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Via Electronic Filing

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

RE: National Pollutant Discharge Elimination System Permit Number NH-0100790 for the Keene Wastewater Treatment Plant

Dear Mr. Cortes:

On behalf of the City of Keene, New Hampshire, in regard to the above captioned matter, please find enclosed the City of Keene's Reply Brief in Support of Petition for Review and Certificate of Service.

Thank you for your consideration.

Sincerely,

Joanna B. Tourangeau

Cc: Ms. Kristen Scherb, Esq. (by e-mail)
Mr. Samir Bukhari, Esq. (by e-mail)
Ms. Deborah Szaro (by e-mail)

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

In Re:	)	
City of Keene, New Hampshire	)	NPDES Appeal No. 21-03
NHDES Permit No. NH0100790	)	

CITY OF KEENE'S
REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The City of Keene, New Hampshire ("Keene"), through its undersigned representatives and pursuant to 40 C.F.R. § 124.19(c)(2), respectfully submits this Reply Brief in Support of Petition for Review ("Reply") seeking review of three portions of the final National Pollutant Discharge Elimination System ("NPDES") Permit No. NH0100790 ("Final Permit"), issued to Keene by the United States Environmental Protection Agency ("EPA") on September 13, 2021.[1]

EPA has not delegated New Hampshire authority under the Clean Water Act because New Hampshire did not demonstrate that it has a program for protecting waters of the state, like the Ashuelot River, that is at least as stringent as the Clean Water Act ("CWA"). Consequently, the CWA obligates EPA to issue a NPDES Permit ensuring that Keene's discharge to the Ashuelot River complies with New Hampshire's water quality standards ("WQS") and the CWA. EPA cannot selectively delegate these obligations to the state. Nor can EPA defer to New Hampshire Department of Environmental Services ("NHDES") decisions or determinations in lieu of making EPA's own, carefully reasoned determination regarding Final Permit standards Keene must meet to comply with the CWA and WQS. EPA, by its own admission, failed to do so. Thus, the Environmental Appeals Board ("Board") must review the Final Permit discharge standards for pH, aluminum and copper.

EPA argues that these Final Permit effluent limits and determinations must be upheld because Keene wrongly challenges New Hampshire's WQS. However, Keene does not contest or seek to overturn New Hampshire's applicable WQS. EPA and Keene agree that EPA must apply WQS as written. The disagreement flows from EPA's failure to implement or

[1] Keene notes that EPA's notice of uncontested and severable permit conditions in connection with the Final Permit posits that Keene did not challenge the copper standard itself and specifies that unchallenged provisions will become effective on February 1, 2021. Both of these propositions are in error.

calculate compliance with those WQS based on EPA's own carefully reasoned determination supported by EPA's best and most current science. EPA must implement applicable WQS using its own judgment regarding *how* to do so. Instead, EPA deferred to the entirety of the state's non-delegated program and NHDES determinations regarding WQS, thereby impermissibly declining to make a well-reasoned or supported decision based on the administrative record.

EPA Region 1's Response to the Petition for Review ("Response") blatantly describes this incorrect approach. EPA states repeatedly that instead of carefully weighing record evidence, it opted to ignore Keene's presentation of significant data and evidence in the administrative record (including directly from NHDES), instead deferring entirely to NHDES. EPA improperly substituted NHDES's judgment for its own and failed to exercise its judgment to assess conflicting information. Thus, EPA erred. EPA cannot wholesale defer to a non-delegated state program and call it exercise of its own well-reasoned judgment.

Specifically, first, EPA rejects Keene's presentation of reams of data and evidence regarding the naturally occurring pH of the Ashuelot being below 6.0. Instead, EPA imposes a Final Permit pH limit of 6.5-8.0 based on NHDES listing the Ashuelot as impaired for pH, claiming that this listing equates to a NHDES determination that the low pH of the Ashuelot is entirely attributable to human causes (even though the WQS includes no such requirement and NHDES explicitly stated to EPA repeatedly that it couldn't determine the cause of the low pH with any precision). Second, EPA argues that it must continue to utilize an inapplicable methodology for calculating the Final Permit effluent limit for total recoverable aluminum and may not account for the use of site-specific data in its permit conditions, despite agreeing with this approach. Last, EPA claims that it is procedurally barred from including a process for

developing a site-specific effluent copper limit in the Final Permit even though this process fully accords with EPA-required and NHDES-required procedures.

