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

In re: City of Manchester, New Hampshire Manchester Wastewater Treatment Facility NPDES Permit No. NH0100447	NPDES Appeal No. 25-04

CONSERVATION LAW FOUNDATION'S SUR-REPLY TO EPA REGION 1'S SUR-REPLY

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INTRODUCTION

Conservation Law Foundation ("Petitioner") respectfully submits this sur-reply to the Environmental Protection Agency, Region 1's ("the Region") Sur-reply. The Region's sur-reply improperly characterizes eight statements in Petitioner's Reply as "new" and "untimely" arguments in an inequitable attempt to prevent meaningful, substantive replies to the Region's Response Brief.

The Region's Sur-reply extracts portions of eight sentences (referenced as Statements in this Sur-reply) from Petitioner's 24-page Reply, at times taking them out of context and mischaracterizing them to suggest they constitute new and untimely arguments. The Region engages in a "hair-splitting" approach the U.S. Supreme Court has disfavored in the public comment context[1] and generally advocates an approach that would deprive petitioners and the Board any meaningful benefit of reply briefing. The Region disputes Statements (a) through (h) below:

> Statement (a): ". . . the Region's concurrence with the limited [reasonable potential analysis] – conducted by NHDES… – does not remedy the Region's clear error and abuse of discretion in failing to conduct its own [reasonable potential analysis] . . ." Reply, 7.
>
> Statement (b): ". . . as the permitting authority for a state without a delegated NPDES Program, the Region cannot defer to NHDES's 401 certification analysis." Reply, 7.
>
> Statement (c): ". . . the Region relies heavily on an NHDES decision that is not yet final." Reply, 8.
>
> Statement (d): ". . . whether to conduct an independent [reasonable potential analysis] is a question of federal regulation . . . not state law." Reply, 8.
>
> Statement (e): ". . . the Region's concurrence with the state's [reasonable potential analysis] is *not* equivalent to the Region conducting its own independent analysis." Reply, 9 (emphasis in original).

[1] *See Ohio v. U.S. Envt'l Prot. Agency*, 603 U.S. 279, 296 (2024) (internal citation and quotation marks omitted) (stating that "reasonable specificity" in public comments, under the Clean Air Act, "does not call for 'a hair-splitting approach.'").

Statement (f): ". . . the narrative standards, Env-Wq 1703.21(a) and Env-Wq 1703.01(b) account for bioaccumulation, while the numeric criteria do not." Reply, 10.

Statement (g): ". . . the Permit's [WET] requirement does not account for bioaccumulation of PFAS under state narrative criteria." Reply, 10.

Statement (h): ". . . new industrial users may discharge additional amounts of PFAS to the WWTF, increasing PFAS discharges to the Merrimack River and increasing PFAS in sludge." Reply, 22.

Statements (a) through (h) are neither new nor untimely because they relate to and support the petition and because Petitioner could not have included these statements, as articulated in the Reply, in the Petition. Petitioner respectfully requests that the Environmental Appeals Board (the "Board") deny the Region's request to strike or deny review of Statements (a) through (h).

ARGUMENT

I. Legal Standard

Under 40 C.F.R. § 124.19(c)(2), the "Petitioner may not raise new issues or arguments in the reply." In interpreting this standard, the Board has stated arguments in the Petition not "relating to" the arguments in the Petition are waived. *In re Springfield Water & Sewer Comm'n*, 18 E.A.D. 430, 473 n.22 (EAB 2021) (emphasis added) ("[B]y failing to raise in its petition any arguments *relating to* the Connecticut antidegradation policy, the Commission has waived such arguments."); *see In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) (emphasis added) ("The Board considered all petitioner replies that *related to* issues raised in the petitions for review."). The phrase "relating to" connotes an expansive breadth. *See In re New England Compounding Pharm., Inc. Prods. Liab. Litig.*, No. 13-02419-RWZ, 2016 WL 11045600, at *1 (D. Mass. Feb. 29, 2016) (quoting Black's Law Dictionary (10th ed. 2014)) (determining that "related" has a broad ordinary meaning, "with Black's defining the term as '[c]onnected in some way.'"); *Id.* (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374,

383 (1992) ("The ordinary meaning of ['relating to'] is a broad one . . ."). In the analogous context of considering when issues are sufficiently raised in public comments such that they are preserved for review, the U.S. Supreme Court has stated that "reasonable specificity" in public comments, under Clean Air Act regulations, "does not call for 'a hair-splitting approach.'" *Ohio v. U.S. Envt'l Prot. Agency*, 603 U.S. 279, 296 (2024).

