

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

In the Matter of:

City of Keene

NPDES Permit No. NH0100790

NPDES Appeal No. 21-03

EPA REGION 1'S SURREPLY

Respectfully submitted,

Kristen Scherb, Esq.
Samir Bukhari, Esq.
U.S. Environmental Protection Agency
Office of Regional Counsel, Region 1
5 Post Office Square
Boston, MA 02109
Tel: (617) 918-1767
(617) 918-1095
Email: scherb.kristen@epa.gov
Bukhari.samir@epa.gov

Of Counsel:

Pooja Parikh, Esq.
Water Law Office, Office of General Counsel

Dated by electronic signature

TABLE OF CONTENTS

Table of Authorities	<i>ii</i>
I. Introduction	1
II. Argument	2
A. Petitioner’s Reply improperly raises new delegations arguments.	2
B. Petitioner’s Reply improperly raises two new aluminum arguments.	4
C. Petitioner may not alter its request for a special permit condition related to copper at this late stage of litigation.	5
III. Conclusion	6
Statement of Compliance with Word Limitations	8
Certificate of Service	9

TABLE OF AUTHORITIES

EAB Decisions

<i>In re City of Moscow</i> , 10 E.A.D. 135 (EAB 2001).....	3
<i>In re City of Port St. Joe</i> , 7 E.A.D. 275 (EAB 1997)	4
<i>In re Encogen Cogeneration Facility</i> , 8 E.A.D. 244 (EAB 1999).....	1
<i>In re Knauf Fiber Glass, GmbH</i> , 8 E.A.D. 121 (EAB 1999).....	1
<i>In re Mille Lacs Wastewater Treatment Facility</i> , 11 E.A.D. 356 (EAB 2004)	1
<i>In re Springfield Water and Sewer Commission</i> , 18 E.A.D. 430 (EAB 2021).....	1, 4, 6
<i>In re Teck Cominco Alaska Inc.</i> , 11 E.A.D. 457 (EAB 2004)	3

Federal Regulations

40 C.F.R. § 122.4	5
40 C.F.R. § 124.13	1, 5
40 C.F.R. § 124.19	1, 5

I. INTRODUCTION

Regulations governing NPDES appeals and a long line of Environmental Appeals Board (“Board”) precedent unambiguously establish that petitioners “may not raise new issues or arguments in the reply.” 40 C.F.R. § 124.19(c)(2); *E.g., In re Springfield Water and Sewer Commission*, 18 E.A.D. 430, 457 n.12 (EAB 2021) (“It is well settled that petitioners may not raise new issues or arguments in their reply briefs.”); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) (“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.”). Additionally, Petitioners may not, in any appeal filing, raise issues or arguments outside the scope of those raised in public comments, except those which were not reasonably ascertainable at the time of draft permit issuance. *See* 40 C.F.R. § 124.13; 40 C.F.R. § 124.19(a)(4)(ii); *In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 376 (EAB 2004) (“...the petitioner must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period.”) *See also In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999) (“[t]he effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final.”)

Stepping beyond these clear procedural parameters, the Reply raises three new arguments and wholly recharacterizes a request made in Petitioners’ comments on the draft permit. The Reply invokes – for the very first time in this proceeding – the topic of delegations and, in doing so, makes a new argument that the Region “wholesale defer[ed] to a non-delegated state program...” *Reply* at 4, *see also id.* at 3, 8. The Reply also raises new arguments – that could

have been raised as early as the public comment period – that the disputed aluminum special condition would be proper because a similar condition “has been approved by the Board in other NPDES permits...” and that “[b]y not including ... a special condition tied to the current, but not yet effective, [aluminum] limit, a new effluent limit, if any, may be barred by anti-backsliding requirements.” *Id.* at 13. Finally, the Reply attempts to revise, post-hoc, Petitioner’s original request for a copper special condition by asserting that “Keene is requesting a special condition that automatically implements the permit modification **process**, not the **outcome**” (*Id.* at 15) (emphasis in original), a statement belied by the plain text of Petitioner’s Comments on the draft permit (“Keene... respectfully requests that additional language be included in the Final Permit indicating that the **results** of a site-specific approach will be accepted...”) (emphasis added) *AR Index No. A.2* (Attachment D to the Region’s Response to the Petition) at 28.

All three new arguments discussed above were available to Petitioner at the time it filed its Petition, if not earlier. Similarly, Petitioner could have requested the new copper special condition described in its Reply instead of the one it did, in fact, request in its comments. At this late stage of litigation, Petitioner may neither rewrite its comments on the draft permit nor revamp its legal position with new arguments that were reasonably available – yet not raised – previously.

