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

In the Matter of: City of Manchester NPDES Permit No. NH0100447	NPDES Appeal No. 25-04

EPA REGION 1'S SUR-REPLY

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

EAB Decisions

Federal Regulations

Other Authorities

I. SUMMARY

"It is well settled that petitioners may not raise new issues or arguments in their reply briefs." *In re Springfield Water and Sewer Commission,* 18 E.A.D. 430, 457 n.12 (EAB 2021). Indeed, the regulations governing NPDES permit appeals explicitly forbid it. 40 C.F.R. § 124.19(c)(2) ("Petitioner may not raise new issues or arguments in the reply."); *see also, e.g.*, *In re City of Keene*, 18 E.A.D. 720, 746 (EAB 2022) ("The Board will not consider… argument[s]… not timely raised in the petition."); *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.").

The prohibition against new arguments in reply briefs serves important purposes. Consistent with the Board's aim of efficiently and fairly resolving appeals of permitting decisions, the regulations demand that petitioners include in their petitions all issues and arguments for review; permit issuers, in turn, respond to all timely-raised issues and arguments in their response briefs. *See* 40 C.F.R. §§ 124.19(a)(4), (b) (petitioners must clearly set forth, with legal and factual support, contentions for why the permit decision should be reviewed and the permit issuer must file a response to the petition). It would be unfair and inefficient to allow a petitioner to broaden the scope of appeal *ex post* by raising in a reply brief new issues or arguments that could have been raised in the petition. *In re Carlota Copper Co.*, 11 E.A.D. 692, 735-736 (EAB 2004) ("[A]llowing petitioners to [supplement deficient appeals] typically constitutes an unwarranted expansion of a party's appeal rights and prejudices the permittee's interest in the timely resolution of the permitting process."). It is inappropriate to raise new arguments in a reply brief, when the Region and the City have already filed their principal briefs and the regulations do not give either the right to submit additional briefing. *See* 40 C.F.R. §

124.19. In its review of the permitting record, the Board should consider the issues raised in the Petition – fully briefed by all parties – not the new arguments raised for the first time on Reply.

The Board has exercised its discretion to strike untimely arguments. *E.g., In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB May 20, 2008) (Order Granting Motion to Strike); *In re Woodcrest Manufacturing, Inc.*, 7 E.A.D. 757, 759, 764 (EAB 1998) (granting motion to strike a portion of a brief, stating "we will not consider… Appendix D to [the] Brief *or the related arguments contained in the Brief*") (emphasis added); *In re Caribe General Electric Products, Inc.*, 8 E.A.D. 696, 698 n.1 (EAB 2000) (granting a Motion to Strike a brief both because the party did not seek leave of the Board to file the brief and because the brief "in a number of instances raised new arguments that should have been raised [earlier], not presented for the first time in the Reply"); *see In re City of Taunton*, 17 E.A.D. 105, 154 n.41 (EAB 2016) (granting the Region's Motion to Strike with respect to a document, "*including the additional argument and analyses contained within*, as untimely") (emphasis added). The Board also routinely disregards arguments raised for the first time in reply briefs. *E.g., Keene*, 18 E.A.D. at 746 (EAB 2022) ("The Board will not consider this argument because it was not timely raised in the petition.").

As identified in the Region's Motion for Leave to File Sur-reply, Petitioner has raised eight new arguments for the first time on Reply. All eight were available to Petitioner at the time it filed its Petition and were therefore required to be included, if at all, in that initial filing. 40 C.F.R. §§ 124.19(a)(4)(i), (c)(2). The Board should strike or deny review of these untimely arguments raised improperly for the first time on Reply.

II. ARGUMENT

A. The Reply belatedly challenges the Region's evaluation of and concurrence with the state's reasonable potential analysis.

The Region highlighted in its response brief that the Petition wholly ignored the state's reasonable potential analysis and the Region's concurrence with it, both of which are reflected in the administrative record and described in the Response to Comments. *E.g.,* EPA Region 1's Response to the Petition for Review, 20; A.R. Index No. D.2;[1] Response to Comments,[2] 88-89, 82, 85. Petitioner finally addresses the state's analysis and the Region's concurrence in the Reply Brief, arguing for the first time in this appeal that "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); "as the permitting authority for a state without a delegated NPDES Program, the Region cannot defer to NHDES's 401 certification analysis" (Reply, 7); "the Region relies heavily on an NHDES decision that is not yet final" (Reply, 8); "whether to conduct an independent [reasonable potential analysis] is a question of federal regulation… not state law." (Reply, 8); "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); and "the Region[]… does not explain how the state's evaluation … addresses the narrative standards Env-Wq 1703.21(a) and Env-Wq 1703.01(b). For example th[ose] narrative standards… account for bioaccumulation, while the numeric criteria do not." (Reply, 10).

All of these arguments could and should have been raised in the Petition for Review. 40 C.F.R. § 124.19(a)(4)(i) ("[A] petition for review must identify the contested permit condition or

[1] Available as Attachment L to the Region's Response to the Petition for Review.
[2] Available as Attachment C to the Region's Response to the Petition for Review.

other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed."). In several instances in the Response to Comments on the Draft Permit, the Region explained or referenced its explanation that:

> … the state, as part of its 401 water quality certification process, conducted a reasonable potential analysis using recent state-adopted (but not EPA approved) PFAS MCLs. In their response to comments document, NHDES concluded that "The results of this evaluation… show that the Manchester WWTF's discharge does not have reasonable potential to cause or contribute to an exceedance of the four PFAS water quality criteria in the receiving water, and the permit, as currently written, will ensure that the discharge will comply with New Hampshire's surface water quality standards."[] EPA concurs with NHDES's analysis and conclusion which provides additional support that effluent limits for PFAS are not necessary in this permit to protect water quality standards at this time.