For these reasons and those in Keene's Petition for Review ("Petition"), each of these Final Permit effluent limits and determinations present clear error and are an abuse of discretion.

II. ARGUMENT

A. EPA's Failure to Apply New Hampshire Water Quality Standards for pH, as Written, Is Clear Error.

The parties agree that the administrative record includes copious NHDES data from 2007 through 2019 documenting the low pH of the Ashuelot River and that low pH is (at the very least in part) due to natural causes. A.R. C.3.d at 4.2 (2007 VRAP Report); A.R. C.3.e at 4.2 (2008 VRAP Report); A.R. C.3.f at 4.2 (2009 VRAP Report); A.R. C.3.g at 4.2 (2010 VRAP Report); A.R. C.3 at 3-1 to 3-4 and Appendix B (Keene Draft Comments); Petition at 5-6; Response at 19. EPA dismisses this evidence, and, in its Response, states that it has come to different technical conclusions regarding the cause of the low pH value by deferring to NHDES. Response at 17-20. EPA further claims that Keene's Petition is merely a critique of New Hampshire WQS and the 303(d) list and is therefore improper. EPA contends it duly considered and adequately explained the Keene Draft Comments. Response at 20-23. EPA's arguments are unsupported by the record.

All parties agree that the segment of the Ashuelot to which the Keene Wastewater Treatment Plant discharges its treated wastewater (the "receiving water") has a low pH. Petition at 5-10; Response at 16. The administrative record before EPA includes significant and uncontroverted evidence and data demonstrating that this low pH is due in part to natural causes.

A.R. C.3.d at 4.2 (2007 VRAP Report); A.R. C.3.e at 4.2 (2008 VRAP Report); A.R. C.3.f at 4.2 (2009 VRAP Report); A.R. C.3.g at 4.2 (2010 VRAP Report); A.R. C.3 at 3-1 to 3-4 and Appendix B (Keene Draft Comments); Petition at 5-6. NHDES affirmed this fact to EPA as recently as August of 2020. A.R. F.4 (Email from NHDES to EPA, August 11, 2020) ("We are at this time unable to precisely differentiate contributions of the natural and anthropogenic contributions to low pH.").

New Hampshire's WQS for pH states "the pH of class B waters shall be 6.5 to 8.0, unless due to natural causes." N.H. Admin. R., Env-Wq 1703.18(b). EPA claims that because NHDES included the receiving water as impaired for pH on the 303(d) list[2] and because NHDES indicates that this listing is based on both natural causes and an anthropogenic factor—historical acid deposition (acid rain)—the WQS prohibits EPA from establishing a Final Permit pH of less than 6.5 for Keene because the low pH of the receiving water is not due to natural causes. Response at 18. This makes no sense.

EPA's position interprets the New Hampshire WQS for pH, which grants an exception to the pH range for Class B waters "due to natural causes" to bar application of this exception unless the pH is *solely* due to natural causes. N.H. Admin. R., Env-Wq 1703.18(b). EPA posits that because NHDES is "unable to precisely differentiate contributions of the natural and

[2] EPA claims that Keene's arguments amount to an improper critique of NH WQS and 303(d) listing. Response at 1, 3. Keene does not dispute New Hampshire's WQS for pH. Keene disputes EPA's application of the WQS to derive an effluent limit for its NPDES permit. Similarly, Keene is not disputing New Hampshire's decision to add the receiving water to the 303(d) list. Rather, Keene argues that inclusion on this list is not dispositive of the contention that natural causes are a contributor to the waterway's low pH levels. EPA argues that because "these comments were beyond the scope of the NPDES permit, the Region had no obligation to respond to them." Response at 23. However, EPA's application of NH WQS to derive an effluent limit for pH and its treatment of the 303(d) list as dispositive is directly relevant to Keene's NPDES permit conditions and thus is squarely within the Board's jurisdiction. 40 C.F.R. §§ 1.25(e)(2), 124.19(a).

anthropogenic contributions to low pH" the exception does not apply and the WQS prohibits a Final Permit limit for pH that is lower than 6.5. *See* Response at 18.