II. ARGUMENT

A. Petitioner’s Reply improperly raises new delegations arguments.

Petitioner’s Reply argues, for the first time in this permit proceeding, that the Region impermissibly “delegate[d] [its] obligations to the state” and inappropriately “deferr[ed] entirely to [NHDES].” *Reply* at 3, 4; *see also id.* at 7 (“This interpretation of the WQS is taken wholesale from NHDES’s August 20, 2020 email and is unsupported by ... any EPA analysis in the

record.”) and *id.* at 8 (“[The Region] can[not]... shirk its duties as the permitting authority by deferring to NHDES without making, and making public, its own findings necessary to support the pH effluent limit imposed in Keene’s Final Permit.”) (regarding the permit’s pH limit.)

This is a new argument. The Petition simply asserted that the Region had not adequately considered Petitioner’s comments, including data, related to pH. *See Petition* Sec. V.B.1-2. Nowhere in the Petition did Petitioner even suggest that the Region had improperly relied upon NHDES determinations, much less improperly delegated its permitting authority to the state.

The Response to Comments is clear that the Region considered statements and prior findings by the state in assessing Petitioner’s comments and setting the pH limit. *See AR Index No. A.2 (Response Att. D)* at 22. Thus, any arguments that the Region relied disproportionately or inappropriately upon these NHDES determinations was reasonably available to Petitioner at the time it filed its Petition. Petitioner may not raise these arguments for the first time in its Reply.

Even if Petitioner had timely raised these arguments, they would fail on the merits. That the Region’s legal interpretation of the state WQS aligns with the state’s own interpretation of the same does not signify that the Region “deferred wholesale” to that state interpretation without doing its own legal analysis. Furthermore, it is entirely appropriate for the Region, in its legal analysis, to consider a state’s interpretation of the WQS. The Board “generally give[s] substantial deference to [a] state’s interpretation of its own laws.” *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 489 (EAB 2004); *see In re City of Moscow*, 10 E.A.D. 135, 154 (EAB 2001) (holding that a Region must have a “compelling reason” for not following a state’s interpretation of a state regulation).

It was additionally appropriate, for reasons described in the Region's Response to the Petition, for the Region to rely upon the 303(d) list as part of its determination that the receiving water is impaired without reevaluating the data underlying it.¹ How reliance on a listing previously considered and approved by EPA amounts to a wholesale delegation of decision-making to the state is left unexplained by Petitioner.

B. Petitioner's Reply improperly raises two new aluminum arguments.

The Reply presents two new reasons for the inclusion of Petitioner's requested special permit condition for aluminum: (1) a special condition like the one requested "has been approved by the Board in other NPDES permits..." and (2) "[b]y 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." *Reply* at 13. Petitioner could have raised these issues in its comments on the draft permit. It did not, and likewise did not in the Petition. It is simply too late to do so now, for the first time, at this late stage of briefing.

Nor would such arguments succeed on the merits, had they been timely raised. Comparisons to other permits are legally irrelevant. *See In re Springfield*, 18 E.A.D. at 499 n.31 (holding that comparison to other permits is "inapposite" because "... permits are issued on an individual basis, taking into account individual differences where appropriate.") (*quoting In re City of Port St. Joe*, 7 E.A.D. 275, 304 n.44 (EAB 1997)).

Petitioner makes no attempt to explain how the mere inclusion of its requested special condition would avoid a future potential limit being barred by anti-backsliding, perhaps because

¹ On a separate note: The Reply asserts that the Region takes the position that the state's 303(d) "listing equates to a NHDES determination that the low pH of the Ashuelot is entirely attributable to human causes..." *Reply* at 4. This is not the Region's stated position. *See Response to Petition* at 17 ("The Region... reasonably relied, in dispositive part, upon the existing 303(d) list to reach its technical conclusion that the receiving water's low pH is not due to natural causes.") *See also id.* at 18 ("...there is at least one...anthropogenic factor... that ... 'causes' [low pH.]")

it is impossible: Even if the Region included Petitioner’s requested special condition, the anti-backsliding requirements of the Clean Water Act and its implementing regulations would still need to be met were a less stringent aluminum limit to be considered in the future. *See* 40 C.F.R. § 122.4(a). The Region additionally notes that if the permit’s stated numeric aluminum limit never takes effect (due to the compliance schedule described in Final Permit Section 1.G.2), that unrealized limit would have no effect on future backsliding analyses.

C. Petitioner may not alter its request for a special permit condition related to copper at this late stage of litigation.

According to the Reply, “Keene is requesting a special condition [related to copper] that automatically implements the permit modification **process**, not the **outcome**.” *Reply* at 15 (emphasis in original). This characterization stands in direct contrast to Petitioner’s comment on the draft permit: “Keene... respectfully requests that additional language be included in the Final Permit indicating that the **results** of a site-specific approach will be accepted...” *AR Index No. A.2 (Response Att. D)* at 28 (emphasis added).