Response to Comments, 89, 82, 85. The Response to Comments, furthermore, incorporated by reference the state analysis described in the RTC. *Id.* at 89, citing A.R. Index No. D.2, 6. Interested parties, reasonably on notice of the analysis, its outcome, and the Region's concurrence with it, could have challenged the Region's reasoning in a Petition for review. *Taunton*, 17 E.A.D. at 129 (EAB 2016) ("If [petitioner] wanted to raise… arguments on appeal… it needed to… conduct its review of the Region's analysis in time to assert, in its Petition, any clear errors it perceived.").[3]

Petitioner attempts to excuse its tardy arguments by pointing to the fact that the Region "repeatedly" described "the lack of federally-approved water quality standards" while "mention[ing] NHDES's [reasonable potential analysis]… only *once,*"[4] but this does not cure

[3] Indeed, Petitioner challenged the Region's partial reliance on the benthic survey analysis in the 401 certification ("The Region… clearly erred by relying on NHDES's 401 certification condition and justification… (Petition, 34)), further indicating that Petitioner should have been capable of raising similar arguments regarding PFAS in the Petition, rather than for the first time on reply.

[4] The Region notes that the Response to Comments addresses the state analysis and the Region's concurrence with it more than just "once." *See* Response to Comments, 88-89, 82 ("see also Response 55"), 85 ("see also Response 55").

Petitioner's failure to object to, or indeed even acknowledge, the analysis in its Petition. Reply, 5 (emphasis in original). Under the Board's precedent, where "The record shows that [Petitioner] had notice that the Region was relying at least in part on NHDES's technical determinations" and Petitioner "could have raised its objection[s] to this reliance in the petition and failed to do so[,]"the Board must "decline[] review of this issue as untimely raised in the reply brief." *Keene*, 18 E.A.D. at 747.

B. Petitioner belatedly challenges the WET requirement.

Petitioner argues for the first time on reply that, "the Permit's Whole Effluent Toxicity ("WET") requirement does not account for bioaccumulation of PFAS under state narrative criteria." Reply, 10. Like Petitioner's other new arguments related to the Region's approach to PFAS, this argument was reasonably available to Petitioner at the time of permit issuance. In response to Petitioner's comment that the Region should evaluate the reasonable potential of the effluent to violate water quality standards, the Region explained (among other things):

> In any event, as described in the Fact Sheet, EPA has chosen a Whole Effluent Toxicity (WET) approach to ensure the permittee's discharge does not violate th[e] narrative water quality criterion [for toxics.] Fact Sheet, 31-32 ("The inclusion of WET requirements in the … Permit will assure that the Facility does not discharge combinations of pollutants into the receiving water in amounts that would be toxic to aquatic life or human health."); *see also NPDES Permit Writers' Manual*, pg. 6-11 – 6-12 ("Effluent limitations… may be based on a parameter-specific approach or a WET testing approach to implementing water quality standards" and "The WET approach is useful [for example] … where it might be infeasible to identify and regulate all toxic pollutants in the effluent.").

Response to Comments, 81-82. On notice of the Region's decision with regards to the WET limit, 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. *Taunton*, 17 E.A.D. at 189 (Petitioner's "failure to address the Region's merits-based responses in its Petition is grounds for denial of review."). Petitioner claims this issue is preserved because the

Petition "highlighted that the RTC did not address 'whether [WET] testing ensures Env-Wq 1703.21(a) compliance for PFAS.'" Reply, 11, citing Petition, 19. Even this retelling of the Petition, however, neglects to mention bioaccumulation. *Springfield,* 18 E.A.D. at 457, n.12 ("assertion[s] that… arguments are *not* new lack merit [if] they cannot be found within the four corners of the petition.") (emphasis in original). The Petition does assert that "the Pickard Study data indicates… bioaccumulation of PFAS…" (Petition, 26), but it is not clear anywhere in the Petition that Petitioner was intending to raise on appeal the issue that "the Permit's [WET] requirement does not account for bioaccumulation of PFAS under state narrative criteria." Reply, 10. Petitioner cannot make that claim for the first time in a reply brief. 40 C.F.R. §§ 124.19(a)(4), (c)(2); *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 721-24 (EAB 2006) (The Board will not "entertain[]" "an argument only obliquely presented in [petitioner's] initial brief but the subject of elaboration in its reply brief . . . ."). The Board should strike or deny review of this issue as untimely.

C. Petitioner belatedly argues that industrial users may discharge additional PFAS.

Petitioner is also late in arguing 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." Reply, 22. Petitioner offers this "example" in response to the Region's "claim that the permit will not allow increased water quality impacts to the environment or human health." *Id*. The Region's position was clear in the Response to Comments: "EPA has ensured 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." Response to Comments, 72. Indeed, the Petition challenges this response on several

bases. Petition, 44-45. The argument that new industrial users may discharge additional PFAS, however, does not appear until the Reply. For this reason, the Board should strike or deny review of this issue as untimely. 40 C.F.R. §§ 124.19(a)(4), (c)(2).

III. CONCLUSION

For the foregoing reasons, the Board should strike or deny review of the arguments raised for the first time in Petitioner's Reply Brief.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that the Region's sur-reply contains fewer than 7,000 words, in accordance with 40 C.F.R. § 124.19(d)(3).

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CERTIFICATE OF SERVICE

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