

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

In re:)	
TOWN OF CONCORD, DEPARTMENT OF PUBLIC WORKS)	NPDES APPEAL NO. 13-08
NPDES Permit No. MA0100668)	
)	

**PETITIONER’S OPPOSITION TO REGION 1’S MOTION FOR LEAVE
TO FILE SUR-REPLY**

Town of Concord, Department of Public Works (“Town”) opposes Region 1’s Motion for Leave to file a Sur-Reply in this matter on the ground that such further briefing is not allowed or contemplated by the Environmental Appeals Board’s (the “Board”) revised rules, 78 Fed Reg. 5281, 5288 (Jan. 25, 2013). Alternatively, if the Board does allow Region 1’s Motion for leave to file a Sur-Reply, as a matter of fairness and toward assisting the Board in its deliberations, the Town should be granted leave to respond to Region 1’s Sur-Reply. In support of this opposition, the Town states the following:

1. On January 25, 2013, the Board issued revisions to its procedural rules, including briefing requirements, that became effective March 26, 2013. *See* Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed Reg. 5281, 5288 (Jan. 25, 2013). The rule revisions were issued to “clarify existing practices and procedures that are applicable to permit appeals filed with the [Board],” 78 Fed Reg. at 5285, and “make the appeals process more efficient by avoiding unnecessary filings and Board orders.” *Id.* at 5281. In comprehensively revising its procedural rules, the Board chose not include any provision allowing for the submittal of sur-replies. Instead, the Board set forth specific requirements for briefing: (1) a Petition for Review,

(2) Response to Petition for Review, and (3) Reply. 40 CFR § 124.19(a), (b) and (c). Nowhere do the rules contemplate a sur-reply by the Agency.

2. In this matter, commenced after the effective date of the revised Part 124 Rules, the Town timely submitted its Petition for Review with the Board pursuant to 40 CFR § 124.19(a) on September 9, 2013. On October 31, 2013, Region 1 submitted its Response pursuant to 40 CFR § 124.19(b). On November 15, 2013, the Town submitted its Reply to Region 1's Response to Petition for Review as provided under 40 CFR § 124.19(c). 40 CFR § 124.19 does not provide for sur-reply briefs.

3. One round of briefing is all that allowed by the revised rules. According to the preamble to the revised rules, “[t]he changes to the rule clarify to practitioners that substantive briefing must be submitted at the outset of the appeal and that one substantive review will occur.” 78 Fed Reg. at 5281. “Today’s revision of Sec. 124.19 simplifies the review process and promotes judicial economy by clarifying that one complete round of briefing will occur at the outset of the appeal” *Id.* at 5282. “The revisions adopted today are intended to codify current procedural practices, clarifying existing review procedures, and simplify the permit review process. Practitioners before the Board will benefit from the greater clarity and efficiency in these procedural rules, as will the Agency.” *Id.* at 5283.

4. Under the prior practice, upon receipt of a petition, the Board routinely requested a response from the permitting authority or the Region. After the Region’s response had been filed, the Board normally did not require further briefing. However, upon motion explaining why a reply brief is necessary, petitioners or other interested parties could seek leave to file a reply brief. *See* June 2012 EAB Practice Manual (superseded by January 2013 Practice Manual), at 48-49. The 2012 EAB Practice Manual further states “[i]f a reply brief has been filed, the

EAB may similarly, upon motion, allow the filing of a surreply brief,” *id.* at 49,¹ but only “upon motion explaining why a reply brief is necessary” and leave is sought and granted by the Board would reply briefs be permitted. *Id.* It is in the context of this prior practice that a sur-reply brief might follow a reply that the Region’s request for a sur-reply would have been considered.

5. This prior practice, however, has been changed by the Board’s revised rules.² Under the revised rules, three filings are contemplated: a Petition by the Petitioner, a Response by Region and a Reply by Petitioner which is now allowed as of right. 40 CFR § 124.19(c)(2). The Board revised its rules establishing these three filings to promote efficiency and fairness. See Paragraph 1 above. As such, a sur-reply is inconsistent with the new regulations and contrary to the filing balance established by the new regulations. Consequently, if the Board grants the Region leave to file a sur-reply, Petitioner respectfully requests that such grant be accompanied by a leave for Petitioner to respond to the sur-reply to maintain the parity established in the revised regulations and new practice manual.

6. While the Board has inherent authority to manage its docket, including for good cause, to relax or suspend the filing requirements prescribed by the rules, 40 CFR § 124.19(n), it should not allow Region 1’s Motion for Leave to file a Sur-Reply. The Region has not

¹ The 2013 Practice Manual contains the same wording, without reference to the revised rules.

