UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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VIA ELECTRONIC FILING

December 4, 2020

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

RE: In re Granite Shore Power Merrimack LLC
NPDES Permit No. NH0001465; NPDES Appeal No. 20-05

Dear Ms. Durr:

In connection with NPDES Appeal No. 20-05, please find and docket EPA Region 1's attached Surreply brief, and accompanying Certificate of Service, responding to the Petition for Review and Reply Brief earlier filed by Sierra Club and Conservation Law Foundation in this case.

Thank you for your assistance with this matter.

Sincerely,

/s/ Mark A. Stein

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

In the Matter of:	)	
Granite Shore Power Merrimack LLC	)	NPDES Appeal No. 20-05
NPDES Permit No. NH0001465	)	

REGION 1 SURREPLY

Respectfully submitted,

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Date: December 4, 2020

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I. INTRODUCTION

In their Petition for Review, Sierra Club and Conservation Law Foundation ("Petitioners") challenge the thermal discharge and combustion residual leachate ("leachate") conditions in the Final Permit (NPDES Permit No. NH0001465) (the "Permit"), AR-1886, issued by EPA Region 1 ("the Region" or "Region 1") for the Merrimack Station power plant ("Merrimack Station" or the "Facility"). After receiving Responses from both Region 1 and the Permittee, GSP Merrimack LLC ("GSP"), Petitioners filed their Reply on November 9, 2020 (the "Reply"). By Order dated November 24, 2020, the Board granted the Region leave to file this Surreply on or before December 4, 2020.

Petitioners' Reply contravenes 40 C.F.R. § 124.19(c)(2) by raising several new issues and arguments not presented in their Petition for Review. The Board's regulations and caselaw are clear: a petitioner must in its petition "clearly set forth, with legal and factual support," all of its arguments for why a permit decision should be reviewed, 40 C.F.R. § 124.19(a)(4)(i), and it "may not raise new issues or arguments in the reply," 40 C.F.R. § 124.19(c)(2). *See also In re Arizona Pub. Serv. Co.*, 18 E.A.D. 245, 273 (EAB 2020); *In re City of Lowell*, 18 E.A.D. 115, 157 n.22 (EAB 2020); *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). Petitioners could have presented these new issues and arguments in their Petition and, having failed to do so, they may not correct such omissions in their Reply. *See In re City of Taunton*, 17 E.A.D. 105, 183, 129 (EAB 2016) (rejecting as untimely a petitioner's attempt to use its reply to correct its earlier failure to explain in the petition why the permit issuer's response to comments warranted review); *In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 123 n.52 (EAB 2005) (citations omitted) (noting that petitioners' attempt to use reply brief to substantiate a claim with new arguments was tardy and petitioners should have raised all their

claims and supporting arguments in their petitions, and that allowing such late arguments would provide unwarranted expansion of appeal rights and prejudice permittee's interest in timely completion of permit proceeding). As a result, the Board should disregard the new issues and arguments raised in Petitioners' Reply. In addition, to the extent that the Board decides to consider these new arguments, Region 1 briefly addresses them on substantive grounds below and demonstrates that they do not warrant Board review.

Region 1 also recognizes, however, that one group of new arguments raised in Petitioners' Reply may fall under an exception to the rule barring presentation of new arguments in a reply. Specifically, Petitioners' Reply makes new arguments pertaining to the Board's recent decision in *In re Arizona Public Service Co.*, 18 E.A.D. 245, 273 (EAB 2020) (hereinafter "*Arizona Public Service*"). Because *Arizona Public Service* was not issued by the Board until after both the Petition for Review and Region 1's Response were filed in the instant case, the Region recognizes that Petitioners could not have presented arguments based on *Arizona Public Service* until their Reply. To the extent that the Board considers Petitioners' new arguments concerning *Arizona Public Service*, the Region briefly responds to these arguments below.

II. ARGUMENT

A. Petitioners' New Arguments in the Reply Challenging the Permit's Thermal Discharge Limits Should Be Disregarded as Untimely and Do Not Warrant Board Review of the Permit

As explained in Region 1's Response, at 15, the Region established the Permit's thermal discharge conditions pursuant to a CWA § 316(a) variance. These thermal discharge conditions have several different components, two of which are relevant for this Surreply: first, the Permit's capacity factor limit that applies from May 1 to September 30 as an alternative to the Permit's

instream temperature limits for preventing chronic adverse effects to fish from thermal discharges, AR-1886 at 17, 19 n.6; and second, the Permit's specification of sampling station S-4 ("S-4") as the compliance point for the Permit's temperature limits for preventing acute adverse effects from thermal discharges. *Id*. at 17, 19 nn.4 and 7. As detailed below, Petitioners' Reply makes new arguments challenging both of these components of the Permit's thermal discharge limits. Yet, there is no reason these new arguments could not have been raised in the Petition. As a result, Petitioners have waived them and the Board should disregard them. 40 C.F.R. § 124.19(c)(2). To the extent that the Board does consider them, however, the Region explains below why these new issues and arguments do not demonstrate clear error.