The Board will not consider arguments in a reply that "could have been but were not raised in the Petition[.]" *In re Caribe General Electric Products, Inc.*, 8 E.A.D. 696, 704 n.18 (EAB 2000). Similarly, the Board will not consider arguments in a reply when a petitioner "does not once in its reply brief argument . . . reference, cite, or otherwise indicate that its . . . argument was in response to the Region's response brief." *Springfield* at 490 n.27.[2]

The Region incorrectly claims that eight statements in the Reply, identified in the Region's Motion for Leave to File Sur-reply ("Motion") and referred to below as Statements (a) through (h),[3] are new and untimely arguments that broaden the scope of this appeal. *See* Motion; Sur-reply. As described below, none of the eight statements is a new argument. Rather, all of the statements (1) directly relate to and support arguments in the Petition and (2) directly reply to arguments in the Response.

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[2] The Region argues: "[i]t would be unfair and inefficient to allow a petitioner to broaden the scope of the appeal ex post by raising in a reply brief new issues or arguments that could have been raised in the petition." Sur-reply, 1 (emphasis added). However, in so arguing, the Region relies on language from *In re Carlota Copper Co.*, 11 E.A.D. 692, 735-36 (EAB 2004), that does not address Reply briefs. The Board there stated: "to supplement deficient appeals . . . typically constitutes an unwarranted expansion of a party's appeals rights and prejudices the permittee's interest in the timely resolution of the permitting process" in response to a Petitioner's attempt to "raise for the first time in a second petition . . . arguments that they should have raised in an original petition." *Id.* (emphasis added). The Board supported its reasoning by relying on cases in which petitioners sought to "amend a facially inadequate Petition" and moved for leave to "file supplement to petition for review" – not by relying on precedent involving reply briefs. *Id.*

[3] *See* Petitioner's Objection to the Region's Motion for Leave to File Sur-reply ("Objection") 4-13.

II. Reply Statements (a) Through (h) Are Not New or Untimely Arguments Because They Directly Relate to and Support the Petition.

A. Statements (a) through (f) are not new or untimely arguments because they directly relate to arguments asserted in the Petition that the Region bears responsibility to conduct a reasonable potential analysis and that the Region avoided a reasonable potential analysis by referencing the state's failure to include an effluent limitation for PFAS in its 401 certification.

Statements (a) through (f) all relate to the Region's failure to conduct an independent reasonable potential analysis for PFAS and the Region's deference to the state's reasonable potential evaluation.[4] The Region argues that "[a]ll of these arguments could and should have been raised in the Petition for Review." Sur-reply, 3. However, these statements relate to and support the Petition's argument that the Region clearly erred and abused its discretion by failing to conduct a reasonable potential analysis for PFAS, and that such failure is an important policy consideration warranting the Board's review. Petition, 17-30. They also relate to and support the Petition's unequivocal assertion that:

> In New Hampshire, [the NPDES's Permit Writers' Manual and 40 C.F.R. § 122.44(d)(1)(i)] requirements mean *the Region, as the permitting authority,* must analyze whether the City's discharges 'may . . . have the reasonable potential to cause, or contribute to' violations of New Hampshire's narrative standards for toxics, Env-Wq 1703.21(a), and its standards protecting designated uses, Env-Wq 1703.01(b).

Petition at 5 (emphasis added).

