UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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February 10, 2021

VIA ELECTRONIC FILING

Eurika Durr
Clerk of the Board
U.S. EPA Environmental Appeals Board
1200 Pennsylvania Avenue, NW (Mail Code 1103M)
Washington, D.C. 20460-0001

RE: Springfield Water and Sewer Commission
NPDES Permit No. MA0101613; NPDES Appeal No. 20-07

Dear Ms. Durr:

Please find EPA's Surreply in connection with *In re Springfield Water and Sewer Commission*, NPDES Appeal No. 20-07.

If you have any questions regarding this filing, please contact Michael Knapp of the Office of Regional Counsel at 617.918.1053.

Sincerely,

_____

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

In the Matter of:	)	
Springfield Water and Sewer Commission	)	
NPDES Permit No. MA0101613	)	NPDES Appeal No. 20-07

RESPONDENT EPA'S SURREPLY

Respectfully submitted,

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Dated: February 10, 2021

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I. INTRODUCTION

Regulations governing NPDES appeals as well as a long line of Environmental Appeals Board ("Board") precedent unambiguously establish 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.18 (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.").

Despite this prohibition, Petitioner impermissibly raises two entirely new arguments in its Reply: (1) that EPA allegedly violated the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*., in reclassifying Outfall 042 (*Pet. Reply* at 11-14), and (2) that EPA imposed more stringent environmental requirements on Springfield, an "economically challenged inner-city" community, compared to other, "higher-income, suburban" communities (*Pet. Reply* at 7), even though, Petitioner contends, the latter collectively contribute a greater portion of the overall out-of-basin nitrogen load to Long Island Sound ("LIS"). Petitioner did not raise either of these arguments in its Petition. Nor did EPA open the door to these arguments by invoking any *post-hoc* justification in defending any aspect of the permit in its Response to the Petition ("EPA Response"). In other words, Petitioner was fully capable of raising these new issues prior to its Reply. It did not do so, and it may not rectify such omissions by doing so now.

To justify its tardy argumentation, Petitioner asserts that "principles of administrative procedure and due process require that the Commission be allowed to raise

new arguments relating to provisions and rationales that appeared for the first time in the Final Permit." *Pet. Reply* at 2. This is true, but insofar as the issues were not reasonably ascertainable or the arguments not reasonably available during the comment period, they must be raised at the time a petitioner files its ***petition***. Petitioner's further contention that "it is completely legitimate for the Commission to raise these issues now," *id.*, is not only unsubstantiated, but directly contravenes the Board's regulations and precedents, described above. Because Petitioner raised neither the new procedural argument related to Outfall 042 in its Petition, nor at any point the new substantive argument that population density/household income should be considered when allocating the out-of-basin nitrogen load, Petitioner's arguments must be rejected as untimely.

II. ARGUMENT

A. Petitioner failed to challenge EPA's classification of Outfall 042 as a CSO on APA grounds, although the argument was reasonably available

Petitioner asserts for the first time in its Reply brief that EPA's classification of Outfall 042 violated the APA due to a lack of proper notice and opportunity to comment. *Pet*. *Reply* at 11. Its failure to raise the issue in its Petition is inexplicable: at the time of that filing, Petitioner was fully aware of EPA's allegedly new position in the Final Permit. EPA explained in the Response to Comments that "the inlet structure was not designed to nor does it provide any treatment, and it occurs before the headworks of the WWTP. . . [,]" so it was a CSO and not a bypass. *EPA Response, Ex. S* at 52. Furthermore, Petitioner was obviously equipped to make a procedural argument regarding EPA's classification of Outfall 042 in its Petition: after all, it objected to another issue—the total nitrogen limitation—on those same procedural grounds, *Pet*. *at*

7-10. However, Petitioner failed to even generically assert that EPA's position on Outfall 042 was erroneous on fair notice grounds anywhere in its Petition.

Not only is Petitioner foreclosed from asserting its APA argument for the first time in its Reply, the claim itself is without merit. Contrary to Petitioner's characterization of the record, EPA clearly raised the issue of Outfall 042's classification in the Fact Sheet, which accompanied the proposed permit. EPA both acknowledged that it was taking a new position on Outfall 042 from the then-existing permit, *EPA Response Ex. C* at 27, and articulated its understanding that discharges from Outfall 042 receive no treatment,[1] *Ex. C* at 8. EPA certainly provided further analysis on these points in the Response to Comments accompanying the Final Permit, *EPA Response Ex. S* at 49-53, but this was necessary and appropriate in order to respond to Petitioner's detailed comments. *See In Re: City of Palmdale,* 15 E.A.D. 700, 701 (EAB 2012) (holding public comment period was sufficient where changes occurred "as a response to – or as a logical outgrowth of – the comments received").