In addition, Petitioners also raise new issues and arguments attacking Region 1's determination that certain water quality requirements of New Hampshire state law support the Permit's thermal discharge limits. Region 1 made its interpretation of these state law requirements clear throughout the permit proceeding and there is no reason that Petitioners could not have raised their counterarguments in their Petition or their earlier comments on the draft permit. Petitioners never did so, however, and they should not be permitted to raise these new arguments in their Reply. Accordingly, the Board should disregard Petitioners' new arguments concerning the Region's interpretation of New Hampshire law. Moreover, to the extent that the Board does consider these new arguments, the Region explains below why Petitioners have failed to raise any issues warranting Board review.

1. Petitioners' New Arguments Attacking the Biological Basis of the Permit's Capacity Factor Limit Should be Disregarded and, in any event, Do Not Warrant Board Review of the Permit.

The Permit sets various instream temperature limits to protect fish from acute and chronic harms in the impounded segment of the Merrimack River receiving the Facility's thermal discharges (commonly known as the "Hooksett Pool"). AR-1886 at 17-19. The Permit also sets a capacity factor limit that applies as an alternative to the chronic temperature limits from May 1 through September 30 but not the rest of the year. *Id.* at 18, 19 n.6. The capacity factor limit also does not provide an alternative to the Permit's acute temperature limits. *Id*. at 17-18, 19 n.6. *See also* Response at 27, 36-40. Thus, from May 1 to September 30, the Permittee must comply with either the Permit's applicable instream chronic temperature limits or its capacity factor limit (*i.e.*, by maintaining a capacity factor of no more than 40 percent on a 45-day rolling average basis, AR-1886 at 17, 18, 19 n.6; *see also* Response at 36-37), and also must comply with the Permit's acute temperature limits as well as its "Rise in Temperature" limit. AR-1886 at 17, 18, 19 nn.7 and 8. In addition, the chronic instream limits and the Rise in Temperature limit also apply during the rest of the year (*i.e.*, from October 1 to April 30). *Id.* at 17, 18, 19 n.8.

In its Responses to Comments, Region 1 well explained the biological bases for its conclusion that these CWA § 316(a) variance-based thermal discharge limits would reasonably assure the protection and propagation of the balanced, indigenous population of fish, shellfish and wildlife (the "BIP") of the Hooksett Pool, as required by CWA § 316(a). Just one such basis is that the most recent data (from 2012 and 2013) concerning, among other things, increasing fish abundance and greater presence downstream of the Facility's discharge of species that favor cooler water indicate that the health of the fish community has been improving in recent years as

Facility operations have decreased.[1] *See* AR-1885 at II/73, II/186, II/216-17, II/337-38. The Region cited to specific data and reports to support these conclusions. *Id*. Further, based on these biological data indicating improved fish community health in recent years coincident with the Facility's reduced operations and correspondingly reduced thermal discharges, the Region concluded that protection and propagation of the BIP would be reasonably assured from May 1 to September 30 of each year if the Facility complied with the instream temperature limits for preventing acute harm to fish, the Rise in Temperature limit, and either the capacity factor limit or the instream temperature limits for preventing chronic harm to fish. *See id.* at II/14, II/48-61, II/186, II/327-28, II/338.

While the Petition certainly attacks the Permit's capacity factor limit, it makes *no mention* of the Region's biological analysis supporting that limit. In its Response to the Petition, Region 1 did, of course, mention this biological analysis because it was an important factor in the Region's determination of thermal discharge limits under CWA § 316(a). *See* Response at 15, 28, 40, 47 and 50. Now, in their Reply, Petitioners for the first time acknowledge and then attack the adequacy of the Region's biological analysis assessing recent improvements in fish community health. Petitioners now argue that the Region's assessment was "based on a paucity of evidentiary support: one study from 2012–2013, and another from 2010–2013, which EPA describes in extremely tentative terms …." Reply at 3-4. *See also id.* at 12-15. Yet, Petitioners run afoul of 40 C.F.R. § 124.19(c)(2) by raising these arguments for the first time in their Reply. As a result, Petitioners have waived these arguments and the Board should disregard them.