Statements (a) through (f) are also related to and supportive of the Petitioner's assertion that the Region "avoided considering Petitioner's comment advocating a reasonable potential analysis [for PFAS] by referencing the state's failure to list the receiving water as impaired for PFAS and failure to include an effluent limit in its 401 certification conditions." Petition, 20. While Petitioner's statements take a different *form* in the Reply because Petitioner responds to

[4] *See* Introduction, 1-2, *supra*, (setting forth Statements (a) through (h)).

new information revealed only in the Response, *see infra* III.A, the statements were substantively part of and are related to the Petition.[5]

These statements are materially distinguishable from the arguments the petitioner made in *In re City of Keene*, 18 E.A.D. 720, 747 (EAB 2022), in which the Board declined review because the Petition failed to raise the issue of deferral altogether. In that case, the Board rejected a petitioner's attempt to argue "for the first time" in its reply that "the Region improperly deferred to NHDES instead of making its own determinations regarding the pH effluent limitation in the permit at issue." *Id.* at 746. There, the Region had relied on the state's interpretation of its water quality standards and the 303(d) list of impaired waters – which are "functions, in the first instance, within the purview of the State" – to set the pH effluent limit. *Id.* at 747. The case did not involve a NHDES 401 certification decision. *Id.* The Board highlighted that the petitioner "did not raise the issue of deferral in its initial petition *or identify the Region's reliance on NHDES as a basis for challenging the . . . effluent limit.*" *Id.* (emphasis added). The Board also stated that the Region's Response to Comments "*repeatedly* cited statements by NHDES to support its conclusions regarding the . . . effluent limitation[,]" putting Petitioner on notice "that the Region was relying at least in part on NHDES's technical determinations[.]" *Id.*

Here, the Petition *did* identify the Region's reliance on NHDES as a basis for challenging the Region's failure to conduct a reasonable potential analysis for PFAS. *See* Petition, 20 (arguing the Region "avoided considering Petitioner's comment advocating a reasonable

[5] The Region vacillates between claiming that Petitioner has simply "repackage[d]" its arguments, Region's Response, 20, and alternatively claiming that Petitioner has brought entirely new arguments. Sur-reply, 3-7. In doing so, the Region has unfairly scrutinized the *delivery* of Petitioner's arguments rather than attempting to respond to them substantively.

potential analysis [for PFAS] by referencing the state's failure to list the receiving water as impaired for PFAS and failure to include an effluent limit in its 401 certification conditions."). Additionally, here the Response to Comments did not "*repeatedly* cite statements by NHDES"; it made one reference to the state's reasonable potential evaluation in Response 55 and stated twice "See also Response 55." Petition, Att. 2 at 88-89, 82, 85; *see also infra*, 11 n.3. Finally, here the Region's mere reference to and concurrence with the state's certification did not constitute a "technical" determination. *See* Reply, 10 n.7.

Neither does *In re City of Taunton*, 17 E.A.D. 105, 129 (EAB 2016) support the Region's claim. There, the petitioner introduced a declaration by an environmental engineer in its Reply Brief. *Id.* at 128. The declaration contained "challenges [to] charts the Region included in the Response to Comments document (to address the [petitioner's] comments)" and contained "additional arguments based on information added to the Administrative Record after the close of the public comment period" that were not referenced in the petition. *Id*. The Board sensibly decided that the petitioner could not "raise those challenges for the first time in reply." *Id.* The petitioner provided a "justification for its belated submission – that the Region did not provide the [petitioner] with the data underlying the Region's decision in a timely manner[.]" *Id.* at 128-29. The Board decided this justification was "undermined by the fact that the [petitioner] *waited until after the Region filed its Response to seek the underlying data*." *Id.* at 129 (emphasis added). The Board concluded: "If the City wanted to raise the arguments made in the . . . Declaration on appeal, it needed to seek the underlying data and conduct its review of the Region's analysis in time to assert, in its Petition, any clear errors it perceived." *Id.*

Here, unlike in *Taunton*, the Reply did not contain a new document that challenged, for the first time, data the Region relied on during the public comment period. Rather, Statements 1

through 6 permissibly relate to and support arguments made in the Petition that the Region, as the permitting authority, bears responsibility for ensuring compliance with water quality standards and for conducting a reasonable potential analysis under 40 C.F.R. § 122.44(d)(1)(i) and that the Region impermissibly avoided a reasonable potential analysis by referencing the state's failure to include an effluent limitation condition in its 401 certification.

