

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

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In Re:	)	
	)	
	)	
Springfield Water and Sewer Commission,	)	
Springfield Regional Wastewater Treatment	)	NPDES Permit Appeal No. 20-07
Facility	)	
	)	
Reissuance of NPDES Permit No.	)	
MA0101613	)	
	)	

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**SPRINGFIELD WATER AND SEWER COMMISSION’S  
RESPONSE TO EPA’S SURREPLY**

The Springfield Water and Sewer Commission (the “Commission”) submits this Response to EPA’s Surreply to clarify and correct mischaracterizations in the United States Environmental Protection Agency (“EPA”) Region 1’s Surreply. The applicable rules contemplate that the petitioner will submit the final brief. *See* 40 C.F.R. § 124.19 (providing for one complete round of briefing, ending with petitioner’s reply brief). Nevertheless, EPA is attempting to have the final word, by claiming that the Commission has violated the Environmental Appeals Board’s (“Board”) rule against raising new issues in a reply brief. EPA’s claims are untrue and should be disregarded.

**ARGUMENT**

The Commission had a duty to raise new issues in its petition that were not ascertainable during the public comment periods because they were raised for the first time in the final permit and response to comments. *See* 40 C.F.R. § 124.13; 40 C.F.R. §§ 124.19(a)(4)(ii); *see also In re: Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip.op. at 6 (EAB April 4, 2001). In its reply brief, the Commission merely addressed EPA’s arguments concerning issues that the parties have disputed for several years. The Commission has repeatedly raised

concerns relating to the permit's nitrogen limits and EPA's characterization of outfall 042, both generally and on specific issues.

**A. The Commission's petition expressly objected to EPA's failure to present its new rationale for reclassifying outfall 042 in the draft permits.**

Regarding outfall 042, EPA announced an entirely new rationale for reclassifying outfall 042 in the final permit and response to comments. The Commission objected to this new rationale on both substantive and procedural grounds. *See* Pet. at 27–30. Substantively, the Commission explained that outfall 042 does not meet the definition of a CSO.

Regarding its procedural objections, the Commission's petition made it clear that the Commission did not have an opportunity to comment on EPA's new rationale as to classifying outfall 042, stating that “the treatment and location issues were not reasonably ascertainable during the public comment periods, as they first arose in the Final Permit and supporting documents.” *Id.* at 27. At that point in the briefing process, the Commission's focus was to show that it was entitled, and in fact had a duty, “to present new information to demonstrate clear error.” *Id.* EPA then, in its brief, objected to the Commission's presentation of that new information, arguing that the Commission had waived the right to do so. EPA Resp. at 41, n.9; EPA Surreply at 6, n.1. In response, the Commission explained in detail why it was entitled to provide that new information, stating:

Because of EPA's brevity and lack of an adequate and defensible regulatory basis for the reclassification of Outfall 042 in the Draft Permit, the Commission was deprived of notice and a meaningful opportunity to provide comments. Because the treatment and location issues were not reasonably ascertainable during the public comment period, as they first arose in the Final Permit and supporting documents, the Commission has a duty to present new information to demonstrate clear error.

Pet.'s Reply at 12. Further elaborating on this argument, the Commission pointed out that EPA's actions here, which justified the Commission providing new information, were in violation of basic

Administrative Procedure Act (“APA”) requirements. Pet.’s Reply at 12–15. This was in support of the Commission’s key procedural contention: that EPA’s change in explanations for its outfall 042 position allows the Commission to explain why the newest Agency position is wrong. This is shown by the conclusion of this argument in the Reply:

Given the dramatic shift in EPA’s rationale for reclassifying Outfall 042, the Commission is entitled to respond—as it did in its Petition—to EPA’s new rationale. EPA’s shift from “inadvertently omitted” to an entirely different rationale deprived the Commission of notice and a meaningful opportunity to comment on the changes between the Draft Permit and the Final Permit as it relates to Outfall 042 in violation of the APA.

Pet.’s Reply at 15. It was not the Commission’s intention to insert an entirely new and independent APA claim here. Rather, the APA issue was cited in support of the Commission’s response to EPA’s waiver argument. That was proper, and there is no basis to strike those APA contentions.

**B. EPA’s “new approach” to nitrogen limits is arbitrary, as supported by the fact that it disproportionately burdens the Commission, which serves urban, lower-income communities.**

Regarding nitrogen limits, the Commission’s primary argument in its petition relates to EPA’s development of arbitrary concentrations and its arbitrary assignment of those concentrations. *See* Pet. at 6–23. The Commission’s argument is not new. EPA’s “new approach,” announced for the first time in the final permit, of assigning arbitrary target concentrations of either 5, 8, or 10 mg/L to facilities, ostensibly based on discharge volume, places a disproportionate burden on the Commission, which serves a larger urban, and economically disadvantaged, community. This is a factual consequence of EPA’s arbitrary “new approach,” not a new legal argument in itself.