[1] Additional bases for concluding that the Permit's thermal discharge limits will reasonably assure the protection and propagation of the BIP include that Region 1 set these limits based on the most sensitive species and life stage present over the year and that the limits are well-founded in the scientific literature. *See* AR-1885 at II/70-74, II-98-101, II/123-34.

Should the Board decide to consider these new arguments, Region 1 points out that it undertook and presented a detailed and balanced biological assessment of the health of the fish community in the Hookset Pool, *See, e.g.,* AR-1885 at II/186, II/202-17, II/337-38, and well explained how this assessment supports the Permit's thermal discharge limits. *See id.* at II/14, II/61, II/73, II/186, II/327-28, II/338. While Petitioners now complain, Reply at 3, that the Region relied on "a paucity of evidence" and discussed the information in only "tentative" terms, the Region's discussion in the Responses to Comments clearly delineated a rational connection between the Region's conclusions and the information upon which it relied. This analysis was more than adequate. *See City of Taunton*, 17 E.A.D. at 112 (citations omitted) ("On matters that are fundamentally technical or scientific in nature, the Board will defer to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record."), *aff'd,* 895 F.3d 120 (1st Cir. 2018). *See also City of Taunton v. EPA*, 895 F.3d 120, 135 (1st Cir. 2018) (*quoting Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 13 (1st Cir. 2012)) ("As in many science-based policymaking contexts, under the CWA the EPA is required to exercise its judgment even in the face of some scientific uncertainty."); *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 797, 1004 (D.C. Cir. 1997) (citation omitted) (explaining that an agency's choice to regulate on basis of "imperfect scientific information" is not arbitrary and capricious unless "there is 'simply no rational relationship'" between the means used to account for the imperfections and the situation being addressed).

At most, Petitioners identify a difference of scientific opinion with the Region regarding the adequacy of the biological data and the Board should defer to the Region's scientific judgment on these complex, difficult scientific issues (*i.e.*, assessing and projecting fish

community health, and thermal discharge effects on the fish, over time). *See City of Taunton*, 17 E.A.D. at 131-32 ("It is well established that the Board, when considering technical issues, will defer to the permit issuer's position if the record demonstrates that the permit issuer duly considered the issues and made a determination that is rational in light of all the information in the record."). *See also* Response at 18 (*citing In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001) (noting that a petitioner does not establish clear error or an exercise of discretion warranting review merely by presenting "a difference of opinion or alternative theory regarding a technical matter"); *In re NE Hub*, 7 E.A.D. 561, 567-68 (EAB 1998) ("In cases where the views of the Region and the petitioner indicate bona fide differences of expert opinion or judgment on a technical issue, the Board will typically defer to the Region")).

2. The Board Should Disregard Petitioners' New Arguments Attacking the Permit's Specification of S-4 as the Compliance Point for the Acute Thermal Discharge Limits, But, If the Board Considers Them, It Should Find that they Do Not Warrant Board Review of the Permit.

Petitioner's Reply, at 17-18, raises new issues and arguments challenging Region 1's specification of S-4 as the compliance monitoring location for the Permit's acute instream temperature limits. The Board should disregard these new issues and arguments because they were first raised by Petitioner in its Reply in violation of 40 C.F.R. § 124.19(c)(2).

The Permit specifies S-4 as the compliance monitoring point for the acute instream temperature limits. AR-1886 at 17 (Daily Maximum Limits), 19 n.7. The Hooksett Pool is 5.8 miles long with Station S-0 located inside the Facility's discharge canal about midway down the Pool, and S-4 another approximately 2,000 feet downstream from the discharge canal. *See* Response at 8 (including figure showing, among other things, S-4 and S-0).

Region 1 had proposed for the 2011 Draft Permit that S-0 would be the compliance point for acute instream temperature limits, but the Region changed the compliance point to S-4 for the Final Permit in response to public comments. *See* Response at 26. The Region thoroughly explained the bases for this decision in its Responses to Comments. *See id*. at 31-32, 26-27. *See also* AR-1885 at II/129-31, II/218, II/54, II/120. Specifically, the Region found that using S-4 is reasonable given the rapid decrease in water temperatures as the thermal discharge plume mixes in the river over the relatively short distance from Station S-0 to S-4.[2] AR-1885 at II/129, 120.