This interpretation of the WQS is taken wholesale from NHDES's August 20, 2020 email and is unsupported by the plain language of the exception nor by any EPA analysis in the record. *See* A.R. F.4 (Email from NHDES to EPA, August 11, 2020); N.H. Admin. R., Env-Wq 1703.18(b). Should NHDES have wanted the exception to apply only in situations where natural causes were the *sole* cause of the pH levels being low, it simply needed to add a single word – only or solely. It did not do so, thus EPA must apply the WQS as written. *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., *concurring*: must "identify and give effect to the best reading of the words in a provision at issue") *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.") Assuming, *arguendo*, the receiving water's low pH is due to both natural and non-natural causes (and not solely due to natural causes), EPA must determine whether the natural cause exception applies *before* it can determine whether Keene's discharge "has the reasonable potential to cause, or contribute[] to an in-stream excursion above a narrative or numeric criteria" and before setting an effluent limit for pH. 40 C.F.R. § 122.44(d)(1)(ii).

EPA further argues the natural cause exception does not apply because the receiving water is on the 303(d) list. Response at 18. However, these elements are not mutually exclusive. A waterway can be impaired and included on the 303(d) list *and* it can have lower pH values due to natural causes. For example, a waterway can have a low pH due to natural causes, and an anthropogenic source may further lower that waterway's pH level. New Hampshire's WQS for pH does not specify that any scintilla of anthropogenic causation bars application of the natural cause exception when the pH of a waterway is already naturally lower than the range for Class B

waters. *See* N.H. Admin. R., Env-Wq 1703.18(b). It that were the case, it could lead to absurd results. A waterway could be required to reach an artificially high pH level, both unnatural to the waterbody and unsupportive of its aquatic life.[3]

EPA does not have the authority to rewrite the WQS as a part of the permitting process. Nor can it 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. 40 C.F.R. §§ 122.44(d)(1), 124.8. In both the Final Permit and EPA's Response, EPA selectively, and improperly, relies on one NHDES statement about the possibility of a contributing anthropogenic factor and a 303(d) listing, [4] while disregarding the administrative record evidence, including that from NHDES, stating that the low pH is due to natural causes. Response at 18; A.R. C.3.d at 4.2 (2007 VRAP Report) ("lower pH measurements are likely the result of natural conditions such as the soils, geology, or the presence of wetlands in the area"); *see also* A.R. C.3.e at 4.2 (2008 VRAP Report); A.R. C.3.f at 4.2 (2009 VRAP Report); A.R. C.3.g at 4.2 (2010 VRAP Report). Neither NHDES's statement nor the 303(d) listing are dispositive of whether the receiving water's low pH is due, at least in part, to natural causes. Neither are they sufficient to overcome the plain meaning of the WQS

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[3] Contrary to EPA's allegations, *see* Response at 20, Keene raised the issue about negative impacts to aquatic life in its Draft Permit comments. A.R. C.3 at 3-1 (Keene Draft Comments). Though the language is not identical to the arguments made in Keene's Petition, it is the same essential argument – that EPA's misapplication of the NH WQS for pH does not protect the aquatic life that inhabits the low-pH conditions of the receiving water. Further, Keene does not state that effluent should *always* accord with the pH of a receiving water, *see* Response at 16-17, but that the delta between the naturally low pH of the receiving water and that of Keene's effluent may have negative impacts. Petition at 10; A.R. C.3 at 3-1 (Keene Draft Comments). These record facts underscore the need for EPA to make clear and defensible findings about the application of the natural source exception- which need went unmet.