B. Petitioner failed to raise its proposal to allocate the out-of-basin total nitrogen load based on population density/household income although the issue was reasonably ascertainable

For the first time on reply, Petitioner asserts that its nitrogen limit was not "'necessary' to address the impairments in LIS" because EPA assigned less stringent limitations to "smaller facilities serving higher-income, suburban populations," compared to those serving "economically challenged inner-city populations," even though the former, Petitioner contends, collectively contribute a greater proportion of the overall

[1] Petitioner again raises the issue of the extent of treatment that occurs at Outfall 042 in its Reply. *Pet. Reply at 16.* As EPA explained in its Response, Petitioner has waived the argument as to the extent of treatment occurring at Outfall 042. *See EPA Response* at 41, fn.8-9.

load. *Pet. Reply* at 7. EPA's principal bases for allocating the available out-of-basin load, *i.e.*, the size and location of the discharge, two factors closely related to receiving water quality, were, however, evident on the record below. *EPA Response Ex.S* at 9-15. As EPA pointed out, the Springfield Regional Wastewater Treatment Facility ("Facility") is a large, regionally-integrated POTW located on the mainstem of the Connecticut River, a short distance upstream from Long Island Sound. *Id.* at 12-13. Petitioner had the opportunity to claim throughout these proceedings, as well as in its Petition, that EPA should specifically account for Springfield's economic standing relative to its neighbors when allocating the out-of-basin load, and that it should obtain greater total nitrogen reductions from higher income areas. It failed to do so and, in fact, never proposed an alternative methodology for allocation that would ensure that the overall nitrogen load would not increase, the issue on which EPA requested comment. *EPA Resp. Ex. V* at 3; *Ex. S* at 13-15. Instead, Petitioner proposed that EPA allocate loads based on design flow using a concentration-based limit, an approach that would not ensure against a mass-loading increase. *EPA Resp. Ex. S* at 86 ("While EPA certainly has some latitude in allocating the allowable TMDL wasteload among individual dischargers, the fairest and most straightforward way to do this is based on design flows."); 139-144 (identifying concentration-based limit). EPA did find merit in Petitioner's suggestion to use design flow and incorporated it into its methodology for allocating the out-of-basin load, but also ensured that loads would not increase through the imposition of mass-based limits. In so doing, "EPA considered a series of technical and environmental factors within its expertise, and also took into account equitable considerations[,]" *id.* at 13, including the burdens placed on the out-of-of basin facilities relative to their size. The resulting

allocations ensured that the responsibility for controlling nitrogen was fairly distributed and was not unreasonably shifted from large facilities to small ones. *Id*. While EPA now understands that Petitioner would have weighed the equities differently and utilized different factors (*i.e.*, urban/suburban; household income), it was obligated to raise those issues prior to the reply stage of these proceedings.

Even if EPA were to allocate loads based primarily on economic considerations (such as median household income), Petitioner offers no support for its newfound premise that smaller dischargers are "higher income suburban communities." *Pet. Reply* at 7. Many of the smaller facilities in the LIS watershed are rural communities and may well have lower than statewide average median household income. Moreover, such an approach would be problematic to implement, not only because median household fluctuates from year to year, but because the intersection between demographics and wastewater infrastructure can be complex: the Facility itself collects wastewater for treatment from suburban satellite communities, including Longmeadow and Wilbraham, two communities with the highest median household income in the Massachusetts portion of the out-of-basin watershed. As to the comparison of loading from smaller and larger facilities, EPA questions the whether the methodology used to arrive at the conclusion that, "smaller facilities serving higher-income, suburban populations represent substantially greater out-of-basin loadings than the SRWTF" is appropriate. *Pet. Reply* at 7. In coming to that determination, Petitioner simply added all POTWs with design flow less than 1 MGD and industrial dischargers in Massachusetts, New Hampshire and Vermont. Given EPA's focus on the size and location of the discharge as key drivers of its out-of-basin allocation plan, the more apt comparison is probably among communities

within Massachusetts, which is closest to LIS and responsible for the largest proportion of the load. The loads from Massachusetts in 2018—the year referenced in Petitioner's filing[2]—are as follows:

	2018 Actual MA Loads	
	lb/day	% of Load
POTWs with Design Flow > 10 MGD (4)	5,491	52%
POTWs with Design Flow < 10 MGD and > 5 MGD (5)	1,510	14%
POTWs with Design Flow ≤ 5 MGD and ≥ 1 MGD (20)	2,844	27%
POTWs with Design Flow < 1 MGD (23) (no numeric effluent limit)	450	4%
Industrial Dischargers (12) (no numeric effluent limit)	336	3%
TOTAL Load	**10,631**	**100%**

In sum, Petitioner's new theory rests on premises that are uncorroborated or debatable and is, at best, an alternative opinion on a technical matter, not a demonstration of reviewable error. *In re City of Taunton*, 17 E.A.D. 105, 132 (EAB 2016) aff'd, 895 F.3d 120 (1st Cir. 2018), cert. denied, 139 S. Ct. 1240 (2019).

III. CONCLUSION

Petitioner's late-arriving arguments are procedurally flawed and substantively without merit. In order to ensure the efficiency of the Board's review, and adherence to the Board's regulations and precedent, and to ensure the efficiency of the Board's review,

[2] Petitioner does not explain why it chose 2018 as the representative year. Although Petitioner's new argument turns on the allegation that costs were unfairly distributed, EPA observes there would appear to be no cost to meet the limit as of that year, as the Facility was *35%* below the permitted load (1894 lbs/day/2794 lbs/day).

Petitioner's newly-raised arguments should be dismissed as untimely, and review of this Permit should be denied.

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this Sur-reply contains less than 7,000 words in accordance with 40 C.F.R. § 124.19(d)(3).

.

Dated: February 10, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Sur-reply and Statement of Compliance with Word Limitations, in connection with *In re Springfield Water and Sewer Commission*, NPDES Appeal No. 20-07, was sent to the following persons in the manner indicated:

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