Furthermore, the Region explained that adult and juvenile fish can avoid (*i.e.*, swim away from or under) any intermittently undesirable temperatures in the area. *See id.* at II/54 (American shad), 56, 57 (yellow perch). Region 1 further explained that for drifting organisms (*i.e.*, fish larvae and eggs), applying the acute temperature limits at S-4 will prevent undue mortality for a combination of reasons. First, not only is the distance between S-0 and S-4 relatively short – providing only a relatively short exposure time before reaching S-4 – but the data show that the Facility's thermal discharge plume mixes rapidly with the river and water temperatures drop fairly quickly on the way to S-4. *Id*. at II/129-31. Second, the acute limits to be applied at S-4 incorporate a 2°C buffer (*i.e.*, the limits are set 2°C *below* the lethal temperature)[3] to ensure that any exposure of larvae to elevated temperatures as they drift past Station S-0 will be limited in severity as well as duration.[4] *Id.* at II/129-31 (separately addressing American shad and yellow

[2] The entire Hooksett Pool is 5.8 miles, or 30,624 feet, long. Therefore, the approximate 2,000-foot distance from S-0 to S-4 represents about 6.53% of the length of the Pool (2,000/30,624 = 0.0653).

[3] Region 1 explained in the Responses to Comments that incorporating the 2°C buffer in setting acute limits is consistent with EPA methodology. AR-1885 at II/130. In addition, at the time of the 2011 Draft Permit, Region 1 had also explained and utilized the 2°C buffer in identifying acute temperature limits. *See* AR-618 at 188, 206. Petitioners did not comment on the buffer value at that time.

[4] In addition, the Region based the acute limits on temperatures needed to protect the *most sensitive* species present at any given time, meaning that the limits would also be protective for all the other species that make up the BIP. AR-618 at 178-80; AR-1885 at II/13, II/98.

perch). *See also id.* at II/54, II/56, II/120, II/218. Third, the data show that measured temperatures at S-4 (and even at S-0) had rarely exceeded lethal temperatures for any life stage of American shad or yellow perch since 2014 (or even earlier) as the Facility shifted to an intermittent operational profile. AR-1885 at II/54, II/56-57, II/59, II/61. Finally, the Region also explained that the BIP would be protected because the Permit requires prompt action by the Facility to reduce its thermal discharges if the acute permit limits (which incorporate the 2°C buffer) at S-4 are ever exceeded. *See id.* at II/131, 218. *See also* AR-1886 at 17 (daily maximum limits), 19 n.7.

Despite the discussion in the Responses to Comments, Petitioners argue for the first time in their Reply, at 17-18, that Region 1's application of the 2°C buffer in setting acute temperature limits does not support selecting S-4 as the compliance point. Reply at 17-18. While the Petition attacked using S-4 as the compliance point for the acute temperature limits, it made no mention whatsoever of the 2°C buffer or its role in establishing the reasonableness of using S-4. As a result, the new arguments in this regard in Petitioners' Reply contravene 40 C.F.R. § 124.19(c)(2) and should be disregarded by the Board.

To the extent that the Board does consider Petitioners' new arguments related to the 2°C buffer, these arguments do not demonstrate clear error. First, Petitioners incorrectly argue that the 2°C buffer will not prevent acute mortality because the Region "simultaneously *increased* the 'lethal limit' by 1.8°C, from 31.5°C to 33.3°C, despite acknowledging significant uncertainty as to where that limit should be set." Reply at 17 (footnotes omitted). While Petitioners are correct that Region 1 adjusted the acute temperature limit (for American shad larvae) from 31.5°C to

33.3°C, they provide no basis for second-guessing that adjustment.[5] Region 1 explained the scientific basis for adopting the 33.3°C limit in its Responses to Comments, AR-1885 at II/130, whereas Petitioners provide no reason whatsoever for contradicting it. As Region 1 stated in its Response to the Petition, at 18, "in raising a technical objection, a petitioner must present the Board with references to studies, reports, or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer." *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 289-92 (EAB 2005). *See also, e.g.*, *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 718 (EAB 2006), *appeal dismissed per stip.*, No.) (citations omitted), *appeal dismissed per stip.*, No. 06-1817 (1st Cir. 2006). Petitioners provide no such support. In addition, once more, having raised no issues with the 33.3°C value in the Petition, Petitioners may not do so for the first time in their Reply. 40 C.F.R. § 124.19(c)(2).