The Reply here did not bring forth new arguments that could have been identified if Petitioner sought "underlying data" to "conduct [a] review of the Region's analysis" before submitting the Petition because the Region conducted *no* analysis and significantly shifted its rationale from reliance on water quality standards (in the Response to Comments) to deference to the state's 401 certification (in the Response Brief), as discussed *infra,* Part III.A.

B. Statement (g) is not a new or untimely argument because it directly relates to and supports an argument in the Petition that the WET requirement does not ensure compliance with a state standard that prohibits harmful accumulation of toxic chemicals.

The Region claims Statement (g)[6] is "the first time" that Petitioner argues that the WET requirement does not account for bioaccumulation of PFAS under state narrative criteria." Sur-reply, 5 (citing Reply, 10). The Region's challenge to Statement (g) exemplifies an argument in which the Region has inappropriately scrutinized and attempted to contort Petitioner's claims by viewing them through an overly narrow lens.

The Petition argues that the Region failed to consider whether the WET requirement ensures compliance with the state's narrative standard that directly prohibits toxics in

[6] As set forth in the Introduction, *supra*, Statement (g), as extracted by the Region from Petitioner's Reply, is as follows: ". . . the Permit's [WET] requirement does not account for bioaccumulation of PFAS under state narrative criteria." Reply, 10.

concentrations that "*accumulate* in aquatic organisms to levels that result in harmful concentrations in . . . [e]dible portions of fish[,]" Petition at 4, 18-19 (emphasis added), stating:

> The Region further avoided the issue [of conducting a reasonable potential analysis for PFAS] by claiming . . . the Whole Effluent Toxicity requirement ensures compliance with the narrative criterion – without acknowledging Petitioner's arguments that PFAS are toxic within the meaning of Env-1703.21(a) and without considering whether Whole Effluent Toxicity testing ensures Env-Wq 1703.21(a) compliance for PFAS.

Petition, 19.

The Region now contends that Petitioner raises an entirely new argument in its reply because the Petition "neglects to mention bioaccumulation[,]" Sur-reply, 6. It does so despite the fact that the Petition's WET argument specifically references the state standard that prohibits chemicals that accumulate to harmful levels. Petition, 19. To demand verbatim repetition from the Petition in the Reply falls into the "hair-splitting" trap disapproved by the U.S. Supreme Court. *See Ohio v. EPA*, 603 U.S. 279, 296. Statement (g) is not a new or untimely argument.

The Region attempts to rely on *In re City of Taunton*, 17 E.A.D. 105, 189 (EAB 2016) to support its claim that "Petitioner could have raised in its initial filing its argument that the WET limit does not account for bioaccumulation of PFAS consistent with state narrative criteria. It did not." Sur-reply, 5. However, *Taunton* provides that a petitioner's "failure to address the Region's merits-based responses [to comments] in its Petition is grounds for denial of review." *Taunton*, 17 E.A.D. at 189. *Taunton* does not stand for the proposition that where – as here – a Petitioner *did* address the Region's merits-based responses in its Petition, but did not do so in the exact language mirroring its Reply, the issue should not be reviewed.

In *Taunton*, the initial petition challenged the Region's denial of a request to set less stringent wet weather limits. *Id*. The initial petition argued the Region denied the request because it "believed it generally lacked the authority to do so[,]" without addressing the Response to

Comments' merits-based responses (i.e., responses regarding the state requirement "to set limits based on the lowest observed river flows over a ten-year period" and the Region's "analysis of data"). *Id.* In its Reply brief, the Petitioner argued that the Region's analysis was "complete fabrication[.]" *Id.* The Board denied review of the issue because the Petition did not acknowledge the Response to Comments' "merits-based responses" regarding the state requirement and data analysis. *Id.* Here, in direct contrast, the Petition and the Reply *both* take issue with the Region's merits-based response regarding the Region's failure to conduct a reasonable potential analysis and the insufficiency of the WET requirement; the Petition does not assert any argument related to the Region's authority with respect to the WET test. The only difference between the Petition's WET argument and the Reply's WET argument is that the former explicitly references a *state standard* that addresses bioaccumulation, while the latter explicitly references the term "bioaccumulation" itself. Petition, 19; Reply, 10-11.

