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ENVIR. APPEALS BOARD

Date: FEB 13 2008

**U.S. Environmental Protection Agency  
Office of Regional Counsel  
One Congress Street, Suite 1100  
Boston, MA 02114-2023  
Phone: (617) 918-1148  
Fax: (617) 918-1029**

**PLEASE DELIVER TO:**

**Eurika Durr  
Clerk, EPA Environmental Appeals Board  
(202) 233-0121**

**From: Samir Bukhari  
Attorney, Office of Regional Counsel  
EPA, Region 1**

**Number of Pages to Follow:**

**RE: City of Keene, New Hampshire  
Surreply  
NPDES Appeal No. 07-18  
NPDES Permit No. NH0100790**

**Originals will follow via First Class Mail.**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 1

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ENVIR. APPEALS BOARD

**VIA U.S. MAIL AND FACSIMILE**

U.S. Environmental Protection Agency  
Attn: Eureka Durr  
Clerk of the Board, Environmental Appeals Board (MC1103B)  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

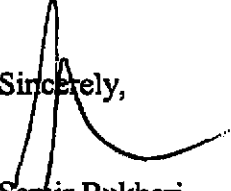
**Re: City of Keene, New Hampshire  
U.S. EPA-Region 1's Surreply  
NPDES Appeal No. 07-18  
NPDES Permit No. NH0100790**

Dear Ms. Durr:

In connection with the above-referenced permit appeal, please find enclosed for docketing and review by the United States Environmental Protection Agency Environmental Appeals Board an original and five copies of U.S. EPA Region 1's Surreply. A certificate of service has also been provided.

If you should have any questions, please do not hesitate to contact me at 617-918-1095.

Sincerely,

  
Samir Bukhari  
Assistant Regional Counsel  
Office of Regional Counsel  
US EPA-Region 1

Enclosures

cc:

Recipients Listed on Enclosed Certificate of Service

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

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ENVIR. APPEALS BOARD

In the Matter of:	)	
	)	
City of Keene	)	NPDES Appeal No. 07-18
Keene, New Hampshire	)	
	)	
NPDES Permit No. NH0100790	)	
	)	

**SURREPLY**

Region 1 of the United States Environmental Protection Agency ("Region") respectfully submits to the U.S. EPA Environmental Appeals Board ("Board") this surreply, which responds to the City of Keene's ("City's or "Petitioner's") January 11, 2008, Reply Memorandum ("Reply").

In its January 31, 2008, Order Granting Motion for Leave to File a Reply ("Order"), the Board stated that it would entertain the substance of the City's Reply "only to the extent that it indeed addresses arguments newly raised by the Region." See Order at 2. The arguments in the Reply fail to meet this criterion. Petitioner's representation to this Board that its Reply merely responds to arguments raised for the first time by the Region in its November 20, 2007, Memorandum in Opposition to Petition for Review ("Opposition") is incorrect. As demonstrated below, each of the Region's arguments that is cited by Petitioner in its Reply is already contained in the Fact Sheet (AR A.5), the Response to Comments ("RTC") (AR B.1), or both. The Board should accordingly decline to consider the City's new critiques of the phosphorus limit as they appear in the Reply because they relate to existing arguments.

Petitioner first argues that the Region erred in its use of in-stream phosphorus concentrations and recommended phosphorus targets from EPA guidance as "metric[s] for determining whether the New Hampshire definition of cultural eutrophication had been met[.] See Reply at 2. Petitioner's claim that it was not on notice of the Region's position in this regard is implausible, since Petitioner itself raised the issue in its comments on the draft permit, and the Region clearly responded to it. See RTC at 19-20 (Comment B2). The Region explained that it was using ambient total phosphorus concentrations as one indicator among several of cultural eutrophication and provided a technical rationale for this multi-factorial approach, which included a detailed discussion of relevant EPA guidance. See RTC at 19-25, 29, 35-36, 41, 61-63; Fact Sheet at 16-19. In its Opposition, the Region reiterated material that had been earlier outlined in the RTC and Fact Sheet. See Opposition at 16-20 (explaining general approach to assessing nutrient impacts on water bodies), 20-31 (explaining application of this approach to the Keene WWTF permit and outlining derivation of the phosphorus limit). While Petitioner may disagree with the merits of using total phosphorus concentrations when assessing the trophic status of a water body under New Hampshire's water quality standards, its claim that the Region's position in this regard was not articulated until the Opposition is plainly contradicted by the record. Since the arguments that Petitioner seeks to make in its Reply, at 1-2, do not respond to newly raised arguments by the Region, they should not be considered by the Board.

Petitioner also objects to the Region's interpretation of data collected by the New Hampshire Department of Environmental Services ("NHDES") regarding the percent coverage of the Ashuelot River by aquatic plant growth. See Reply at 2-4. However, these data and the accompanying interpretations by the Region did not appear in the Opposition post hoc, but were first presented in the Region's RTC on pages 26-27. The Opposition, at 25, merely contains a

summary of this earlier discussion. Petitioner chooses to ignore these facts, although they directly undermine the City's representation that the arguments on pages 2-4 of the Reply flow from new arguments raised for the first time in the Region's Opposition.