EPA falsely claims that the Commission seeks to argue that EPA should allocate loads based primarily on economic considerations. The Commission makes no such argument. Rather, the points made in the Commission’s reply merely illustrate the arbitrariness of EPA’s “new

approach,” which the Commission objected to at length in its petition. Those communities required to meet the less stringent nitrogen limits based on 8 or 10 mg/L, or no limit at all, generally serve higher-income, suburban populations, but in the aggregate discharge more total nitrogen than does the Commission. By contrast, the Commission, which serves a larger urban, less economically advantaged population, is required to meet the most stringent nitrogen limits proposed by EPA, even though it contributes a smaller nitrogen load than the total load from all facilities subject to less stringent or no limits. In other words, if facilities with combined nitrogen loadings greater than the Commission’s are sufficiently regulated with less stringent or no limits, it cannot be considered necessary to impose a more stringent limit in the Commission’s permit. The Commission’s point was to demonstrate EPA’s arbitrary choice and assignment of nitrogen limits generally, and EPA’s failure to establish that the nitrogen limit imposed on the Commission is consistent with the applicable TMDL or otherwise necessary to achieve water quality standards specifically.

The table of loadings in Massachusetts from 2018 that EPA includes in its surreply further demonstrates the Commission’s point. Four communities, comprising 52% of the 2018 loadings, are subject to the most stringent limits based on 5 mg/L concentration, while the facilities responsible for the other 48% of nitrogen loadings are subject to less stringent limits or no limits at all. EPA Surreply at 9. If it is critical, in order to meet water quality standards, that 52% of the loadings be reduced by implementing stringent nitrogen limits, EPA has failed to explain why the other 48% of loadings need not be reduced in the same manner. The limits are arbitrary, as is the assignment of those limits, and the overall approach places a disproportionate burden on the Commission, which serves urban, lower-income communities.

EPA also points out that the Springfield Regional Wastewater Treatment Facility’s (“SRWTF”) discharges in 2018 were 35% below the permitted load. EPA Surreply at 9. This fact actually supports the Commission’s arguments. EPA has now shown that there is no need to

impose limits on the Commission's discharges, when it concedes that those discharges are well below EPA's assigned level, without any limit in the current permit. As a result, the SRWTF discharge cannot be considered to have a reasonable potential to cause or contribute to exceedances of water quality standards.

For the foregoing reasons, the Commission requests that the Board disregard EPA's arguments that the Commission has raised new issues on appeal, and remand NPDES Permit No. MA0101613, as EPA clearly erred in issuing the Final Permit over the Commission's detailed objections.

Date: February 17, 2021

Respectfully submitted,

*/s/ Fredric P. Andes*

Fredric P. Andes

Erika K. Powers

Ashley E. Parr

BARNES & THORNBURG LLP

One North Wacker Drive, Suite 4400

Chicago, Illinois 60647

(312) 357-1313

Fredric.Andes@btlaw.com

Erika.Powers@btlaw.com

Ashley.Parr@btlaw.com

*Attorneys for Springfield Regional  
Wastewater Treatment Plant*

**STATEMENT OF COMPLIANCE WITH THE WORD/PAGE LIMITATION**

In accordance with 40 C.F.R. § 124.19(d)(1)(iv) & (d)(3), I hereby certify that this Response to EPA's Surreply does not exceed 7,000 words.

*/s/ Fredric P. Andes*

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Fredric P. Andes

## CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2021 the foregoing Response to EPA's Surreply was served on to the following persons, in the manner specified below.

By Electronic Filing to:

Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1201 Constitution Avenue, N.W.  
WJC East Building, Room 3332  
Washington, D.C. 20004

By Electronic Mail:

Samir Bukhar  
Michael Knapp  
Kristen Scherb  
U.S. Environmental Protection Agency  
Office of Regional Counsel, Region 1  
5 Post Office Square  
Boston, Massachusetts 02109  
bukhari.samir@epa.gov  
knapp.michael@epa.gov  
scherb.kristen@epa.gov

Pooja Parikh  
Peter Ford  
U.S. Environmental Protection Agency  
Office of General Counsel, Water Law Office  
1200 Pennsylvania Avenue, N.W.  
Mail Code 2355A  
Washington, D.C. 50460  
parikh.pooja@epa.gov  
ford.peter@epa.gov

Scott N. Koschwitz  
Assistant Attorney General  
Office of the Attorney General  
165 Capitol Avenue  
Hartford, Connecticut 06106  
Scott.Koschwitz@ct.gov

Roger Reynolds  
Senior Legal Counsel  
Save the Sound  
900 Chapel Street, Upper Mezzanine  
New Haven, Connecticut 06510  
rreynolds@savethesound.org

Andrew Fisk  
Executive Director  
Connecticut River Conservancy  
Greenfield, Massachusetts 01301  
afisk@ctriver.org

*/s/ Fredric P. Andes*  
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Fredric P. Andes