[4] EPA argues it has no obligation "to look behind the face of a 303(d) listing to determine the precise causes of the impairment;" further arguing that it does not need to explain any further "its determination that the receiving water is impaired." Response at 21. However, Keene's concern is that EPA provided no data to support its conclusion that because the receiving water is impaired, "the upstream pH values referenced by the commenter do not represent a 'natural condition'" in light of copious evidence demonstrating otherwise. A.R. A.2 at 22 (Response to Comments); Petition at 17. When EPA cannot apply the relevant WQS to an impaired waterbody without understanding the relevant contributions of natural causes and/or other causes to a low pH value, as here, EPA must look beyond the face of a 303(d) listing in order to make its own well-reasoned decision.

without EPA making its own findings ruling out the contribution of natural causes to the receiving water's low pH. EPA's Response to Comments does not provide a cogent, nor legally defensible, explanation for its decision to ignore this evidence, and EPA's faulty application of New Hampshire WQS for pH is clear error the Board must review.

B. EPA's Failure to Account for Applicable and Site-Specific Data When Implementing Keene's Final Permit Effluent Limit for Total Recoverable Aluminum Is Clear Error.

EPA must use its own reasoned judgment to ensure applicable WQS are met when setting a Final Permit effluent limit for Total Recoverable Aluminum ("aluminum"). This is relevant when determining which WQS apply and how best to utilize any site-specific data, now or in the future, while establishing an effluent limit. EPA's reliance on a WQS that, by EPA's own guidance, does not apply in waters with a pH below 6.5, ignores relevant site conditions. EPA's rejection of a special condition that would allow for a site-specific approach renders this approach futile, despite EPA's claim that it would consider this approach.

1. EPA's Implementation of a Final Permit Effluent Limit of 109 µg/L for Total Recoverable Aluminum Is Clear Error and Must be Reviewed Because It Is Based on an Obsolete and Inapplicable Methodology Instead of EPA's Own Current Standard.

Keene agrees with EPA that when setting an effluent limit, EPA must ensure that applicable state WQS are met. 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 122.44(d)(1)(vii)(A). However, the WQS for aluminum upon which EPA relies in establishing the Final Permit aluminum effluent limit does not apply.[5] NHDES adopted EPA's 1988 criteria for aluminum,

[5] Keene did not merely restate its grievances from its comments, nor fail to identify a basis for review. Keene continues to argue an issue first raised in its comments, that EPA should have applied its updated criteria in place of NHDES's dated and inapplicable criteria. Petition at 20-23; A.R. C.3 at 4-1 to 4-2 (Keene Draft Comments). However, in its petition, Keene explains why EPA's response was clearly erroneous and warrants review. Petition at

N.H. Admin. R. Env-Wq 1703.21(b), which applies to receiving waters within the 6.5-8.0 pH range.[6] EPA since developed updated criteria that apply to a broader pH range[7] and which EPA expects NHDES to adopt. A.R. A.2 at 26 (Response at Comments) ("once the new criteria are in place in the NH WQS. . . "). EPA's new criteria apply to waterways, like this receiving water, with a pH range from 5.0 to 10.5.[8] EPA admits that the 1988 guidance upon which the NHDES criterion was based only applied to waters with a pH above 6.5. Response at 31. Regardless of whether this limited pH range was due to the impacts of pH on aquatic life or a lack of conclusive data as to how pH impacts aluminum at higher and lower pH levels, is irrelevant.[9] The stated basis for the aluminum WQS does not apply to waterways with a pH lower than 6.5.

pH levels impact the bioavailability of aluminum, and thus impact EPA's analysis of whether the pH of the effluent "will cause, have the reasonable potential to cause, or contribute to an excursion above any water quality standard, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1)(i). EPA is well aware that NHDES's WQS for aluminum is not designed to apply to waters with a pH below 6.5; therefore, EPA must use its own reasoned judgment to apply the best science to ensure that the State's narrative criteria are met. *See, id.*

23-24 ("EPA is not required to, and should not, elevate implementation of state WQS that are not *currently* based on sound scientific rationale over its own assessment of the relevant standard. 40 C.F.R. § 131.11. Nor should it use a state WQS developed using criteria that does not apply to a receiving water with Ashuelot's pH levels, especially when an updated, scientifically sound, and directly applicable methodology is available.")