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[5] Petitioners' Reply, at 17-18 n.61, is perhaps suggesting that it was inappropriate for Region 1 to adjust the lethal temperature value upward given that the Region also recognizes uncertainties inherent in setting such temperature values due to variables such as acclimation temperature and exposure times in the river. Yet, the Region's recognition of these uncertainties does not contradict the specific scientific reasons Region 1 gave in the Responses to Comments for adjusting the acute lethality limit. AR-1885 at II-130. Indeed, the uncertainty around setting these sorts of values supports the Board deferring to the Region's scientific judgment on the subject. *See In re Upper Blackstone Water Pollution Abatement Dist.,* 14 E.A.D. 577, 606 (EAB 2010), *aff'd,* 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (2013). Moreover, this attack constitutes yet another new argument contravening 40 C.F.R. § 124.19(c)(2) because it was not raised in the Petition. *See also City of Taunton*, 17 E.A.D. at 132 (*quoting Upper Blackstone,* 690 F.3d at 13 ("But where a complex administrative statute, like those the EPA is charged with administering, requires an agency to set a numerical standard, courts will not overturn the agency's choice of a precise figure where it falls within a 'zone of reasonableness.'") Moreover, this attack constitutes yet another new argument contravening 40 C.F.R. § 124.19(c)(2) because it was not raised in the Petition. Finally, Region 1 also notes that Petitioners' Reply, at 18 n.61, selectively quotes from the Responses to Comments and leaves out the two important sentences following the passage they quote. Those sentences read as follows:

> Nevertheless, the studies referenced in the 2011 Determinations Document suggest that mortality and/or sub-lethal effects to early life stages of yellow perch and American shad could occur at temperatures that have been observed in the thermal plume. *In light of the available data, EPA derived protective temperatures for thermally sensitive species and life stages consistent with the methods described for setting water quality criteria in EPA's Gold Book.*

AR-1885 at II/71 (emphasis added).

Petitioners' Reply, at 18, also argues, for the first time, that a 2°C buffer is inadequate because thermal data referenced in the Responses to Comments indicate that the difference in water temperatures between S-0 and S-4 downstream are such that the lethal limit of 33.3°C could be exceeded at S-0, and at points between S-0 and S-4, even when the applicable acute limit of 31.3°C in the Permit (reflecting the 2°C buffer) is being met at S-4. Petitioners further argue that travel times from S-0 to S-4 could provide long enough exposure times to result in mortality to some drifting organisms. *Id*. at 18-19. Yet, none of this undermines either the reasonableness of the Permit's thermal discharge limits or their lawfulness under CWA § 316(a). Region 1 was persuaded by public comment that using S-0 as the compliance point for the acute limits was unreasonably stringent in this case. While the Region recognized that some mortality to drifting larvae could not be ruled out in the small area of the Pool between S-0 and S-4, it also concluded that any such mortality would be at low enough levels to reasonably assure the protection and propagation of the BIP. The reasons for this conclusion have already been detailed above. Thus, Region 1 does not dispute that some thermally-induced larval mortality is possible, but the Region applied its scientific judgment to conclude that under the facts of this case, and with the protective conditions of the Permit in place, the protection and propagation of the BIP would be reasonably assured consistent with CWA § 316(a). AR-1885 at II/131.

To the extent that Petitioners may be arguing that *no* thermal mortality is acceptable under CWA § 316(a), neither the statute nor regulations set a zero mortality standard. Response at 32. *See also In re Dominion Energy Brayton Point (Dominion II)*, 13 E.A.D. 407, 427 (EAB 2007) ("316(a) requires 'reasonable assurance of the protection and propagation of a [BIP]' as opposed to a 'no effects' standard"); *In re Dominion Energy Brayton Point (Dominion I),* 12 E.A.D. 490, 575 (EAB 2006). EPA regulations indicate that thermal discharge limits under a

CWA § 316(a) variance should not cause "appreciable harm" to the BIP but do not prohibit *any harm whatsoever* to all organisms. *See* 40 C.F.R. § 125.73(c)(1). Region 1 reasonably considered a range of factors in determining that the Permit's limits would reasonably assure the protection and propagation of the BIP of the Hooksett Pool, even if it is possible that at times some drifting larvae might experience thermally-induced mortality. To the extent that Petitioners simply express a different opinion about where to draw the line on the degree of risk that the permit limit should allow for drifting larvae, the Board should defer to the Region's well-explained, scientifically-grounded determination. *See Upper Blackstone*, 14 E.A.D. at 606 (explaining that in the face of some uncertainty, the Board will uphold the agency's choice of a particular standard "if it is within a 'zone of reasonableness.'"),*aff'd.*690 F.3d 9 (1st Cir. 2012). *See also City of Taunton*, 17 E.A.D. at 169; *Dominion II*, 13 E.A.D. at 429; *Dominion I*, 12 E.A.D. at 510, 543 n.84, 562; *NE Hub*, 7 E.A.D. at 567-68 (EAB 1998).

3. The Board Should Disregard Petitioners' New Arguments Attacking the Region's Interpretation of New Hampshire Water Quality Law, But, If the Board Considers Them, It Should Find that they Do Not Warrant Board Review of the Permit.

