



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**Region 1 – New England
5 Post Office Square, Suite 100
Boston, MA 02109-3912**

VIA ELECTRONIC FILING

November 20, 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:

Please find the attached EPA Region 1 Motion for Leave to File Surreply and accompanying Certificate of Service, in connection with NPDES Appeal No. 20-05.

Thank you for your assistance with this matter.

Sincerely,

/s/ Mark Stein

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

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

EPA REGION 1 MOTION FOR LEAVE TO FILE SURREPLY

Pursuant to 40 CFR § 124.19(f), Region 1 (“Region 1” or the “Region”) of the United States Environmental Protection Agency (“EPA”) hereby moves the Environmental Appeals Board (the “Board”) for leave to file a surreply in response to the Petitioners’ reply brief (the “Reply”). The Board has discretion to grant requests to file surreply briefs and “has typically exercised [this discretion] to allow surreply briefs where it is alleged that new arguments are raised in reply briefs or where further briefing would assist the Board in resolving disputed claims.” *In re Arizona Public Serv. Co.*, NPDES Appeal No. 19-06, at 2 (EAB Jan. 29, 2020) (Order Granting Motion for Leave to File Surreply) (*citing 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); 40 C.F.R. § 124.19(n) (now redesignated as 40 C.F.R. § 124.19(o) as per 85 Fed. Reg. 51650, 51657 (Aug. 21, 2020)). Both factors apply here and support the Board granting the Region leave to file a surreply in this case. Region 1 proposes a deadline of December 4, 2020, for submittal of its surreply.

The grounds for this motion are as follows:

1. Petitioners filed their Reply with the Board on November 9, 2020. Upon review, the Region concludes that Petitioners' Reply raises several new issues or arguments, contrary to the Board's regulations. 40 CFR § 124.19(c)(2).
2. This regulation, 40 CFR § 124.19(c)(2), formalized what had long been the Board's practice on this procedural issue. The Board has frequently held that new arguments and issues may not be raised in reply briefs submitted after the permitting authority has responded to a petition for review. *See, 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). The Board has explained that "new 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." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999); *see also In re City of Lowell*, 18 E.A.D. 115, 159 n.24 (EAB 2020).
3. To ensure adherence to the Board's procedural regulations, and the reasons for them, Region 1 should be allowed to identify these new issues and arguments and to respond to them concisely. Providing an opportunity for the Region to respond would not only be equitable but would also promote efficiency and assist the Board in its decision-making. This is especially true here because the new issues and arguments pertain in part to technical issues that must be evaluated against a complex and extensive permit record with which the Region is familiar.
4. In addition, Petitioners' Reply also raises issues related to the Board's recent decision in *In re Arizona Public Service Co.*, 18 E.A.D. 245 (EAB 2020). This opinion was issued after both the Petition and Region 1's Response were filed in this appeal. Providing the

Region an opportunity to address this opinion and Petitioners' arguments about it will assist the Board in its consideration of certain claims in this appeal.

5. Region 1 has endeavored to analyze Petitioners' Reply as quickly as possible and will prepare its surreply brief with similar expedition. Region 1 proposes a deadline of December 4, 2020, for filing its surreply, and offers that this date is warranted considering the following:

- a. Pursuant to the Board's Order dated June 16, 2020, and a subsequent Order dated October 23, 2020, Petitioner had 45 days, or until November 9, 2020, to prepare its Reply. A deadline for a surreply of December 4, 2020, would equitably provide the Region with 25 days to file a surreply. December 4 is also the same date by which the Region must file any reply brief in support of its September 25, 2020, Motion to Strike.
- b. November 26, 2020, is Thanksgiving, a federal holiday. Several critical staff in EPA Region 1 and Headquarters will be out of the office for additional days due to the holiday. This, in turn, will affect the Region's ability to coordinate with necessary technical and legal staff in both the Region and in Headquarters in preparing the surreply. Therefore, it is reasonable and expeditious for the Region to file its surreply the week after Thanksgiving.

Region 1 contacted Petitioners' and the Permittee's counsel to ascertain their position on this motion. While the Permittee assents to the instant Motion, Petitioners indicate that they "cannot take a position until they see the motion the Region files, and they reserve the right to file a response then."

For the reasons set forth above, and in the interest of assisting the Board in its decision-making, Region 1 respectfully requests that the Board grant this Motion for Leave to File a Surreply with a deadline for submittal of Friday, December 4, 2020.

Date: November 20, 2020

Respectfully submitted,

/s/ Mark A. Stein
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing EPA Region 1 Motion for Leave to File Surreply, in the matter of Granite Shore Power Merrimack LLC, NPDES Appeal No. 20-05, was served on the following persons in the manner indicated:

By Electronic Filing:

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
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Dated: November 20, 2020

/s/ Mark A. Stein

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