[6] U.S. Dep't Envtl. Prot., Ambient Water Quality Criteria for Aluminum – 1988 at 1, EPA-440/5-86-008, https://www.epa.gov/sites/default/files/2019-02/documents/ambient-wqc-aluminum-1988.pdf.

[7] U.S. Dep't Envtl. Prot., Final Aquatic Life Ambient Water Quality Criteria for Aluminum – 2018, Executive Summary at xi, CAS Registry Number 7429-90-05, EPA-822-R-18-001, https://www.epa.gov/sites/production/files/2018-12/documents/aluminum-final-national-recommended-awqc.pdf.

[8] *Id* at xiv ("EPA took this approach so that the recommended criteria can be calculated for, and will be protective of, a broader range of natural waters found in the U.S.").

[9] *See, e.g.,* U.S. Dep't Envtl. Prot., Ambient Water Quality Criteria for Aluminum – 1988 at 9, EPA-440/5-86-008, https://www.epa.gov/sites/default/files/2019-02/documents/ambient-wqc-aluminum-1988.pdf ("Some researchers found that the acute toxicity of aluminum increased with pH, whereas others found the opposite to be true.")

Given that EPA recently developed its own criteria that *does* apply in receiving waters below 6.5 S.U., and the requirement that EPA exercise its reasoned judgment (not NHDES judgment) in establishing Final Permit effluent limits, Keene posits that EPA must utilize the correct criteria to determine the Final Permit effluent limit for aluminum.[10]

Keene applied EPA's new criteria and determined that Keene's discharge would not have the reasonable potential to cause or contribute to an exceedance of this standard for aluminum. A.R. C.3 at 4-1 (Keene Draft Comments). EPA claims that it was not required to validate Keene's calculations because Keene based them on EPA guidance rather than NHDES's inapplicable WQS (because of the pH of the receiving water) that is likely soon-to-be replaced. Response at 31; A.R. A.2 at 24-25 (Response to Comments). However, the numeric WQS on which EPA relies does not apply to receiving waters with a pH below 6.5, like the Ashuelot, and Keene's application of the recent and applicable aluminum criteria to its discharge is both relevant and significant to EPA's requirement to ensure the State's narrative water quality criteria is met. *See, e.g.,* 40 C.F.R. §§ 122.44(d)(1)(i), 124.17(a). EPA should have validated and responded substantively to Keene's calculations.

EPA further argues that Keene does not identify the source of the inputs used until its Petition, and that such inputs were not from the receiving water. Response at 32. This is not true. Keene utilized upstream receiving water data and effluent data for pH, DOC, and hardness, which it described and identified in its Draft Comments at 4-1. Keene's reference to Hillsborough in its Petition is in regards to utilizing the *process employed* by EPA for Keene's

[10] Contrary to EPA's assertion, Response at 30, Keene did raise the issue of the 1988 criteria's failure to consider the variable effects of water chemistry, unlike the more recent EPA guidance. A.R. C.3 at 4-2 (Keene Draft Comments) ("The new EPA criteria accurately characterizes the bioavailability of aluminum by accounting for site specific data for parameters that directly impact the amount of aluminum that is bioavailable. pH, DOC, and hardness each affect the toxicity level of aluminum in the receiving water. The current criterion does not consider these parameters[.]"). Further, Keene did raise the issue of using the recent EPA criteria for aluminum as opposed to the NHDES WQS, which was based on dated guidance, in part due to the recent criteria's consideration of site-specific pH values. A.R. C.3 at 4-2 (Keene Draft Comments).