Petitioner may not, at this stage of litigation, re-write its comments on the draft permit. *See* 40 C.F.R. §§ 124.13, 124.19(a)(4)(ii). There is no reason Petitioner could not have submitted the request described in the Reply as part of its comment on the draft permit. The Petition for Review only affirms the original plain language of Petitioner’s comment on the draft permit; the copper argument opens with: “Keene’s Draft Comments requested that EPA include language in the Final Permit specifying that the **results** of a site-specific approach to establish a copper effluent limit (WER or BLM) be incorporated into the Final Permit.” *Petition* at 25 (emphasis added). *See also id.* at 26 (“This is precisely the permit condition Keene sought in its Draft

Comments- that the Final Permit include language specifying that if it set the criterion using WER or BLM that reset would be incorporated into the Final Permit.”)

In any event, even if Petitioner had timely requested the special condition described in the Reply, the Region would not have committed a reviewable abuse of discretion by declining to include it in the Final Permit. Petitioner was made aware of the modification process by the Region’s Response to Comments and a decision by the Region not to spell out the modification process in a special condition would not, in any way, alter Petitioner’s ability to obtain an appropriate, future modification. *AR Index No. A.2 (Response Att. D)* at 30-31. As Petitioner “does not cite any legal or other authority to support its contention of clear error when a permitting authority agrees to a permit applicant’s request for relief but decides on a different vehicle than the one proposed to provide that relief[,]” its claim must fail. *In re Springfield*, 18 E.A.D. at 475.²

III. CONCLUSION

Petitioner’s late-arriving arguments and attempted recharacterization of a request made during the public comment period are procedurally flawed and lack merit. To ensure the

² In the Reply, Petitioner contends that the Region erroneously deemed the permit’s effluent limitation for copper as uncontested. *Reply* at 3, n.1. Petitioner does not support this claim with any reference or citation to its Petition, nor can it, because Petitioner did not challenge the copper limit itself, but rather the absence of a separate, special condition contemplating the potential development of a new limit. Petitioner’s newfound position that it was merely seeking description of a permit modification process, not an agreement that the results of a potential site-specific study would be incorporated into the permit, makes the relation to the substantive basis for the permit’s existing copper limit even more attenuated. Furthermore, the Final Permit’s copper effluent limitations are precisely those requested by Petitioner in its comments. *A.R. Index A.2 (Response Att. D)* at 27-28, 2; *A.R. Index A.1 (Response Att. M)* at 3; *Response* at 14-15. Under these circumstances, the copper effluent limitation is both uncontested and severable within the meaning of 40 C.F.R. § 124.16(a) and .60(b).

As for Petitioner’s statement regarding the effective date of the unchallenged permit provisions (*Reply* at 3, n.1), the Region acknowledges that the Notice of Uncontested and Severable Permit Conditions it filed on December 15, 2021 contained a typo incorrectly identifying the effective date as February 1, 2021. However, the Region also filed, on December 16, 2021, a corrected Notice and a cover letter clearly identifying the typo and indicating that the correct effective date is, in fact, February 1, 2022. Not only do this notice and cover letter appear on the Board’s docket for this matter, they were also served upon Petitioner on December 16, 2021.

efficiency of the Board's review and adherence to the Board's regulations and precedent, Petitioner's newly-raised arguments should be dismissed as untimely, Petitioner's attempted rewriting of its request for a copper special condition should be disregarded, and review of this Permit should be denied for the reasons set forth in the Response to the Petition.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this surreply contains fewer than 7,000 words, in accordance with 40 C.F.R. § 124.19(f)(5).

Dated by electronic signature

Kristen Scherb, Esq.
U.S. Environmental Protection Agency
Office of Regional Counsel, Region 1

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below a copy of the foregoing Surreply, in connection with *In re City of Keene*, NPDES Appeal No. 21-03, was sent to the following persons in the manner indicated:

By electronic filing:

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

By email, as authorized by the Board's standing order dated Sept. 21, 2020:

Attorneys for Keene

Joanna B. Tourangeau, Esq.
Drummond Woodson & MacMahon
84 Marginal Way, Suite 207
Portland, ME
jtourangeau@dwmlaw.com

Stacey Caulk, Esq.
Drummond Woodson & MacMahon
84 Marginal Way, Suite 600
Portland, ME
scaulk@dwmlaw.com

Dated by electronic signature

Kristen Scherb, Esq.
U.S. Environmental Protection Agency
Office of Regional Counsel, Region 1