Springfield is similarly inapposite. There, the Board stated that a petitioner's "assertion that . . . arguments are not new lack merit, as they cannot be found within the four corners of the petition." *Springfield*, 18 E.A.D. at 457, n.12. The "new issues" in *Springfield* were: (1) an Administrative Procedure Act claim that was not referenced in the Petition, and (2) a claim that an effluent limit was not necessary because of other, less-stringent limitations assigned to other facilities, that was not addressed at all in the petition. *Id.* at 457, n.12; 473 n.22. Both arguments were entirely new. Here, to the contrary, the WET argument is clearly stated in the Petition and it incorporates the reference to "bioaccumulation" through the state standard that governs bioaccumulation, Petition, 19; the Petition also repeatedly and explicitly references the concern of PFAS bioaccumulation in fish, Petition, 7, 10, and 26,

Finally, *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 721-24 (EAB 2006), does not support the Region's hair-splitting claim that the Petition did not adequately "raise on appeal the issue that 'the Permit's [WET] requirement does not account for bioaccumulation of PFAS under state narrative criteria.'" Sur-reply, 6 (citing Reply, 10). The Region relies on *Scituate's* statement that "[t]he Board will not 'entertain[]' 'an argument only obliquely presented in [petitioner's] initial brief but the subject of elaboration in its reply brief . . . .'" Sur-reply, 6 (quoting *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 721-24 (EAB 2006)). However, *Scituate* is far from analogous. There, the petitioner's initial brief stated that the NPDES permit authorized discharges "to the Herring River[.]" *Scituate*, 12 E.A.D. at 721. The Region's response stated that a tidal creek, not the Herring River, was the designated receiving water. *Id.* The Reply then stated that "the tidal creek is a 'manmade ditch' rather than a receiving water . . .impl[ying] that such a water body cannot legally be considered a water of the United States due to its purportedly artificial character." *Id.*

The Board in *Scituate* decided that the petitioner "mischaracterized the permit" and "did not clearly raise . . . in the petition for review, the specific issue of the tidal creek's legal status as a water of the United States[.]" *Id.* at 724. The Board denied review, stating that the petitioner "raises this claim for the first time in its reply brief[.]" *Id.* Like the APA claim in *Springfield* – and unlike the WET claim or any of the disputed Statements here – the reply brief in *Scituate* described an entirely new legal argument that was not clear in the Petition. Here, to the contrary, both the Petition and Reply argue that the Region failed to account for PFAS under the narrative toxics standard, including by failing to ensure that the WET requirement complies with the state standard prohibiting accumulation of toxics to harmful levels. Petition, 19; Reply, 10. The fact that the WET argument in the Petition did not explicitly use the term "bioaccumulation" (but

rather referenced a state narrative toxics standard that prohibits *accumulation* of toxics to harmful levels) while the Reply does specifically use the term "bioaccumulation" with respect to the WET test does not make Statement (g) a new or untimely argument.

C. Statement (h) is not a new or untimely argument because it directly relates to and supports an argument in the Petition.

The Region claims that Statement (h)[7] is untimely and that "[t]he argument that new industrial users may discharge additional PFAS. . . does not appear until the Reply." Sur-reply, 7. Contrary to this claim, the Petition addresses the fact that industrial users discharge PFAS into wastewater treatment plants and the "importan[t]" role of industrial users in reducing PFAS at wastewater treatment facilities. Petition at 12-13, 46. Specifically, the Petition states that EPA's memoranda addressing PFAS discharges into WWTFs from Industrial Users "highlight[] the importance of reducing, not just monitoring for, PFAS through Clean Water Act permitting" and that "[b]y regulating industrial users, the Permit can directly affect PFAS levels in the sludge. . . ." Petition at 12-13, 46. Statement (h) is related to and supports these assertions in the Petition and, therefore, does not constitute a new or untimely argument.

III. Statements (a) Through (h) Directly Reply to the Response Brief and Could Not Have Been Asserted in The Petition in the Exact Manner Articulated in the Reply.