analysis, not utilizing the data from Hillsborough. Petition at 12-13. Keene recognizes that its references to Hillsborough in the Petition may lack precision; however, Keene clearly identified the inputs as coming from site-specific data in both Keene's comments and in its Petition. A.R. C.3 at 4-1 to 4-2 (Keene Draft Comments); Petition at 12. EPA goes on to allege that by utilizing their new guidance, the resulting chronic criterion is 51 ug/L, and not the 320 ug/L cited in Keene's comments. Response at 32, n.10. However, EPA's resulting criterion uses the median concentrations of pH, DOC and hardness upstream of Keene's discharge without including Keene's effluent data in its calculations. *Id.* This approach is inconsistent with EPA recommendations and with EPA's approach elsewhere.[11] Following EPA's recommendations, Keene used this upstream data *together with* Keene's effluent data to determine the resultant downstream concentrations, utilizing the same approach EPA employed with Hillsborough. A.R. C.3 at 4-1 to 4-2 (Keene Draft Comments); Petition at 12. Keene used EPA's most current guidance and applied the EPA recommended processes to determine compliance, and concluded that the chronic criterion is 320 ug/L. Keene would not have the reasonable potential to cause or contribute to an exceedance of this standard for aluminum. A.R. C.3 at 4-1 (Keene Draft Comments). EPA cannot avoid its responsibility to provide a cogent and legally defensible basis for the effluent limits in the Final Permit, and deference to inapplicable NHDES criteria does not provide a means to escape analyzing and responding to Keene's relevant comments.

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[11] *See, e.g.,* U.S. Dep't of Envtl. Prot., Draft Technical Support Document: Implementing the 2018 Recommended Aquatic Life Water Quality Criteria for Aluminum at 34-35, EPA-800D-21-001, https://www.epa.gov/system/files/documents/2021-11/aluminum-tsd-draft-2021.pdf ("If the boundaries of the mixing zone cannot be determined, or if downstream sampling reflecting conditions after mixing is not practicable, input parameter values representing those conditions may be estimated from concentration and flow values for the point source or tributary and the waterbody."); Final Permit for Hillsborough Wastewater Control Facility, NPDES Permit No. NH0100111, Response to Comments at 9-11; .U.S. Dep't of Envtl. Prot., The Metals Translator: Guidance for Calculating a Total Recoverable Permit Limit from a Dissolved Criterion at 14-15, EPA 823-B-96-007, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjN3Pnm5Yv1AhUGkokEHfiBBKEQFnoECAwQAQ&url=https%3A%2F%2Fwww3.epa.gov%2Fnpdes%2Fpubs%2Fmetals_translator.pdf&usg=AOvVaw12Dplyt-8oXosQrueF1FHY.

EPA's Response to Comments does not provide a cogent, nor legally defensible, explanation for its decision to ignore Keene's calculations, and EPA's use of an inapplicable NHDES WQS for aluminum is clear error which the Board must review.

2. EPA's Failure to Account for Site-Specific Data on Acid-Soluble and Total Recoverable Aluminum Is Inconsistent and Is Clear Error that Must Be Reviewed.

Absent use of EPA's updated criteria, Keene consistently requested inclusion of a special condition that would establish a clear mechanism providing for use of site-specific data to adjust Keene's aluminum effluent limit. A.R. C.3 at 4.2 (Keene Draft Comments); Petition at 24-25. This type of special condition, already included in the Final Permit for a different effluent limit, has been approved by the Board in other NPDES permits. *See, e.g., In re Town of Concord Dep't of Public Works*, 16 E.A.D. 514, 535 (EAB 2014). EPA counters that it responded to this request and that the request was reasonable. Response at 35-36. EPA's response is disingenuous. EPA sets out the process that Keene may utilize to obtain this new data to request an updated effluent limit without explaining *why* it did not include this approach as a special condition. A.R. A.2 at 26 (Response to Comments). By 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. 33 U.S.C. § 1342(o). Thus, this new site-specific data, once collected and approved by NHDES, may have zero impact on Keene's effluent limit. In an attempt to avoid wasting NHDES's, EPA's, and its own time and limited funds, Keene requested this special condition to give certainty to all involved that should Keene conduct a NHDES-approved study and obtain NHDES approval of the results, that there is a mechanism in the Final Permit specifying the propriety of this process.

EPA claimed that it interpreted Keene's request as asking EPA to use non-existent site-specific data to create an effluent limit in the Final Permit. Response at 35. This is not so. Keene was simply pointing out that EPA failed to account for the site-specific data *by not including this requested special condition*, which would provide a clearly specified mechanism for collection and application of that data. Petition at 24. EPA and Keene agree on the approach, but EPA's rejection of this special condition prevents this approach from being utilized as intended, thus rendering it futile and EPA's response to Keene's comment a determination without substantive support or a rational basis because it avoided addressing the actual issue.

