



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: Eurika Durr
Clerk of the Board, Environmental Appeals Board (MC1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

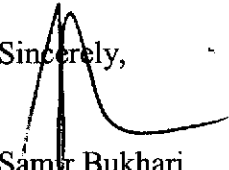
**Re: City of Keene, New Hampshire
Opposition to Petitioner's Motion for Leave to File Reply Memorandum
NPDES Appeal No. 07-18
NPDES Permit No. NH0100790**

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 Opposition to Petitioner's Motion for Leave to File Reply Memorandum. 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)	
Keene, New Hampshire)	NPDES Appeal No. 07-18
NPDES Permit No. NH0100790)	
_____)	

**REGION 1'S OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE
REPLY MEMORANDUM**

Region 1 ("Region" or "Region 1") of the United States Environmental Protection Agency ("EPA") hereby opposes the City of Keene's ("Petitioner's" or "City's") Motion for Leave to File Reply Memorandum in the above-captioned matter. For the following reasons, this case does not warrant a reply brief.

The EPA Environmental Appeals Board ("Board's" or "EAB's") Practice Manual ("Manual") states, "petitioners are advised that a petition for review should set forth, in detail, all of the issues and all of the arguments in their favor." Manual at 43. Only "on occasion" is leave granted to file a reply brief. *Id.* at 36. "[N]ew issues raised [by petitioner] for the first time at the reply stage of [the] proceedings are equivalent to late-filed appeals" and, absent extraordinary circumstances justifying such an appeal, must be denied on the basis of timeliness. *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 121, 126 n. 9 (EAB 1999); *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 (EAB 1999), *aff'd sub. nom., Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000).

A reply brief would be inappropriate under the circumstances of this case because, as outlined in Region 1's Memorandum in Opposition to Petition for Review, the City in its original petition merely repeated its earlier comments on the draft permit without addressing or even acknowledging the Region's responses. The Board, however, requires those seeking review of final permits under 40 C.F.R. part 124 to meet certain threshold levels of specificity in their petitions: it is well-established under Board precedent that "[w]here the Region responds to comments when it issues a final permit, it is not sufficient for a petitioner to rely solely on previous statements of its objections, such as comments on the draft permit. Rather, a petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review." *In re: Hecla Mining Company, Lucky Friday Mine*, NPDES Appeal Nos. 03-10 & 06-05, slip op. at 26 n. 26 (EAB, Oct. 26, 2006), 13 E.A.D. ___. In this case, a reply brief would simply serve as a device for the City to make arguments that should have been made in its original petition, but were not. The Board should not sanction Petitioner's failure to raise these arguments in a timely fashion by granting this motion. To do so would effectively allow the City to circumvent—without justification—the minimum filing conditions to which all other petitioners are generally subject.¹

The "equitable" reasons cited by Petitioner as grounds for allowing additional briefing do not amount to extraordinary circumstances warranting acceptance of this untimely submission. In fact, all are ordinary elements of the NPDES permit issuance process. The Region's responses to comments are often far more detailed and lengthy than fact sheet discussions, particularly where comments on the draft permit are voluminous and highly technical. It is

¹ In defending the permit, the Region in its Memorandum in Opposition relies on existing rationales pertaining to the phosphorus limit already set forth in the fact sheet and the response to comments. Whereas new arguments appearing for the first time in a response to petition might well counsel in favor of a reply brief, that is clearly not the case here.

worth noting that the overwhelming majority of the comments on the draft permit were received from the City itself. (In addition, for ease of reference, these comments were reproduced in their entirety within the response to comments document, which added significantly to its length). Similarly, there is nothing unusual or unfair in the fact that the amount of time taken by the Region to respond to comments and issue a final permit can and often does exceed the 30-day period provided to a petitioner to prepare a petition for review; it stands to reason that different stages of the NPDES permit issuance process will consume different amounts of time. For instance, prior to issuing a final permit, the Region must not only adequately respond to comments received on the draft permit, but must also compile the administrative record, carry out numerous administrative tasks associated with physically issuing the permit, and coordinate its activities with state and federal regulatory partners. Given this, it is unremarkable that the process of issuing a final permit in many cases takes the Region far beyond 30 days.

Finally, the difference in the amount of time provided to the Region to prepare its response to petition and that provided to Petitioner to prepare its petition for review is beside the point. Even if the EAB had provided six months for the Region to prepare its response to the petition, it would not alter the central fact that the arguments now being advanced by Petitioner for the first time were reasonably ascertainable and available at the time the original petition was filed.² Nor does the City provide an explanation of why it was incapable of making all its

² Indeed, the City does not argue the contrary, except in two specific instances. On both counts, the City's position is unavailing. Petitioner first asserts that arguments related to the "supplemental DO data" attached as Exhibit C to the City's Reply Brief were not reasonably available. *See* Reply at 11. Although Petitioner concedes that these data post-dated the issuance of the final permit, it argues that they should be included in the record because they are "highly relevant" and were not available during the comment period. Such a position is without foundation in law or common sense. *See, e.g.,* 40 C.F.R. § 124.18(c) (stating that "the record shall be complete on the date the final permit is issued."); *In re Gen. Motors Corp.*, 5 E.A.D. 400, 405 (EAB 1994) (declining to consider data developed after the final permit decision).

arguments within the filing deadline. Even in technically complex cases, the Region routinely provides parties with thirty days in which to prepare petitions for review. This timeframe is reasonable and fully comports with federal regulations governing NPDES appeal procedures. *See* 40 C.F.R. § 124.19(a). It is only fair that the City is held to the same standard as other petitioners appearing before the Board.

The lateness of the instant motion also weighs in favor of a denial. “[M]otions for leave to file a reply brief should be filed as soon as possible upon receipt of the permitting authority’s response, since the timeliness of the motion may be a factor in the Board’s consideration of whether to grant it.” EAB Manual at 36. The motion now pending before the Board was filed some seven weeks after submission of Region 1’s response to petition. Petitioner offers no explanation for the delay. Allowing the submission of additional briefing after this inexplicable lapse of time would only encourage tardy motions in the future and would not serve the interests of judicial and administrative efficiency.

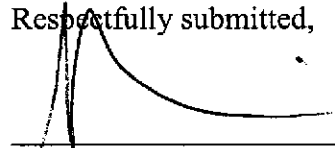
Should the Board determine that a reply brief should be allowed, Region 1 respectfully moves that the Board also permit Region 1 to submit a sur-reply brief.

CONCLUSION

For the foregoing reasons, Petitioner’s motion for leave to file additional briefing should be denied.

Indeed, the gaping exception proposed by Petitioner would simply swallow long-standing principles of administrative law and records. The fact remains that these data were not relied upon by the Region (or even in existence) when preparing the permit and are thus outside the administrative record. The second instance relates to arguments pertaining to EPA’s October 17, 2007, approval of a nutrient TMDL for the Charles River in Massachusetts, attached as Exhibit A to the Reply Brief. *See* Reply at 8. Again, this approval post-dated the final permit, was not relied upon by the Region, and is outside the administrative record.

Respectfully submitted,



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

Dated: January 15, 2008

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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 Opposition to Petitioner's Motion for Leave to File Reply Memorandum were sent to the following persons in the manner and on the date set forth below:

By U.S. Mail and
Facsimile

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U.S. Environmental Protection Agency
Ariel Rios Building
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Washington, D.C. 20460-0001

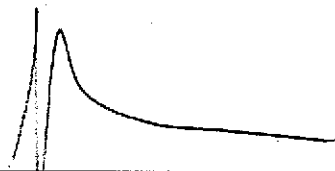
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Dated: January 15, 2008



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