Petitioners raise new arguments concerning the Region's interpretation of New Hampshire water quality law and regulations. Reply at 23-24. This is inconsistent with 40 C.F.R. § 124.19(c)(2), and the Board should disregard these arguments.

In the record for the Draft Permit, Region 1 explained that the relevant New Hampshire statute provided the following (emphases added):

> *[i]n prescribing minimum treatment provisions for thermal wastes discharged to interstate waters, the department shall adhere to the water quality requirements and recommendations of* the New Hampshire fish and game department, the New England Interstate Water Pollution Control Commission, or *the United States*

> *Environmental Protection Agency, whichever requirements and recommendations provide the most effective level of thermal pollution control.*

AR-618 at 177 (quoting N.H. Rev. Stat. Ann. § 485-A:8(VIII)). The Region further noted that this provision applied to the Merrimack Station permit because the Merrimack River is an interstate water. *Id. See also* AR-618 at xi ("In this case, the most effective water quality requirements and recommendations are those developed by EPA in section 8 of this document and they become the state's water quality requirements by operation of state law."). In addition, Region 1 also explained that New Hampshire water quality regulations provide that the thermal requirements derived under this statutory provision determine the state water quality criteria for temperature for the Hooksett Pool, which is a Class B water. The state regulation dictates that "'[t]emperature in class B waters shall be in accordance with N.H. Rev. Stat. Ann. § 485-A:8, II, and VIII.' N.H. Code R. Env-Wq 1703.13(b)." AR-618 at 177. *See also id.* at xi, 176, 178. Thus, the Region explained that its recommended thermal limits would be incorporated as the state thermal requirements pursuant to state law. At the same time, the Region also explained that CWA § 316(a) authorizes EPA to set thermal discharge limits based on a variance from both technology-based and state water quality-based requirements if the criteria of § 316(a) and its implementing regulations are met. AR-618 at xiii, 17-18, 210, 217.

The Region reiterated these state law requirements in its Responses to Comments. AR-1885 at II/6. Region 1 notes that Petitioner CLF's comments on the Draft Permit also indicated that state law required the state to "'adhere to the water quality requirements and recommendations of the New Hampshire Fish and Game Department, the New England Interstate Water Pollution Control Commission, or the United States Environmental Protection Agency, *whichever requirements and recommendations provide the most effective level of thermal pollution control*.'" *Id.* at II/96 (quoting N.H. Rev. Stat. Ann. § 485-A:(8)(VIII))

(emphasis added by the commenter). *See also id.* at II/98 (Region 1 response). Furthermore, Region 1 also again explained that CWA § 316(a) authorizes it to impose thermal discharge limits based on a variance from both technology-based and water quality-based requirements if the criteria of CWA § 316(a) and the applicable regulations are satisfied. AR-1885 at II/6, II/7, II/9, II/307, II/308, II/332. NHDES certified the Region's permit under CWA § 401, AR-1811, and the Region issued the Permit. AR-1886.

In their Petition, Petitioners raised no complaints about any of the above. They did not mention the above-discussed state statutory provision and made only passing mention of the state regulation in a footnoted string-cite listing various state water quality regulations. Petition at 20 n.77 ("Applicable state WQS are codified at N.H. Rev. Stat. Ann. § 485-A:8(II) (Class B waters) and N.H. Code R. Env-Wq §§ 1701.01 (purpose) … 1703.13 (temperature) …."). Further, the Petition did not question that under CWA § 316(a), if the statutory criteria are met, thermal discharge limits may generally be set based on a variance from both the technology-based *and* the water quality-based requirements that would otherwise apply under CWA § 301. Petitioners raised a series of arguments challenging the Region's decision to exclude certain narrative provisions in the Final Permit regarding compliance with water quality standards (*e.g.*, alleging inadequate notice, unlawful backsliding, failure to satisfy standards of CWA § 316(a)), but they did not challenge the Region's assessment of the state law requirements described above.

In its Response to the Petition, at 3, 25 and 49, the Region once more explained that its final thermal discharge limits meet the criteria of CWA § 316(a) (*i.e.*, reasonably assure the protection and propagation of the BIP of the Hooksett Pool) and, as such, were issued based on a variance from both technology-based and water quality-based standards. The Region also reiterated that under N.H. Rev. Stat. Ann. § 485-A:8(VIII), NH DES would adhere to the

Region's recommended requirements for thermal pollution control and that these requirements would set the temperature criteria for the Hooksett Pool under New Hampshire's water quality standards regulations at N.H. Code R. Env-Wq 1703.13(b). *See* Response at 4-5, 25-26, 49.

