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

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

RESPONDENT EPA'S SURREPLY

Respectfully submitted,

/s/
Michael Knapp, Esq.
Cayleigh Eckhardt, Esq.
Maximilian Boal, Esq.
US Environmental Protection Agency
Office of Regional Counsel, Region 1
5 Post Office Square
Boston, MA 02109
Tel: (617) 918-1053
(617) 918-1044
Fax: (617) 918-0044
Email: Knapp.michael@epa.gov
Eckhardt.cayleigh@epa.gov

Of Counsel:

Pooja Parikh, Esq.
Peter Ford, Esq.
Water Law Office, Office of General Counsel

Samir Bukhari, Esq.
Office of Regional Counsel, Region 1

Dated: January 10, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

LIST OF ATTACHMENTS

Attachment 1	(AR.K.1) Technical Support Document for Water Quality-Based Toxics Control. United States Environmental Protection Agency, Office of Water. EPA/505/2-90-001. March 1991 (excerpt of relevant subsections).

I. INTRODUCTION

Petitioner's Reply, like its Petition, is rife with procedural infirmities. It is well-established that petitioners "may not raise new issues or arguments in the reply." 40 C.F.R. § 124.19(c)(1)-(2); *see also, e.g.*, *In re BP Cherry Point*, 12 E.A.D. 209, 216 n.l8 (EAB 2005) (rejecting new legal argument petitioner sought to introduce for the first time in a reply brief); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) ("[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.").

There is no reason why the several new arguments that appear in Petitioner's Reply, as detailed by EPA below, could not have been included either in Petitioner's comments on the Draft Permit or in the original Petition. *See In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 123 n.52 (EAB 2005) (noting that attempt to use reply brief to substantiate a claim with new arguments was tardy and that petitioners should have raised all their claims and supporting arguments in their petitions). The Board will entertain the substance of a reply brief "only to the extent that it indeed addresses arguments *newly* raised by the Region." *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, at 3 (EAB Jan. 31, 2008) (Order Granting Motion for Leave to File a Reply) (emphasis added).

The only "new" argument or defense that appears in EPA's Response is the Agency's catalogue of the procedural flaws contained in the original Petition. Rather than

attempt to meaningfully rebut these arguments, as would have been an appropriate use of a reply brief if possible, Petitioner offers only a brief, conclusory denial.[1] *Reply* at 2-3.

Because the Region properly did not raise any substantive arguments or defenses in its Response brief that were not also contained in its Response to Comments, there were no *new* arguments to which Petitioner could respond. In other words, Petitioner was fully capable of responding to these issues at the RTC and Petition stages. It did not do so, and it may not rectify such omissions by doing so now. *In re Zion Energy, LLC*, 9 E.A.D. 701, 707 (EAB 2001) (rejecting as untimely a petitioner's attempt to correct its failure to explain in the petition why the permit issuer's response to comments on the draft permit was clearly erroneous or otherwise warranted review).

In other instances, Petitioner offers newly elaborated arguments and explanations of positions it had previously articulated, but which likewise do not respond to *new* EPA arguments. In response to the many instances where Petitioner restates arguments made in its Petition, EPA maintains its positions and arguments as articulated in its Response to Comments and Response brief. This surreply is limited to only identifying the procedural flaws contained in Petitioner's Reply and offering a brief substantive rebuttal to the wholly new, improper arguments.

In sum, Petitioner has misconstrued the proper purpose and function of a reply, which may not be used as a means to lodge new arguments which could have been made at the draft permit stage when the Agency could have considered and responded prior to finalizing the permit. The Board's procedural rules are important mechanisms for

[1] For example, if the factual record supported Petitioner's position, it could have pointed the Board to specific citations in the record rebutting the Agency's allegations that it failed to raise certain issues during the public comment period with regard to *E. coli*, (*EPA Response* at 36*)*, metals testing frequency, *(EPA Response* at 40-41*),* and the LTCP, *(EPA Response* at 44*)*. Petitioner failed to do so.

achieving efficient and meaningful review. In order to ensure the efficiency of the Board's review, Petitioner's repeated violations of those rules should not be ignored. Accordingly, and for the reasons set out in the Agency's Response, review of this Permit should be denied.

II. ARGUMENT

A. Effluent Limitations

1. Effluent Flow Limit

Petitioner improperly raises two new arguments in its Reply brief which appeared neither in its comments on the Draft Permit nor in its Petition. It articulates new technical challenges to the flow limit based on faulty assumptions and asserts for the first time that the Agency "recognized the error in permit flow limits" when it issued its 2010 AO. *Reply* at 8-9. Although neither claim is meritorious on the substance, as detailed below, the Board should not even entertain these late-arriving arguments.

Petitioner's first new technical challenge asserts that the Region's approach is overly conservative because, according to Petitioner, exceedances of flow occur during wet weather only, when receiving waters would be at increased levels, thus maintaining or increasing dilution. *Reply* at 8-9. Essentially, Petitioner objects to EPA using critical conditions, *i.e.*, the Facility's design flow and the receiving water's 7Q10 flow, for calculating the reasonable potential analysis and setting WQBELs.

