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January 25, 2022

Via Electronic Filing

Mr. Emilio Cortes
Clerk of the Environmental Appeals Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3332
Washington, DC 20004

RE: NPDES Appeal No. 21-03

Dear Mr. Cortes:

On behalf of the City of Keene, New Hampshire, in regard to the above captioned matter, please find enclosed the City of Keene's Objection to EPA Region 1's Motion for Leave to File Surreply and Certificate of Service.

Thank you for your consideration.

Sincerely,

Joanna B. Tourangeau

Cc: Ms. Kristen Scherb, Esq. (by e-mail)
Mr. Samir Bukhari, Esq. (by e-mail)
Ms. Deborah Szaro (by e-mail)

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

In Re:	)	
City of Keene, New Hampshire	)	NPDES Appeal No. 21-03
NHDES Permit No. NH0100790	)	

CITY OF KEENE, NH OBJECTION TO
EPA REGION ONE MOTION FOR LEAVE TO FILE SURREPLY

Pursuant to 40 C.F.R. § 124.19(f)(3), the City of Keene, New Hampshire ("Keene") hereby objects to EPA Region 1's ("EPA") Motion for Leave to file a Surreply ("EPA Motion"). While, as EPA points out, the Environmental Appeals Board ("Board") possesses discretion to grant leave to file surreply briefs, this discretion is only properly exercised in cases where, as EPA also points out, new arguments or issues are raised in reply briefs. *E.g.*, *In re Arcelor Mittal Cleveland, Inc.*, NPDES Appeal No. 11-01 at 1 (EAB Dec. 9, 2011) (Order Granting in Part EPA's Motion to File Surreply, Denying Petitioner's Request to Provide Additional Information, and Granting Oral Argument); *In re D.C. Water & Sewer Auth.*, NPDES Appeal Nos. 05- 02, 07-10 to 12, at 1-2 (EAB Aug. 3, 2007) (Order Granting Leave to File Surreply and Accepting Surreply for Filing); EPA Motion at 1.

This is not a case where surreply is proper. Keene's reply brief was simply that- a reply

to EPA arguments, new documents, and/or EPA misapprehensions as set forth in EPA Region 1's Response to the Petition for Review ("EPA Brief") and the concurrently filed administrative record upon which it relies. Keene's response to EPA arguments, repeated clarification of its position in an attempt to obtain EPA comprehension, and arguments responsive to EPA positions and documents newly disclosed in the EPA Brief and as part of the administrative record are all proper contents for a reply brief, do not constitute Keene raising new arguments or issues, and do not justify EPA's improper attempt to "get the last word" in Keene's appeal. Keene respectfully requests that the Board deny EPA's request for yet another brief.

ARGUMENT

EPA asserts that "the Region has determined that Petitioner's Reply impermissibly raised three new arguments for the first time, contrary to the Board's regulations. 40 C.F.R. § 124.19(c)." EPA then seeks leave for yet another round of briefing to address three purported "new issues" and because Keene allegedly "recharacterized" its request for a "special copper condition." Keene's reply brief does not, as discussed in detail below, raise new issues or arguments. Further, "recharacterization" of an existing argument or issue is not proper grounds for requesting additional briefing and thus the Board must deny EPA's request regarding "recharacterization." 40 C.F.R. § 124.19(c)(2) ("Petitioner may not raise new issues or arguments in the reply"). Keene objects to the entirety of EPA's request for another brief and seeks denial of same.

I. Keene's argument that EPA improperly substituted NHDES's judgment for its own and thus wholesale deferred to a non-delegated state program is simply responsive to EPA arguments made and documents relied upon in the EPA Brief and is thus proper for a reply brief and does not present a new argument or issue so there is no basis for more EPA briefing.