In their Reply, at 23-24, Petitioners, for the first time, question Region 1's interpretation of the state law requirements and, implicitly, also seem to question whether a variance can be granted from water quality standards-based limits under CWA § 316(a). They complain that the Region's interpretation is "contorted," "new," and lacks clarity. *Id*. at 23. They assert that these state law provisions have "never" been interpreted this way and complain that the Region has cited no "decisional authority" adopting such an interpretation. *Id*. at 24 n.90. Finally, they also present an alternative interpretation of N.H. Rev. Stat. Ann. § 485-A:8(VIII). *Id*. at 24.

Region 1 disputes that its interpretation is contorted, new or unclear. Rather, it has been consistently held and explained throughout this permit proceeding. Nor is there anything particularly unusual or surprising about the way the New Hampshire statute and regulations work in this regard. As the Region explained in the Response, at 5 n.5, Massachusetts has similar state water quality requirements, and these provisions appear to be at least one way that states have endeavored to comply with CWA § 303(g), which requires that "water quality standards relating to heat shall be consistent with [CWA § 316(a)]." *Id*. at 4. With respect to Petitioners' counter-interpretation of N.H. Rev. Stat. Ann. § 485-A:8(VIII), Region 1 notes that it ignores N.H. Code R. Env-Wq 1703.13(b).[6] Moreover, with regard to these competing interpretations of state law, Region 1 points out that NH DES certified the Permit under CWA § 401 and filed an *amicus* brief in this permit appeal in which it firmly stated its support for the Permit and its view that the

[6] While Petitioners complain that the Region provided no "decisional authority" to support its interpretation of the state legal requirements, Region 1 notes that Petitioners provide no more decisional authority to support their newly proffered interpretation.

Permit satisfies state law requirements. Amicus Brief of the N.H. Department of Environmental Services (October 9, 2020) at 1-3.

Petitioners' new arguments about interpretations of state law raised for the first time in their Reply also contravene 40 C.F.R. § 124.19(c)(2), and, as such, the Board should disregard them. The Region presented its interpretation of these state law requirements repeatedly at each stage of this permit proceeding and Petitioners have no excuse for waiting until the Reply to raise these new issues.

B. The Board Should Disregard Petitioners' Attempts to Present New Arguments and Bolster Their Claims Related to Combustion Residual Leachate

1. The Board Should Disregard Petitioners' Late Attempt to Confront the Agency's Response and Rationale for Combustion Residual Leachate Limits

As explained in both the Region's Responses to Comments and Response to the Petition, in light of the Fifth Circuit's vacatur in *Southwestern Electric Power Co. v. EPA*, 920 F.3d 999 (5th Cir. 2019) ("*SWEPCO*"), Region 1 established limits for combustion residual leachate ("leachate") based on the applicable 1982 Steam Electric Effluent Limitations Guidelines ("ELGs"). AR-1885 at V/30; Response at 53-55. Petitioners incorrectly argued in their Petition, at 68, that the Region's limits were based on a site-specific assessment using its best professional judgment ("BPJ") and that such assessment resulted in limits that were not sufficiently stringent. In so doing, Petitioners failed to address the Region's rationale and basis for the leachate limits included in the Final Permit, and, as a result, Region 1's Response demonstrated that Petitioners failed to meet the procedural threshold for Board review. *See* Response at 53-56. Now, in their Reply, Petitioners attempt to acknowledge Region 1's actual rationale by stating that:

> [i]n light of this regulatory history, the specious argument advanced by the Region and the Permittee that a 1982 decision not to set BAT limits for various "low-volume wastes" still "occupies the field" in 2020 is without merit.

Reply at 34 (footnote omitted). To the extent that Petitioners attempt to confront EPA's rationale, they fail to substantiate or articulate why EPA's application of the 1982 regulations is without merit. They simply label it as "specious," "in light of this regulatory history," without anything more. Not only is it too late for Petitioners to cure their procedural error by challenging the Region's rationale for the first time in their Reply, but they have failed to provide any substantive support. *City of Taunton*, 17 E.A.D. at 183 (rejecting as untimely a petitioner's attempt to use its reply to correct its failure to explain in the petition why the permit issuer's response to comments was clearly erroneous or otherwise warranted review); 40 C.F.R. § 124.19(c)(2). Petitioners were presented with the Region's rationale in the Responses to Comments, and there is no reason that they could not have addressed this rationale in their Petition.