Petitioner again disregards, however, EPA regulations requiring that the calculation of effluent limits for POTWs be based on design flow, 40 C.F.R. § 122.45(b), and Massachusetts' requirement that limits be based on the receiving waters' 7Q10 flow, 314 C.M.R. § 4.03(3). *See also Ex.21 at 6-17* (*NPDES Manual)(AR.21)*. Petitioner

essentially asks the Board to accept its preferred permitting approach, while ignoring the long-standing regulatory requirements with which the permit must comply. Given these regulatory requirements, EPA must evaluate the worst-case scenario which is the Facility discharging at its design flow during drought conditions, which in Massachusetts is the 7Q10 flow. 314 C.M.R. § 4.03(3).

Additionally, Petitioner has provided no factual support for its underlying assumption as to when its Facility discharges at or above design flow. EPA notes that Petitioner itself acknowledges that it has exceeded its flow limit in two of the last five years. *Pet.* at 16. Thus, assuming that the Facility will discharge at its design flow can hardly be disparaged as overly-conservative.

Second, Petitioner asserts for the first time that a flow limit is unnecessary because the mass-based limits in the Permit ensure the protection of WQS even at higher flows. This argument makes the inaccurate assumption that all of the pollutant limitations in the permit contain both a mass-based and concentration-based limit. This is not the case for Total Residual Chlorine, *E. coli*, or Total Phosphorus. *Ex. 1 at Part I.A.1, (Permit)(AR.A.1)*. For these pollutants with a concentration limit only, the flow limit is a key element to ensuring WQS are met. Petitioner's argument thus fails as a matter of fact.

Additionally, this argument ignores the fact that the flow limit is a key element in not only the WQBELs, but also in the Agency's reasonable potential analysis. The Agency typically uses concentration levels, not mass levels, when calculating reasonable potential. For example, EPA detailed in the Fact Sheet the calculation used to analyze reasonable potential for applicable metals criteria, which used a concentration level and the facility's design flow as variables in the formula. *Ex.1* at 28-29 *(AR.A.1)*. The result

of that calculation is that there was no reasonable potential for those metals. If the Facility was allowed to discharge above its design flow, it would effectively invalidate the assumed critical condition applied in the reasonable potential analysis for these metals and EPA could no longer be confident that the applicable WQS would be protected.

Petitioner's other new argument – that EPA "recognized the error in permit flow limits" when it issued the 2010 Administrative Order ("2010 AO") and that there was an "unstated understanding" that the new permit would not have a flow limit – is likewise factually inaccurate. *Reply* at 9-10. It is true that in 2010 EPA issued a unilateral enforcement order against the City for, amongst other violations, exceeding the flow limit in its permit. As part of that order, under the heading "Interim Effluent Limits," EPA stated that the flow limit shall be "monitor only." *Ex.14 at 6 (AR.H.22)*. Contrary to Petitioner's characterization, however, this provision of the 2010 AO was intended to provide the City with interim relief until it was able to complete evaluations of its combined wastewater collection system and subsequently implement any necessary operational modifications and upgrades in order to, among other objectives, meet the flow limit. In no way was it a recognition or admission that the permit term itself was improper. Petitioner's representation of this unilateral enforcement action has completely inverted the goal of enforcement – that the *permittee* will ultimately adapt to and achieve the given permit limit, not that the *permit* will ultimately be adapted and relaxed to accommodate the permittee's non-compliance.

2. *E. coli* Daily Maximum Limit

Petitioner doubles-down on its late-arriving argument regarding the necessity of

EPA to show that a weekly limit was "impracticable." *Reply* at 11. Petitioner does not, however, even acknowledge, let alone rebut, EPA's accurate flagging of this argument as one that was not raised during the public comment period and thus may not be raised on appeal. *EPA Response* at 36.

For the first time, Petitioner grapples with EPA's explanation that the daily maximum limit is based on and necessary to protect Massachusetts' WQS for *E. coli*. *Reply* at 15. Petitioner's new challenge is that a daily maximum limit is not necessary in order to protect Massachusetts' water quality standard that "no single sample shall exceed 235 colonies per 100 ML," otherwise known as the single sample maximum criteria ("SSM"). 314 C.M.R. § 4.05(3)(b)(4)(b). Petitioner offers no technical explanation for how its preferred average-only limit, which necessarily allows for the potential for an individual sample within a set of samples to exceed the limit, would adequately ensure protection of the single-sample threshold, as required by CWA § 301(b)(1)(c) (33 U.S.C. § 1311(b)(1)(c)) and 40 C.F.R. § 122.44(d). Moreover, Petitioner calls into question the manner in which EPA implements the State's WQS despite the fact that the Commonwealth issued its own permit under the Massachusetts Clean Waters Act, M.G.L. Chap. 21, §§ 26-51, with the identical daily maximum limit and the State's certification that the permit achieves its WQS, *Ex.7* (MA WQS Certification)(AR.D.1). Petitioner's grievance appears more properly directed at the underlying Massachusetts water quality standard, but the issuance of an NPDES permit is not the forum to lodge such complaints.

