UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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VIA ELECTRONIC FILING

November 16, 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 Sur-Reply by EPA Region 1 to the Petition for Review by GSP Merrimack LLC 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 Appeal No. 20-06
NPDES Permit No. NH0001465	)	

REGION 1's SUR-REPLY

Respectfully submitted,

/s/ Michael Curley

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i
I. INTRODUCTION 1
II. ARGUMENT 2
A. Petitioner Raises New Arguments About the Requirement to Install Wedgewire Screens. 2
B. Petitioner Makes New Arguments to Support its Challenge to the Compliance Schedule for Installing New Fish Returns 7
III. CONCLUSION 12

TABLE OF AUTHORITIES

EAB Cases

In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants, 12 E.A.D. 97 (EAB 2005) 1, 8
In re Arizona Public Serv. Co., 18 E.A.D. 245 (EAB 2020) 1
In re Cape Wind Assocs., LLC, 15 E.A.D. 327 (EAB 2011) 12
In re City of Attleboro, 14 E.A.D. 398 (EAB 2009) 11
In re City of Lowell, 18 E.A.D. 115 (EAB 2020) 1
In re City of Taunton, 17 E.A.D. 105 (EAB 2016) 1, 8
In re Knauf Fiber Glass GmbH, 8 E.A.D. 121 (EAB 1999) 1, 11
In re Pio Pico Energy Ctr., 16 E.A.D. 56 (EAB 2013) 11
In re Sutter Power Plant, 8 E.A.D. 680 (EAB 1999) 11

Regulations

40 CFR § 124.19(a)(4) 1
40 CFR § 124.19(c) 1, 2
40 CFR § 125.91 6
40 CFR § 125.94(d) 6
40 CFR § 125.98(f) 6

I. INTRODUCTION

GSP Merrimack LLC ("GSP" or "Petitioner") in its Petition for Review challenged elements of the Clean Water Act ("CWA") section 316(b) conditions established for its permit. The Petition included only a cursory recital of GSP's claims of error in Region 1's determinations and largely failed to address the Region's record explanations for its permitting decisions. Attempting now to cure these deficiencies, GSP submits a Reply devoting three times as many pages to argument than it did in its Petition. *Compare* Pet. at 20-25 *with* Reply at 2-16. The Board should reject GSP's approach. The Board's regulations and caselaw are clear: A petitioner must in the Petition "clearly set forth, with legal and factual support" all of its arguments for why a permit decision should be reviewed, 40 CFR § 124.19(a)(4)(i), and "may not raise new issues or arguments in the reply," *id.* § 124.19(c)(2); *see also In re Arizona Public Serv. Co.*, 18 E.A.D. 245, 273 (EAB 2020); *In re City of Lowell*, 18 E.A.D. 115, 157 n.22 (EAB 2020); *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 126 n. 9 (EAB 1999).

Petitioner could have clearly set forth its arguments at the Petition stage, if not before. It did not do so and may not correct such omissions now. *In re City of Taunton*, 17 E.A.D. 105, 183 (EAB 2016) (rejecting as untimely a petitioner's attempt to correct its failure to explain in the petition why the permit issuer's response to comments was clearly erroneous or otherwise warranted review). There is no reason why Petitioner could not have raised the several new arguments that appear in Petitioner's Reply, as detailed by the Region below, either as comments on the Region's 2017 Statement of Substantial New Questions for Public Comment ("2017 Statement"), AR-1534, or in GSP's Petition. *See In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 123 n.52 (EAB 2005) (noting that attempt to use reply brief to substantiate a claim with new arguments was tardy and that the petitioners should have raised all

their claims and supporting arguments in their petitions). The Board should decline to consider these new arguments in accordance with 40 CFR § 124.19(c)(2) and, ultimately, should deny the Petition for Review.