C. EPA's Refusal to Include a Process for Developing a Site-Specific Effluent Copper Limit, in Accordance with Its Own Accepted Procedures and Citing Inapplicable Grounds, Is Clear Error.

EPA's Response, again, fundamentally misunderstands the nature of Keene's comments. EPA appears to interpret Keene's request for a special condition as one that prejudges the permitting outcome that may flow from site-specific studies. See Response at 38; A.R. C.3 at 5-2 (Keene Draft Comments) (Keene requests authority to "submit a permit modification request *to apply for* site-specific effluent copper limits . . ." and confirmation that "results of a site-specific approach will be accepted and a permit modification *may be made* to reflect revised effluent limits") (emphasis added). Keene is simply asking EPA to include a special condition in the Final Permit that documents what EPA purports to agree to in its Response to Comments. *See* A.R. A.2 at 30 (Response to Comments); A.R. C.3 at 5-2 (Keene Draft Comments). "Keene may submit a study plan for site specific-copper criteria to NHDES for review, in accordance with Env-Wq 1703.22(d). If the plan and results are approved by NHDES, the revised criteria may be used to modify the permit limits." A.R. A.2 at 30 (Response to Comments).

Keene is requesting a special condition that automatically implements the permit modification *process*, not the *outcome*. EPA argues that Keene is requesting a self-implementing special condition that would deprive EPA of its ability to evaluate compliance. Response at 38-39. But inclusion of this special condition would not deprive EPA of its legally obligated process. As EPA states, a permit writer would still need to complete calculations using the site-specific results and ensure that such revised effluent limit, if any, complied with other legal requirements, such as ensuring the effluent limit met NH's WQS. Response at 37-38. Keene's request for a special condition does not foreclose this process; it contemplates and specifies this process. The special condition would commit the Region to going through its legally obligated process to develop the appropriate site-specific effluent limit, including any required public notice and comment while providing Keene with certainty regarding the legitimacy of the process so that it can confidently invest limited municipal resources. In fact, it would only require the Region to commit to treating the revised criterion, if any, that results from the site-specific study as a cause for modification, similar to special condition 1 for the pH limit in section I.G.I. of the Final Permit and similar to special conditions approved by the Board in other NPDES permits. *See, e.g., In re Town of Concord Dep't of Public Works*, 16 E.A.D. 514, 535 (EAB 2014) (a special condition that allows the town "to submit additional data and seek a modified minimum pH limit" is permissible).

EPA confirms the propriety of Keene's suggested approach to use the results of a site-specific study to establish a revised copper effluent limit, while it declines to include the requested language based on misstatements regarding Keene's intent and the nature of the proposed special condition. EPA's Response to Comments is internally inconsistent and fails to

respond to Keene's actual request, does not provide a cogent basis for excluding the language Keene sought in the Final Permit, and is clear error the Board must review.

III. CONCLUSION

For the foregoing reasons, Keene respectfully requests that the Board hear oral argument and review and remand the contested conditions, decisions, and determinations in NPDES Permit No. NH0100790.

Respectfully submitted,

CITY OF KEENE, NEW HAMPSHIRE

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January 6, 2021

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(1)(iv) and (d)(3), undersigned counsel certifies that the foregoing Reply Brief in Support of Petition for Review contains 4,751 words, as counted by a word processing system, including headings, footnotes, quotations, and citations in the count, but not including the caption, table of contents, table of authorities, table of attachments, signature block, statement of compliance with word limitation, or attachments, and, thus, this Reply Brief meets the 7,000 word limitation contained in 40 C.F.R. § 124.19

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CERTIFICATE OF SERVICE

I, Joanna B. Tourangeau, hereby certify that on this 6th day of January, 2022, I served the foregoing Petition for Review to the following persons in the manner indicated:

By Electronic Filing:

Mr. Emilio Cortes
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
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U.S. EPA East Building, Room 3334
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By Email:

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