Similarly, each of the Region's arguments regarding chlorophyll *a* that is referenced and responded to by Petitioner in its Reply, at 5-9, had already been made by the Region in the Fact Sheet and/or RTC. The Region simply culled these pre-existing arguments into its Opposition. See Fact Sheet at 16-19 (interpreting 2001-2002 TMDL chlorophyll *a* sampling data) and RTC at 24-25, 44-46 (same); RTC at 34-36, 42-43 (declining to use 15 ug/l as a "de facto" water quality criterion for chlorophyll *a*); RTC at 38 (discounting in-stream volunteer monitoring data collected during 2002 and 2005 on the basis that they were not necessarily collected during critical low flow conditions); Fact Sheet at 10-11 (discussing requirement under New Hampshire water quality standards that the permit limits be calculated assuming critical low flow—*i.e.*, 7Q10—conditions) and RTC at 53-55 (same).<sup>1</sup>

The Region's interpretations of the 2001-2002 TMDL and volunteer monitoring program dissolved oxygen data are likewise not new, contrary to the implication in Petitioner's Reply Brief, at 9. In its Opposition, the Region recapitulates existing analyses on these two subjects from the Response to Comments. See RTC at 9-11 (analyzing volunteer monitoring data), 32 (citing evidence of DO violations in TMDL data), 48-50 (analyzing DO data). While Petitioner might disagree with the Region's ultimate conclusions regarding the permit or remain unpersuaded by the Region's responses, the fact remains that the arguments regarding dissolved

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<sup>1</sup> In its Reply, Petitioner appears to concede that these arguments were already set forth in the RTC, stating, "The Agency also cites to chlorophyll *a* data as the basis for declaring that cultural eutrophication exists, comparing the observed data to selected references from the literature, and dismissing more recent data presented by the City *in its response to comments.*" (emphasis added)

oxygen data set forth in the Opposition are anchored in the record below. Because the arguments on pages 9-11 of the Petitioner's Reply do not relate to newly raised arguments, the Board should decline to entertain them.

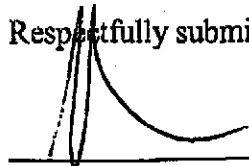
The City also challenges the Region's determination that the City's phosphorus effluent discharge is contributing to unsightly plant growth and other adverse impacts (*i.e.*, objectionable odors, changes to the benthic environment, *etc.*), and questions the Region's interpretation of the U.S. Fish and Wildlife survey and the NHDES field notes compiled during the 2001-2002 TMDL sampling effort. *See Reply at 12.* Petitioner's assertion that the Region misinterpreted these materials should not be confused with the claim that the Region raised this argument for the first time in the Opposition. The City fails to mention that an analysis of the survey and field notes, along with a conclusion that the phosphorus effluent discharges from the Keene WWTF are contributing to a violation of the applicable water quality criterion for nutrients, appears in the Response to Comments. *See RTC at 26-28.*

Finally, the Board should not entertain the raft of arguments made by Petitioner beginning on page 15 of its Reply concerning the Region's conclusion that a phosphorus effluent limit of 0.2 mg/l (based on the 1986 Quality Criteria for Water, or Gold Book, among other sources) would be sufficiently low to ensure compliance with water quality standards and that New Hampshire's water quality standards required such limit to be met under critical low flow conditions. The Region's position on these issues is not newly raised; in its Opposition, the Region again simply summarizes existing arguments from the Fact Sheet and RTC. *See Fact Sheet at 10-11, 15-20; RTC at 29, 53-55, 61-63.*

**CONCLUSION**

The arguments advanced by Petitioner in its Reply Brief do not respond to newly raised arguments and should therefore be dismissed as untimely.

Respectfully submitted,



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Samir Bukhari  
Assistant Regional Counsel  
Office of Regional Counsel  
EPA-Region 1

Dated: February 13, 2008

In the Matter of:  
City of Keene, New Hampshire  
NPDES Appeals Nos. 07-18

**CERTIFICATE OF SERVICE**

I, Samir Bukhari, hereby certify that copies of Respondent Region 1's Surreply were sent to the following persons in the manner and on the date set forth below:

By U.S. Mail and  
Facsimile

Eurika Durr, Clerk of the Board (MC 1103B)  
Environmental Appeals Board  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

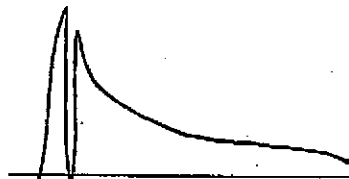
By U.S. Mail

Andrew W. Serell, Esq.  
One Capital Plaza  
Post Office Box 1500  
Concord, New Hampshire 03302-1500

Town of Marlborough  
Board of Selectmen  
P.O. Box 487  
Marlborough, New Hampshire 03455

Swanzey Sewer Commission  
P.O. Box 10009  
Swanzey, New Hampshire 03446

Dated: February 13, 2008



Samir Bukhari  
Office of Regional Counsel  
US EPA Region I (RAA)  
One Congress St. - Suite 1100  
Boston, MA 02114-2023  
617-918-1095