2. The Recent Board Decision in *Arizona Public Service* Supports Region 1's Rationale and Application of the 1982 Regulations to Combustion Residual Leachate

On September 30, 2020, this Board issued a decision denying review of the NPDES Permit issued to Arizona Public Service Company ("APS") (NPDES Appeal No.19-06). *In re Arizona Pub. Serv. Co.*, 18 E.A.D. 245 (EAB 2020). The APS permit appeal and the Board's decision involved issues related to the Steam Electric ELGs. These issues, while different in some respects, are relevant to the Board's analysis of the leachate limits included in Merrimack Station's Final Permit and the underlying rationale for such limits, as will be discussed below. Because the decision was released after the Petition for Review and Responses were filed in the

appeal of Merrimack Station's Final Permit, none of the parties could have previously addressed *Arizona Public Service*.

As mentioned above, Region 1 established limits for leachate based on the applicable 1982 Steam Electric ELGs. *See* AR-1885 at V/30; Response at 53-55. As also mentioned above, Petitioners incorrectly argued in the Petition, at 68, that the Region's limits were based on a site-specific, BPJ-based assessment and that such assessment resulted in limits that were not sufficiently stringent. Petitioners repeat this mistake in their Reply, at 31-33. Petitioners also go on in the Reply brief to discuss the Board's decision in *Arizona Public Service* and assert that it does not demand that the Board reject their leachate arguments. Reply at 35. To the contrary, the Board's opinion supports the Region's rationale and determination of the existing, applicable limits for leachate.

Petitioners cite the following language from the *Arizona Public Service* decision:

> [EPA Region 9] did not clearly err in concluding that relevant parts of the 1982 ELGs are now currently in effect given the Fifth Circuit's vacatur of the corresponding parts of the 2015 ELGs.

In re Arizona Pub. Serv. Co., 18 E.A.D. at 293. Petitioners suggest a narrow and limited interpretation of this language: *i.e.*, that the Board merely affirmed that the 1982 best practicable control technology currently available ("BPT") limits remained in effect following the Fifth Circuit's vacatur, rather than that EPA's 1982 conclusion that BAT, or the best available technology economically achievable, is no more stringent than BPT also remained in effect.[7] This interpretation of *Arizona Public Service* is without basis. Nowhere in the language above

[7] The Fifth Circuit Court of Appeals considered challenges to EPA's 2015 revisions to the Steam Electric Effluent Limitations Guidelines and ultimately vacated and remanded BAT limits for legacy wastewater and BAT limits for leachate. *SWEPCO*, 920 F.3d 999.

does the Board limit the "relevant parts" currently in effect in this way. Moreover, as the Board describes, "the Region explained that the effect of the Fifth Circuit's vacatur of portions of the 2015 steam electric guidelines was to render the corresponding portions in the 1982 steam electric ELGs the ones currently effective." *Id.* at 292. It is this explanation from Region 9 that the Board upheld and in which it found no error. And, the "corresponding portions" of the 1982 guidelines include the corresponding, affirmative decision not to establish BAT limits for leachate at that time.

Ultimately, though the Board's decision in *Arizona Public Service* dealt with a different wastestream, bottom ash transport water, it nevertheless supports two critical aspects of the Region's rationale in establishing Merrimack Station's leachate limits: 1) in vacating the BAT limits for leachate, the Fifth Circuit in *SWEPCO* reinstated the previously effective ELGs from 1982[8]; and 2) the portions of the 1982 regulations that have been reinstated include the 1982 determination that BAT for leachate (as a low volume waste) could be no more stringent than BPT and that, as a result, such determination effectively occupies the regulatory field. *See In re Arizona Pub. Serv. Co.*, 18 E.A.D. at 293-94. Importantly, however, the Board need not even consider the applicability of *Arizona Public Service* to this appeal because, as demonstrated in the Region's Response to the Petition, Petitioners failed to meet the procedural threshold for review of the leachate limits. *See* Response at 61-62; *see also* discussion above.

[8] *In re Arizona Pub. Serv. Co.*, 18 E.A.D. at 293 ("The 1982 steam electric ELGs were not before the Fifth Circuit on review, and the court took no action to vacate that regulation.").

III. CONCLUSION

For the above reasons, the Board should reject Petitioners' attempts to raise new issues or rehabilitate errors from the Petition and, ultimately, it should deny review of the Final Permit.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that the Region's Surreply in the matter of Granite Shore Power Merrimack LLC, NPDES Appeal No. 20-05, contains less than 7,000 words in accordance with 40 CFR § 124.19(d)(3). This Surreply contains 6327 words, excluding the cover page, table of contents, table of authorities, statement of compliance with word limitations, and certificate of service.

Dated: December 4, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Surreply, in the matter of Granite Shore Power Merrimack LLC, NPDES Appeal No. 20-05, were served on the following persons in the manner indicated:

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