In addition to directly relating to and supporting the Petition, all of the eight disputed statements directly reply to the Response Brief; the statements, as articulated in the Reply, could not have been raised in the original Petition. Objection, 4-13. In *Springfield*, the Board did not consider a permittee's new argument because the permittee "[did] not once in its reply brief

[7] As set forth in the Introduction, *supra,* as extracted by the Region from Petitioner's Reply, Statement (h) is as follows: ". . . new industrial users may discharge additional amounts of PFAS to the WWF, increasing PFAS discharges to the Merrimack River and increasing PFAS in sludge." Reply, 22.

argument . . . reference, cite, or otherwise indicate that its . . . argument was in response to the Region's response brief." *Springfield* at 490 n.27. Here, in sharp contrast, each of the eight disputed Reply statements is either preceded by or followed by a reference to the Response and/or an explanation indicating that each argument "was in response to the Region's response brief." *Id.*; *see* Objection, 4-13.

A. Statements (a) through (f) could not have been asserted in the Petition because they relate to the Region's post-hoc rationalization for its failure to conduct a reasonable potential analysis for PFAS, revealed only in the Region's Response.

Statements (a) through (f) reply to the post-hoc rationalizations in the Region's Response Brief – regarding the deference the Region purportedly provided to the state's 401 certification, and issues related to that deference. Deference to the 401 certification, and thus reliance on state numeric standards that do not account for bioaccumulation, was not – in the Region's Response to Comments – the Region's primary rationale for failing to conduct a reasonable potential analysis for PFAS. *See* Reply, 5. In fact, the Region's Response Brief conceded that the Response to Comments' explanation for failing to conduct a reasonable potential analysis for PFAS – that "there are no surface water quality criteria for PFAS" and the Region "has no way to determine whether a given level of PFAS causes or contributes to a violation of the narrative standard for toxics" – was "inartful." Region's Response, 27 (internal citation, quotation marks, and alteration removed). Petitioner's Reply highlighted the shifting rationale in the Region's Response and addressed the Region's new reasoning in direct reply to its Response. Reply, 5.

In EPA's sur-reply in *Springfield* urging the Board to dismiss new arguments, EPA argued it did not "open the door to these [new] arguments by invoking any post-hoc justification in defending any aspect of the permit in its Response to the Petition" and as a result "Petitioner was fully capable of raising these new issues prior to its Reply." *In re Springfield*, NPDES Appeal

No. 20-07, 4 (Feb. 10, 2021) (Respondent EPA's Surreply). The Region did not, and could not, make a similar claim in its sur-reply here. Here, the Region clearly shifted its rationale after conceding that its Response to Comments' primary rationale did not accord with the Clean Water Act and relevant precedent; in shifting its rationale, the Region "open[ed] the door" to arguments in reply to its post-hoc rationalizations. *See id.*

Notably, the Region does not dispute Petitioner's Reply argument that the Region shifted its rationale for failing to conduct an independent reasonable potential analysis for PFAS. Instead, relying on *In re City of Keene*, 18 E.A.D. 720, 747 (EAB 2022), the Region asserts: Petitioner's argument that "the Region 'repeatedly' described 'the lack of federally-approved water quality standards' while 'mentioning NHDES's reasonable potential analysis . . . only *once*[8] . . . does not cure Petitioner's failure to object to, or even acknowledge, the analysis in its Petition" because Petitioner "had notice that the Region was relying at least in part on NHDES's technical determinations[.]" Sur-reply, 4-5. Relying on *In re City of Taunton*, 17 E.A.D. 105, 129 (EAB 2016), the Region claims Petitioner was "reasonably on notice of the analysis, its outcome, and the Region's concurrence with it" and "could have challenged the Region's reasoning[.]" Sur-reply, 4.

[8] The Region claims that the Response to Comments "addresses the state analysis and the Region's concurrence with it more than just 'once[,]'" (i.e., more than just in Response 55) because Responses 53 and 54 both include the phrase "See also Response 55." Sur-reply, 4 n.4. Responses 53 and 54 do not explicitly mention the state's reasonable potential evaluation, whereas the Response to Comments explicitly mention the lack of federally-approved water quality standards six times as a basis for the Region's decision with respect to PFAS. *See* Reply, 5 (citing Petition, Att. 2, 75, 80, 81, 83, 90, 91). Neither do Responses 53 and 54 address "the Region's concurrence" with the state's analysis. To the contrary, Responses 53 and 54 assert that "the *state* agrees" with the *Region's* interpretation, suggesting that the Region made its own determination not to conduct a reasonable potential analysis and that concurrence with the state certification was *not* the primary basis of the Region's decision to avoid that undertaking. *See* Petition, Att. 2, 82, 85.