The EPA Brief cites heavily across nine pages of argument to Exhibit D, NHDES Section 303(d) impairment list and Exhibit O, an "Email from NHDES to EPA - Regarding the State of NH's allowance of pH demonstration to support limit adjustment for pH, August 11, 2020" providing the basis for its argument that its decision regarding pH was not clear error, represented a well-reasoned exercise of EPA's judgment, and did not warrant Board review. EPA Brief at 11-12, 17-23. EPA argues in its EPA Brief that Keene presented a wrongful challenge to New Hampshire's water quality standards instead of proper argument supporting Board review. EPA Brief at 20-21, 25-29.

Keene's Reply Brief in Support of its Petition for Review ("Keene Reply") simply responded to this EPA argument stating:

> EPA argues that these Final Permit effluent limits and determinations must be upheld because Keene wrongly challenges New Hampshire's WQS. However, Keene does not contest or seek to overturn New Hampshire's applicable WQS. EPA and Keene agree that EPA must apply WQS as written. The disagreement flows from EPA's failure to implement or calculate compliance with those WQS based on EPA's own carefully reasoned determination supported by EPA's best and most current science. EPA must implement applicable WQS using its own judgment regarding *how* to do so. Instead, EPA deferred to the entirety of the state's non-delegated program and NHDES determinations regarding WQS, thereby impermissibly declining to make a well-reasoned or supported decision based on the administrative record.

Keene Reply at 3-4. The rules provide Keene with the right to reply to EPA arguments and this is all that Keene did. The very function of a reply brief is to reply to arguments raised in the EPA Brief. Thus, Keene's responsive argument that EPA reliance on these NHDES "determinations" is not a proper substitute for exercise of its own reasoned judgment is not prohibited as a new argument or issue.

Further, prior to review of EPA's Brief, Keene was unaware of the extent to which EPA substituted NHDES decision-making for its own as demonstrated by the EPA Brief reliance on Exhibits C, D and O, NHDES determinations and decisions (see particularly

Exhibit O, email communication between EPA and NHDES which EPA utilized nearly verbatim in its Response to Comments without attaching that Exhibit to the Response to Comments). Consequently, even if there were some impropriety in replying to the EPA Brief (which there is not), Keene must be permitted to address new information EPA relied upon and which EPA includes in its filing of the administrative record. In other words, EPA raised this issue and argument and Keene must be allowed to reply as provided in the rules. 40 C.F.R. § 124.19(c)(2). EPA's motion for a surreply on this issue should be denied.

II. Keene's argument that the aluminum special condition is proper because the Board approved similar conditions in other NPDES permits simply responds to the EPA Brief argument that EPA is without authority to implement such conditions and does not warrant another EPA brief.

EPA argued in the EPA Brief that:

> Not only would including a self-implementing special condition present logistical challenges as described above, but it would also impede the Region from carrying out its legal obligations. The Region has an independent duty to include permit limitations "necessary to meet water quality standards." CWA § 301(b)(1)(C); 40 C.F.R. § 122.44(d)(1), (5). Indeed, EPA regulations specifically prohibit the Region from issuing a permit "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d). For this reason, the Board held that "a mere possibility of compliance does not 'ensure' compliance" as required by the statute and regulations, *see In re City of Marlborough*, 12 E.A.D. at 250. The Board has also explained that "[w]ithout an articulation by the permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality." *In re DC MS4*, 10 E.A.D at 342-43. Keene's requested self-implementing special condition would deprive the Region of both its ability to evaluate – from a technical and a legal perspective – the new limit's compliance with the Act and its opportunity to articulate this analysis. Adjusting the limit by operation of the permit would also shield this determination from public notice and comment, counter to the letter and spirit of Part 124 regulations.

EPA Brief at 38-39. Keene understood this argument to be, essentially, that EPA could not expect this Board to uphold a condition like the one Keene sought for aluminum.