² Counsel for the Town has identified only one matter in which a request for a sur-reply by the Agency was made under the revised rules. *In re ESSROC Cement Corporation*, RCRA 13-03, the Board granted Region 5’s request to file a sur-reply brief, but in circumstances much different from those presented in this matter. See, “Order Granting Petitioner’s Request for Oral Argument and Granting U.S. EPA, Region 5’s Motion for Leave to File Sur-Reply,” dated September 25, 2013. In *ESSROC Cement Corporation*, the Board allowed Region 5’s sur-reply brief only in conjunction with the Board’s order for oral argument. In so doing, the Board identified specific issues for oral argument, including interpretation of a 2007 D.C. Circuit case interpreting specific authority of a regulation which Region 5 sought to address in its sur-reply. The Board noted that “[u]pon examination of the filings in this case to date and in light of the Board’s grant for oral argument request, in which issues discussed in the Region’s proposed sur-reply are likely to emerge,” the Board found a sur-reply might be “helpful in its decision making.” The same, however, cannot be said here. While Region 1’s motion states it identifies in its proposed sur-reply new issues and arguments and that were not preserved, the Region provides no specificity. A cursory review of the argument headings in the Region’s proposed sur-reply shows that it simply seeks to restate the arguments the Region already made in its Response. Unlike *ESSROC Cement Corporation*, there is no specific new issue or interpretation that warrants further discussion. The Town’s Reply does not raise new issues that justify a further response from the Region.

demonstrated “good cause.” It has said only that the Board “typically” grants requests to file sur-reply briefs. Even if the Board may have under prior practice allowed Agency sur-replies that was before the Board revised its rules for briefing. As noted above, the purpose of the new briefing procedure is to “avoid[] unnecessary filings and Board orders.” The new rule was designed to eliminate a prior practice that the Region now seeks to invoke.

7. As also noted in the preamble to the Board’s revised rules:

Nothing in this revision to the rule prevents the Board from ordering additional briefing after the first round in any matter where the Board determines that additional briefing may assist the Board in its deliberations.

78 Fed Reg. at 5282.

The first round of briefing under the Board’s revised rules at 40 CFR § 124.19(a), (b) and (c) – Petition for Review, Response and Reply – has been completed. The Board has not determined that additional briefing is needed to assist the Board in its deliberations. Therefore, the Region’s sur-reply should not be permitted; or if allowed, only because the Board has determined that additional briefing may assist it. Upon the Board’s determination that additional briefing is needed, and as matter of fairness and as “necessary for the efficient, fair and impartial adjudication of issues” presented in this appeal, the Town should be granted leave to respond to those issues raised by the Region in its Sur-Reply. 40 CFR § 124.19(n).

8. The Region’s Sur-Reply incorrectly states that Petitioner sought to introduce new issues and arguments in its Reply. The Town, however, simply responded to matters presented in the Region’s Response in its Reply.³ The Region’s Sur-Reply also seeks to identify “various mischaracterizations by the Petitioner,” which the Town disputes. If the Region’s Sur-Reply is

³ Revised rule 40 CFR § 124.19(c)(2) states “Petitioner may not raise new issues or arguments in the reply.” The Town has complied with this new provision and, contrary to the Region’s claims, addressed in its reply only matters addressed in the Region’s response. *See* Town’s Reply dated November 15, 2013, referring throughout to specific references in, and with citations to, the Region’s Response, dated October 31, 2013.

allowed, the Town should have an opportunity to respond, not only to these claims but others raised by the Region in its Sur-Reply.

9. In submitting its Motion for leave to File a Sur-Reply, the Region failed to comply with the revised rules. 40 CFR § 124.19(f)(2) requires that “[i]n advance of filing a motion, parties *must* attempt to ascertain whether the other party(ies) concur(s) or object(s) to the motion and *must* indicate in the motion the attempt made and the response obtained.” (emphasis supplied). The Region did neither. For this reason alone, the Region’s Motion should be rejected.

For these reasons, the Town requests that the Board deny Region 1’s Motion for Leave to File a Sur-Reply. Alternatively, if the Board does allow Region 1’s Motion and its Sur-Reply, the Town requests the Board to grant leave to the Town to submit a rebuttal or response to the Region’s Sur-Reply.

Respectfully submitted,

/s/

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Date: December 6, 2013

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petitioner's Opposition to Region 1's Motion for Leave to File Sur-Reply in connection with In re Town of Concord, Department of Public Works, NPDES Appeal No. 13-08, was sent to the following persons in the manner indicated:

By Electronic Filing:

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/s/

Robert D. Cox, Jr.

Dated: December 6, 2013