Keene and *Taunton* are both inapposite. In *Keene*, "[n]owhere 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." *City of Keene*, NPDES Appeal No. No. 21-03, 3 (Feb. 2, 2022) (EPA Region 1's Sur-reply). The Region also stated there that the petitioner never even suggested that there was any inappropriate reliance on NHDES findings, "much less [that the Region] improperly delegated its permitting authority to the state." *Id.* Here, in contrast, Petitioner is not introducing a new argument, but building upon facts expressed in its appeal, as explained above.

In *Taunton*, as described above, the Board denied a petitioner's attempt to make new arguments in a reply brief by submitting a declaration that challenged the Region's "underlying data" and a provided a "review of the Region's analysis[.]" *Taunton*, 17 E.A.D. at 129. The Board rejected the petitioner's "justification for its belated submission" – that the "Region did not provide the [petitioner] with the data underlying the Region's decision in a timely manner" – because the petitioner should have sought the data from the Region before submitting its petition. *Id.* at 128-129. Here, to the contrary, Petitioner could not have requested the Response Brief's rationale from the Region before submitting the Petition. The Petitioner properly relied on the rationale emphasized in the Response to Comments – the lack of federally-approved water quality standards – and the Region improperly shifted its rationale toward deference to the state certification in the Response Brief. *See* Reply, 5-7.

B. Statements (g) and (h) could not have been asserted in the Petition because they directly reply to the Region's Response.

Statements (g) and (h), while they do not relate to the Region's post-hoc justification of its failure to conduct a reasonable potential analysis for PFAS, nonetheless could not have been

raised in the Petition as specifically articulated because they directly reply to the Response. *Contrast Springfield*, 18 E.A.D. at 490 n.27.

Statement (g) supports the Petition's statement regarding the Region's failure to ensure that whole effluent toxicity ("WET") testing ensures compliance with a narrative standard that specifically accounts for accumulation of toxic chemicals, in direct response to the Response Brief's argument that "the Petition 'fails to meaningfully confront' the Region's reference to the WET requirement." Reply, 11 (citing Region's Response, 2); Objection, 12.

Statement (h) provides an example in direct reply to the Region's Response, illustrating the inadequacy of the Response. *See* Reply, 22 (emphasis added) ("The Region provides no support *for its claim* that the permit will not allow increased water quality impacts to the environment or human health. *For example*, it does not recognize and address the possibility that new industrial users may discharge additional amounts of PFAS to the WWTF, increasing PFAS discharges to the Merrimack River and increasing PFAS in sludge."); *see also* Objection, 12.

The Region argues that because the Response to Comments stated that "this permit reissuance fully protects all updated water quality standards and does not allow any increased water quality impacts to the environment or human health[,]" Statement (h) is "late." Sur-reply, 6 (citing Response to Comments, 72). The Region fails to acknowledge that the Petition specifically discusses the benefits of reducing PFAS in industrial user discharges and that the Reply's example directly replied to the Region's claim – made only in its Response – that "Petitioner does not provide 'legal or factual support' for its position that the [Program Policy] supports 'reducing' PFAS discharges…" Reply, 22 (citing Region's Response, 44).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Board deny the Region's request to strike or deny review of Statements (a) through (h).

Dated: April 20, 2026

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I, Jillian Aicher, hereby certify that the foregoing Sur-reply contains fewer than 7,000 words in accordance with 40 C.F.R. § 124.19(d)(3). This Sur-reply contains 5,025 words (including headings, footnotes, and quotations), as counted by Microsoft Word. This Sur-reply is written in Times New Roman, 12-point font.

Dated: April 20, 2026

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CERTIFICATE OF SERVICE

I, Jillian Aicher, hereby certify that on April 17, 2026 I caused to be served a true and correct copy of the foregoing Motion to the following persons, in the manner specified below:

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