II. ARGUMENT

Petitioner's Reply raises several new arguments about the requirement to install wedgewire screens and about the compliance schedule for installing new fish returns—arguments Petitioner did not make in comments on the 2017 Statement or in the Petition. Regarding wedgewire screens, Petitioner for the first time argues 1) that the Region should have considered a different schedule for installing them than the record shows Petitioner requested, and 2) that the Region should have ignored the absence of any guarantee that recent reduced operational levels would continue. On the issue of fish returns, Petitioner for the first time argues 1) that newly-identified record material supports its claim that the compliance schedule must be longer to allow Petitioner to obtain other permits, 2) that there is no urgent need to install the returns because Merrimack Station impinges "few, if any, fish each year," and 3) that the returns cannot be designed or built now because unspecified "other screens" could later be found to be BTA. All of these arguments should be rejected because they are untimely, mischaracterize the record, or are otherwise substantively without merit.

A. Petitioner Raises New Arguments About the Requirement to Install Wedgewire Screens

Region 1 determined wedgewire screens represented BTA and provided a compliance schedule of over two-and-a-half years for their installation. Petitioner raises a new argument that the Region erred by failing to give Petitioner a schedule that would allow it to develop and

implement an alternative entrainment compliance method within the same timeframe that wedgewire screens could be designed and installed. Reply at 7-8. This argument comes too late.

In the 2017 Statement, the Region proposed a compliance schedule for installing and operating wedgewire screens in the event the Region determined in the Final Permit that such screens constitute BTA for entrainment at Merrimack Station. AR-1534 at 29-32. Petitioner could have submitted, but did not submit, comments on the compliance schedule. *See* Resp. to Pet. at 34 n.11. Nor did Public Service Company of New Hampshire ("PSNH") or any other party raise the compliance schedule argument that Petitioner now raises in its Reply. After the comment period closed, GSP sought from the Region a "two-stage compliance schedule"—different from the one it raises now. In particular, after the close of the comment period, Petitioner sought a schedule that would *delay* installation of wedgewire screens to provide Petitioner with time first to perform an additional study of wedgewire screens (despite a successful pilot study that Petitioner never challenged[1]), while doing nothing to minimize entrainment. AR-1684; AR-1871 at 3, 4. Petitioner's schedule would have also included an *additional* period to develop possible BTA alternatives to be implemented in lieu of wedgewire screens. AR-1684; AR-1871 at 3, 4. The Region explained why such a lengthy compliance schedule would not satisfy the requirement to establish a BTA in the permit (rather than just study potential BTA technology) and implement it "as soon as practicable." Response to Comments ("RTC") at III-207, III-210 to -212. While Petitioner's Reply now includes an untimely and conclusory attempt to confront the Region's explanation for rejecting this proposed schedule, Reply at 7, it also argues, for the first time, that the Region erred by not adopting a

[1] Any criticisms GSP now lobs at the pilot study conducted by its predecessor owner of Merrimack Station, PSNH, or the Region's reliance on it, *see, e.g.*, Reply at 4 n.5, are new arguments that have been waived by GSP's failure to present them in the Petition or earlier and should, therefore, be ignored.

different schedule from that Petitioner originally sought—a new schedule that would provide for development and implementation of alternatives *within the same timeframe* that wedgewire screens could be installed. This is a new argument, however, and there is no reason why GSP could not have raised it in the Petition (or even during the comment period on the 2017 Statement).