The Keene Reply consequently cited instances where this Board found that such conditions were proper. This is the very heart of a reply brief- replying to EPA arguments by providing contrary Board decisions. Keene is not prohibited from responding to EPA nor prohibited from citing responsive Board decisions. To provide EPA with the opportunity to respond to every new citation is to create an endless briefing cycle and effectively bar Keene from the ability to respond to EPA as it is explicitly allowed to do. 40 C.F.R. § 124.19(c)(2). Put simply, back and forth of point and counterpoint is not a new issue or argument and thus does not provide EPA proper grounds for a surreply on this issue. EPA's motion should be denied as to Keene's reference to other Board decisions allowing special conditions like the one Keene sought.

III. Keene's notation that EPA failed to include a special condition tied to the current, but not yet effective, aluminum limit that may later be barred by anti-backsliding requirements is not a new issue or argument and does not warrant EPA surreply.

The EPA Brief argues:

> The Region responded that it had no objection to such a data collection effort and that it would consider such an adjustment through a permit modification process if those data are collected and become available. The Region went on to offer an advisory opinion on the wisdom of that investment given the ongoing aluminum criteria revision process, a contingency for which it has reasonably accounted by forestalling the immediate imposition of the limit through a compliance schedule.

EPA Brief at 34. EPA then pointed out that:

> Insofar as Keene is suggesting that the existing criteria is too stringent given new recommended criteria, which might lead to a less stringent limitation, this line of argument is unavailing given the logic of the Act. "As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent than required by" EPA. 40 C.F.R. § 131.4(a).

EPA Brief at 35 n. 11.

Consequently, Keene responded, explaining:

> EPA counters that it responded to this request and that the request was reasonable. Response at 35-36. EPA's response is disingenuous. EPA sets out the process that Keene may utilize to obtain this new data to request an updated effluent limit without explaining *why* it did not include this approach as a special condition. A.R. A.2 at 26 (Response to Comments). By not including this process as a special condition tied to the current, but not yet effective, limit, a new effluent limit, if any, may be barred by anti-backsliding requirements. 33 U.S.C. § 1342(o). Thus, this new site-specific data, once collected and approved by NHDES, may have zero impact on Keene's effluent limit. In an attempt to avoid wasting NHDES's, EPA's, and its own time and limited funds, Keene requested this special condition to give certainty to all involved that should Keene conduct a NHDES-approved study and obtain NHDES approval of the results, that there is a mechanism in the Final Permit specifying the propriety of this process.

Keene Reply at 13. As with EPA's other complaints regarding new issues and arguments, Keene's reference to anti-backsliding (the sole discussion of which is above) is directly responsive to EPA Brief argument regarding this issue. Such back and forth is explicitly contemplated and the entire purpose of a reply brief. 40 C.F.R. § 124.19(c)(2). EPA's request for surreply briefing on this issue should be denied.

IV. EPA does not even claim that the Keene Reply discussion of its request for a special copper condition setting a clear process whereby site specific data could be utilized, consistent with state law, to reset Keene's discharge limit (if justified) is a new issue or argument that would justify surreply briefing, and thus EPA's request must be denied.

Keene raised this issue in its comments on the Draft Permit. Keene raised this issue in the brief accompanying its Notice of Appeal (i.e. its Petition). EPA responded:

> In its Petition, Keene conflates the development of a site-specific criterion with development of a new WQBEL based on that criterion. The processes are distinct. That is, even if Keene were to successfully complete a study resulting in the immediate adoption of a site-specific criterion, and even if the Region were to prospectively endorse the results of that study, a permit writer would still need to complete calculations and other analyses using that new criterion before the permit's TRC WQBEL could change. The Region would need to derive a protective WQBEL from the new criterion, and to the extent it is less stringent than the existing WQBEL, ensure it complies with the other requirements of the Act, including those relating to anti-backsliding and antidegradation. *Ex. D,* 30. This is not a mechanical process, but one that requires the exercise of technical

> judgment by the permit writer and advice of legal counsel based upon actual information in the administrative record, not, as the Region pointed out, "conjectur[e]."*Id.* at 31. The Region further explained in its response that receiving water conditions are dynamic and require renewed assessment at regular intervals. *Id.* at 30. For these reasons, the requested, self-implementing permit modification is inappropriate.

