review should set forth, in detail, all of the issues and all of the arguments in their favor." *See* Manual at 43. Only "on occasion" is leave granted to file a reply brief. *Id.* at 36. Thus, Petitioners in NPDES permit appeals before the Board under the procedures of 40 C.F.R. Part 124 are not permitted reply briefs as of right, but the Board has discretion to permit a reply brief (and sur-reply brief) if it deems it necessary in a particular case. *See In re Town of Seabrook, N.H.*, 4 E.A.D. 806, 810 n.6 (EAB 1993).

The City fails to explain why additional briefing beyond what has been filed by the Region and the City is necessary in this matter. The City vaguely contends that a

reply brief would allow the City to assist the Board in focusing "upon the few points that really matter," without hinting at what these "few points" might be and why they "really matter." *See* Motion at 1. By failing to articulate with reasonable precision which issues it will address in its Reply, the Motion opens the door for the City to revisit and reframe issues and arguments subsequent to the Region having filed its carefully considered response to the Petition as written. The Region should not be required to expend its scarce legal and technical resources to address a moving target. The City had the opportunity, as well as the obligation, to forcefully present its arguments and to focus the Region's and the Board's attention on the "few points that really matter" in its original Petition. It should be obvious from the City's Petition what issues, in its view, are central to this permit appeal. No further briefing is necessary to amplify the obvious. To the extent the City regards its Petition to require additional explanation or elaboration in light of the Region's response, the City is too late.

The City also contends that a reply brief would enable it to refute the Region's claims that certain issues were not raised below. *Id.* While the City fails to identify the issues to which it is referring, the comments received on the draft permit speak for themselves with regard to what issues were preserved for appeal and, accordingly, this matter does not merit additional briefing. In addition, it was incumbent upon the City in its original petition for review to "demonstrate[e] that any issues being raised were raised during the public comment period…to the extent required by these regulations[.]" *See* 40 C.F.R. § 124.19(a). If the City failed to do so clearly in the first instance, it should not now be permitted to do so after the fact by way of a reply brief. *See In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.10 (EAB 1999).

Next, the City argues that a reply brief would allow it to correct unspecified misstatements of law and fact. The City again fails to indicate the significance of these purported errors, or to state whether these alleged errors stemmed from information in the fact sheet and/or response to comments (on which the Region heavily, if not exclusively, relied) and thus could have been timely addressed in the original Petition. *Id.* Without more, this rationale fails to support the filing of a reply brief.

Finally, the City contends that a reply brief would allow it to clarify certain of its arguments on the grounds that the Region failed to restate them accurately in its response. *Id.* The City was required to clearly state its arguments in its original Petition. If the Region misinterpreted the City's arguments, this should be apparent from reading the Petition. *See In re Genesee Power Station L.P.*, 4 E.A.D. 832, 867-868 (EAB 1993). Thus, this argument also fails to justify the filing of a reply brief.

For the foregoing reasons, Region 1 respectfully submits that City's motion for leave to file additional briefing lacks an adequate basis and should be denied. However, if the Board determines that a reply brief should be allowed, Region 1 respectfully moves that the Board place reasonable page limitations on its length[1] and limit its scope only to those arguments that were not reasonably ascertainable (if any) at the time the City's Petition was filed.

Additionally, if the Board permits the City to file a reply brief, Region 1 respectfully moves that the Board also permit the Region to submit a sur-reply brief limited to addressing issues raised by the City's reply brief and also subject to appropriate page limits.

---

[1] The City itself states that a "short reply" would achieve its objectives. *See* Motion at 1.

Respectfully submitted by EPA-Region 1,

Dated: September 15, 2008

Amanda J. Helwig, Asst. Regional Counsel
Samir Bukhari, Asst. Regional Counsel
Office of Regional Counsel
U.S. EPA Region 1
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114-2023
Tel: (617) 918-1095
Fax: (617) 918-0095
bukhari.samir@epa.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Petitioner's Motion for Leave to Reply to Region 1's Response to Petition for Review, in connection with NPDES Appeal Nos. 08-08, were sent to the following persons in the manner indicated:

By Electronic Submission and First Class U.S. Mail:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

By First Class U.S. Mail:

Douglas H. Wilkins, Esq.
Anderson & Kreiger, LLP
One Canal Park, Suite 200
Cambridge, Massachusetts 02141

Dated: September 15, 2008

Amanda J. Helwig
Assistant Regional Counsel
U.S. EPA - Region 1
1 Congress Street 1100 (RAA)
Boston, MA 02114-2023
Tel: (617) 918-1180
Fax: (617) 918-0180