



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

VIA ELECTRONIC FILING

November 6, 2020

Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

RE: In re GSP Merrimack, LLC
NPDES Permit No. NH0001465; NPDES Appeal No. 20-06

Dear Ms. Durr:

Please find the attached EPA Region 1 Motion for Leave to File Sur-Reply and accompanying Certificate of Service, in connection with NPDES Appeal No. 20-06.

Thank you for your assistance with this matter.

Sincerely,

/s/ Michael Curley
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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In the Matter of:)

GSP Merrimack LLC)

NPDES Permit No. NH0001465)
_____)

NPDES Appeal No. 20-06

EPA REGION 1 MOTION FOR LEAVE TO FILE SUR-REPLY

Pursuant to 40 CFR § 124.19(f), Region 1 of the United States Environmental Protection Agency (“EPA”) hereby moves the Environmental Appeals Board (“Board”) for leave to file a sur-reply in response to Petitioner’s reply brief. The Board has discretion to grant requests to file sur-reply briefs and typically does so in cases where a reply brief raises new arguments or where further briefing would assist the Board in resolving disputed claims. *See e.g., In re Arizona Public Serv. Co.*, NPDES Appeal No. 19-06, at 2 (EAB Jan. 29, 2020) (Order Granting Motion for Leave to File Surreply); *In re Arcelor Mittal Cleveland, Inc.*, NPDES Appeal No. 11-01 at 1 (EAB Dec. 9, 2011) (Order Granting in Part EPA’s Motion to File Surreply, Denying Petitioner’s Request to Provide Additional Information, and Granting Oral Argument). Both factors apply here and support granting the Region leave to file a sur-reply in this matter. Region 1 proposes a deadline for submittal of its sur-reply of Monday November 16, 2020.

The grounds for this motion are as follows:

1. Petitioner filed its reply with the Board on October 26, 2020. Upon review, the Region concludes that Petitioner's Reply raises new arguments, contrary to the Board's regulations. 40 CFR § 124.19(c)(2).
2. This regulation, 40 CFR § 124.19(c)(2), formalized what had long been the Board's consistent practice on this procedural issue. The Board has frequently held that new arguments and new issues may not be raised in reply briefs submitted after the permitting authority has responded to a petition for review. *See, e.g., In re BP Cherry Point*, 12 E.A.D. 209, 216 n.18 (EAB 2005) (rejecting new legal argument petitioner sought to introduce for the first time in a reply brief). The Board has explained that "new issues raised for the first time at the reply stage of these proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999); *see also In re City of Lowell*, 18 E.A.D. 115, 159 n.24 (EAB 2020).
3. To ensure adherence to the Board's procedural regulations, and the rationales underlying them, EPA should be allowed to identify these arguments and to respond to them concisely. Providing an opportunity for the Region to respond would not only be equitable but would also promote efficiency and assist the Board in its decision making. This is especially true here because the new arguments pertain in part to technical issues that must be evaluated against a complex and extensive permit record with which the Region is familiar.
4. EPA has endeavored to analyze the reply and will finalize a response as quickly as possible. The proposed deadline for filing a sur-reply is warranted in light of the following:

- a. Pursuant to the Board's Order dated June 16, 2020, Petitioner had 30 days to prepare its reply. A deadline for a sur-reply of November 16, 2020, would equitably provide the Region with 21 days to file a sur-reply.
- b. November 11, 2020, is a federal holiday, which will affect the Region's ability to coordinate with necessary technical and legal staff in both the Region and in Headquarters in preparing the sur-reply.

EPA contacted Petitioner's counsel to ascertain its position on this motion. Petitioner's counsel replied that "Petitioner takes no position on the motion for leave, but contends that the Petitioner's reply brief did not go outside the scope of the Petition and EPA's response."

For the reasons set forth above, and in the interest of assisting the Board in its decision-making, EPA respectfully requests that the Board grant this Motion for Leave to File a Sur-reply with a deadline for submittal of Monday, November 16, 2020.

Date: November 6, 2020

Respectfully submitted,

/s/Michael Curley

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing EPA Region 1 Motion for Leave to File Sur-Reply, in the matter of GSP Merrimack LLC, NPDES Appeal No. 20-06, was served on the following persons in the manner indicated:

By Electronic Filing:

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

By Electronic Mail, by authorization of the Board:

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Dated: November 6, 2020

/s/Michael Curley

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