EPA Brief at 37-38. Believing that this synopsis represented EPA misunderstanding of its request, Keene explained the issue/argument again in the Keene Reply stating:

> EPA's Response, again, fundamentally misunderstands the nature of Keene's comments. EPA appears to interpret Keene's request for a special condition as one that prejudges the permitting outcome that may flow from site-specific studies. See Response at 38; A.R. C.3 at 5-2 (Keene Draft Comments) (Keene requests authority to "submit a permit modification request *to apply for* site-specific effluent copper limits . . ." and confirmation that "results of a site-specific approach will be accepted and a permit modification *may be made* to reflect revised effluent limits") (emphasis added). Keene is simply asking EPA to include a special condition in the Final Permit that documents what EPA purports to agree to in its Response to Comments. *See* A.R. A.2 at 30 (Response to Comments); A.R. C.3 at 5-2 (Keene Draft Comments). "Keene may submit a study plan for site specific-copper criteria to NHDES for review, in accordance with Env-Wq 1703.22(d). If the plan and results are approved by NHDES, the revised criteria may be used to modify the permit limits." A.R. A.2 at 30 (Response to Comments).
>
> Keene is requesting a special condition that automatically implements the permit modification *process*, not the *outcome*. EPA argues that Keene is requesting a self-implementing special condition that would deprive EPA of its ability to evaluate compliance. Response at 38-39. But inclusion of this special condition would not deprive EPA of its legally obligated process. As EPA states, a permit writer would still need to complete calculations using the site-specific results and ensure that such revised effluent limit, if any, complied with other legal requirements, such as ensuring the effluent limit met NH's WQS. Response at 37-38. Keene's request for a special condition does not foreclose this process; it contemplates and specifies this process. The special condition would commit the Region to going through its legally obligated process to develop the appropriate site-specific effluent limit, including any required public notice and comment while providing Keene with certainty regarding the legitimacy of the process so that it can confidently invest limited municipal resources. In fact, it would only require the Region to commit to treating the revised criterion, if any, that results from the site-specific study as a cause for modification, similar to special condition 1 for the pH limit in section I.G.I. of the Final Permit and similar to special conditions approved by the Board in other NPDES permits. *See, e.g., In re Town of Concord Dep't of Public Works*, 16 E.A.D. 514, 535 (EAB 2014) (a

special condition that allows the town "to submit additional data and seek a modified minimum pH limit" is permissible).

Keene Reply at 14-15. EPA's argument that the above is a "recharacterization" requiring another round of briefing is simply wrong- Keene is just saying the same thing it has since the Draft Permit Comments- but in a manner that specifically responds to EPA's argument as is proper for a reply brief.

As discussed repeatedly above, Keene is allowed to file a reply brief responding to the EPA Brief. 40 C.F.R. § 124.19(c)(2). It did so- as demonstrated above. Keene is allowed to explain and further clarify its issues and arguments, particularly when they are misinterpreted by EPA. That is, as also discussed repeatedly above, the very purpose of a reply brief. EPA's request for a surreply brief because Keene "recharacterized" an existing argument/issue lays bare the real purpose of its request for surreply briefing- an improper attempt to obtain the last word. EPA's motion for surreply on this issue should be denied.

CONCLUSION

For the reasons set forth above, Keene respectfully requests that the Board deny EPA's Motion.

Respectfully submitted,

CITY OF KEENE, NEW HAMPSHIRE

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Attorneys for Appellant

January 25, 2021

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(f)(5), undersigned counsel certifies that the foregoing Objection contains 2,738 words, as counted by a word processing system, including headings, footnotes, quotations, and citations in the count, but not including the caption, signature block, statement of compliance with word limitation, or attachments, and, thus, meets the 7,000 word limitation contained in 40 C.F.R. § 124.19.

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CERTIFICATE OF SERVICE

I, Joanna B. Tourangeau, hereby certify that on this 25th day of January, 2022, I served the foregoing Objection to the following persons in the manner indicated:

By Electronic Filing:

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