

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

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In the Matter of:	)	
	)	
City of Lowell	)	
	)	NPDES Appeal No. 19-03
	)	
NPDES Permit No. MA0100633	)	
_____	)	

**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, by Friday January 10, 2020, 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 or where further briefing would assist the Board in resolving disputed claims. *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). Both factors are applicable here and counsel in favor of accepting the Region’s attached Surreply in this matter.

The grounds for this motion are as follows:

1. Petitioner filed its Reply brief on Monday December 23, 2019.

2. Upon review, EPA has determined that Petitioner impermissibly raised new arguments for the first time on reply, contrary to the Board's regulations. 40 C.F.R. § 124.19(c)(1)-(2).
3. This regulation only formalized what has been the Board's consistent practice on this procedural issue. 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 the Region to respond would not only be equitable but would also promote efficiency and assist the Board in its decision making. This is especially true here, as the new arguments pertain in large measure to technical issues, which must be evaluated against a complex and extensive permit record, with which the Region is familiar.
5. EPA has endeavored to analyze the Reply and to finalize a response as quickly as possible. The proposed deadline for filing a surreply is warranted in light of the following:

- a. The Reply was timely filed two days before Christmas. Due to an Executive Order, EPA offices were closed on December 24, 2019 as well as December 25, 2019. EPA offices were also closed on Wednesday January 1, 2020.
- b. The nature of the issues raised in the Reply required consultation with technical staff. However, numerous key technical and legal staff in both Region 1 and Headquarters were out of the office during all or parts of the weeks of December 23 to 27, 2019 and December 30, 2019 to January 3, 2020 due to previously scheduled leave.
- c. Finally, the Region's coordination with Headquarters has also been modulated by holiday schedules.

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 Brief with a deadline for submittal of Friday, January 10, 2020.

Dated: January 6, 2020

Respectfully submitted,

U.S. EPA – Region 1

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/s/  
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US Environmental Protection Agency  
Office of Regional Counsel, Region 1

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to File a Surreply, connection with In re City of Lowell, NPDES Appeal No. 19-03, was sent to the following persons in the manner indicated:

By Electronic Filing:

Ms. Eureka 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 Filing and Electronic Mail:

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Dated: January 6, 2020

\_\_\_\_\_/s/\_\_\_\_\_  
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US Environmental Protection Agency  
Office of Regional Counsel, Region 1