B. Monitoring and Reporting

The City asserts for the first time in this Reply that taking clean samples, or any samples at all, during the winter months is impracticable. *Reply* at 4, 15. In addition to being procedurally barred, this claim is undermined by the fact that Region 1 has included these same requirements in NPDES permits for other POTWs in Massachusetts, including for neighboring facilities on the Merrimack River, who have successfully complied with such permit terms. *See, e.g., Ex.5 at 26 (RTC)(AR.B.1).* Moreover, as stated in footnote 1 of the Final Permit: "[o]ccasional deviations from the routine sampling program are allowed, but the reason for the deviation shall be documented in correspondence appended to the applicable discharge monitoring report." *Ex.1 at 6 n.1 (AR.A.1)*. If sampling becomes dangerous or impracticable due to winter conditions, a deviation or modification to the routine schedule is allowed as identified in the quoted language above.

Likewise, Petitioner for the first time asserts that the sampling frequency is unnecessarily high because EPA could use a "multiplier procedure" to account for fewer data points. *Reply* at 4. The Board should not consider this late-arriving technical argument. While EPA has methods available for accounting for small datasets when conducting reasonable potential analyses, these methods in no way prohibit or discourage EPA from instead using larger datasets with more datapoints. In fact, the Technical Support Document cited by Petitioner in its Reply explicitly acknowledges the benefit and reduction of uncertainty when more datapoints are available. *See Att. 1* at 52 (AR.K.1)(Technical Support Document for Water Quality-Based Toxics Control. United States Environmental Protection Agency, Office of Water. EPA/505/2-90-001. March

1991). Moreover, as is characteristic of this permit challenge as a whole, Petitioner continues to ignore the state-specific factors which informed the permit term, in this case the Commonwealth's Toxic Policy which clearly indicates quarterly testing is appropriate for a facility of this size, in light of its dilution factor. (*Ex.23 (Toxic Policy)(AR.L.2))*.[2]

C. CSO Provisions

1. Long-Term Control Plan

With regard to the LTCP, the Petitioner again wishes to advance a new argument – that incorporation of the LTCP into the permit is necessary in order to give the public the opportunity to comment on the LTCP. First, this is the first time Petitioner has raised this argument, and, therefore, it should be rejected on procedural grounds. Second, Petitioner has in no way rebutted EPA's argument that the CSO Policy provides the permit-writing authority with discretion to select the appropriate type of document, *e.g.*, permit or enforcement order, in which to enshrine the LTCP requirement. *EPA Response* at 18. Third, Petitioner's attempt to place the burden of public participation on EPA ignores the CSO Policy's explicit call for "*the permittee* to employ a public participation process that actively involves the affected public in the decision-making to select the long-term CSO controls." *(Ex.13 at 18692 (CSO Policy)(AR.H.17) (emphasis added))*.

2. CSO Secondary Bypass

Petitioner seeks to have all bypasses of secondary treatment due to peak flows prospectively approved in its permit. EPA has explained in both the RTC, *(Ex.5 at 28-29*

[2] As a point of clarification, the WET testing required in the final Permit includes testing of *only one* species (the daphnid or Ceriodaphnia dubia). *Ex.*5 at 24-25 (RTC) (AR.B.1); *Ex.1 at 8 n.13 (Permit)(AR.A.1)*. Petitioner's assertion that EPA is requiring testing of *two* species is incorrect, and any calculation of tests required in the current permit term based on such assertion is similarly incorrect. *Reply* at 5.

(AR.B.1)), and its Response brief, (*EPA Response* at 18-20*)*, the optional process contained in the CSO Policy pursuant to which permittees may seek such approval. Petitioner complains now that the Agency never asked or required the City to submit the requisite information to take advantage of this option. *Reply* at 17. Permit compliance is, of course, the responsibility of the permittee. If the City wishes to avail itself of this alternative option, it must take the initiative to develop the requisite information and submit it to EPA. The Agency is, of course, willing to work with the Petitioner on this process, but it is not the Agency's responsibility to initiate alternative, optional permit approaches on behalf of the Permittee.

III. CONCLUSION

The Petition should be denied.

Respectfully submitted,

___/s/_____
Michael Knapp
Senior Assistant Regional Counsel
US Environmental Protection Agency
Office of Regional Counsel, Region 1

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this response to the petition for review contains less than 7,000 words in accordance with 40 C.F.R. § 124.19(d)(3).

.

Dated: January 10, 2020

__/s/_____
Michael Knapp
Senior Assistant Regional Counsel
US Environmental Protection Agency
Office of Regional Counsel, Region 1

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to the Petition for Review and Statement of Compliance with Word Limitations, in the matter of City of Lowell, Massachusetts, NPDES Appeal No. 19-03, were served on the following persons in the manner indicated:

By Electronic Filing:

Ms. Eurika 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:

F. Paul Calamita
Richard H. Sedgley
AquaLaw PLC
6 South 5th Street
Richmond, Virginia 23219
paul@aqualaw.com
dick@aqualaw.com

Dated: January 10, 2020

__/s/_____
Michael Knapp
Senior Assistant Regional Counsel
US Environmental Protection Agency
Office of Regional Counsel, Region 1