Petitioner also fails (for a second time) to address Region 1's observations in the RTC that any proposal to replace the wedgewire screen BTA determination with a flow reduction option later developed by Petitioner would need to be subject to public review and comment through a permit modification proceeding. *See* RTC at III-208, III-226. Instead, Petitioner bemoans the burden on it of a permit modification. *See* Reply at 8-9.[2] Moreover, Petitioner states in the Reply (also for the first time) that it does not agree that an 89% reduction in entrainment based on the performance of wedgewire screens "is the proper benchmark." Reply at 4 n.5. Thus, Petitioner's position is that the Region should have given it a compliance schedule that allowed Petitioner to develop a new compliance option that may not necessarily even achieve an 89% entrainment reduction without any opportunity for the public to participate in the decision as to whether Petitioner's proposed method would achieve comparable entrainment reductions to the technology the Region determined to be BTA.[3]

[2] GSP also newly argues that a possible future permit modification is an inadequate option by misrepresenting why Region 1 did not deem a permit modification appropriate in 2010. *See* Reply at 9 n.9 (citing AR-846 at 125). In 2010, Merrimack Station operated under an expired (but administratively continued) permit, and EPA's long-standing position is that expired permits cannot be modified. AR-448 (citing 40 CFR § 122.62).

[3] Furthermore, Petitioner's new proposal in fact concedes the Region's point in the RTC that Petitioner's proposal for a "two-stage compliance schedule" would not satisfy the requirement in the 316(b) regulations to establish BTA in the permit and require its implementation "as soon as practicable." *See* Reply at 8 (stating that Region 1 could have "provided GSP an option to develop and comply with an

Second, Petitioner takes issue for the first time with the Region's consideration in its BTA determination of the absence of any guarantee that recent reduced operational levels at Merrimack Station would continue. Reply at 5-6. The Region noted in its analysis that, while changes in the energy market have led to decreased intake flows, "an open-cycle permit would not guarantee reduced operations in the future." RTC at III-111; *see also id*. at III-110 & n.62 (noting that, while the trend in decreasing coal-fired generation "is not expected to reverse in the near future," "EPA cannot be certain how the energy markets will evolve" and that, "[o]nly a relatively short time ago, the relative growth in natural gas-powered generation was not foreseen"). The Petition could have endeavored, but did not, to contradict or identify error in the Region's conclusion on this point. In the Reply, Petitioner asserts for the first time that the Region erred in considering this point because the Region "cites no authority that would require it to ensconce the Station's current and expected operations into the Permit in order to consider those operations as part of the BTA analysis." Reply at 6. This is new argument and should, therefore, be disregarded.

In addition, it would make little sense that a permitting authority would establish BTA permit requirements without accounting for the entrainment impacts that the permit would allow. In fact, EPA's 316(b) regulations require the permitting authority to "establish site-specific *requirements* for entrainment" that reflect the permitting authority's determination of the

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alternative compliance approach . . . *so long as* compliance with this alternative approach was achieved *prior* to when the [wedgewire screens] would have been installed and operational," thereby meeting the "'as soon as practicable' directive of the 2014 Final Rule") (emphases added). Relatedly, Petitioner's statement that compliance with its new proposal "could likely occur sooner than the minimum 2+ years the final permit's compliance schedule allots to install the full array of CWWS required by the final permit" is a concession that Petitioner *could*, as the Region stated in the RTC, simultaneously develop a flow-based proposal, rather than delaying installation of wedgewire screens to allow Petitioner to evaluate a flow-based alternative. RTC at III-208, III-226.

"maximum reduction in entrainment warranted." 40 CFR § 125.98(f) (emphasis added); *see also id.* § 125.94(d) (requiring the permitting authority to "establish BTA *standards* for entrainment for each intake on a site-specific basis . . . that reflect the [permitting authority's] determination of the maximum reduction in entrainment warranted"). Petitioner essentially argues that the Region should only have based its BTA determination on the lower levels of entrainment from recent years of reduced operations while issuing a permit authorizing it to operate at higher levels that would result in greater entrainment. Such a permit would not include requirements reflecting the maximum reduction in entrainment warranted.[4]

Petitioner complains that the Region had no basis for concluding that the Facility's future operations are not guaranteed to remain at recent lower levels. Reply at 5. Yet during the late stages of the permit's development, Petitioner itself took the view that operations could possibly increase—indicating that Petitioner "could not be sure of" the levels at which it would run the Facility in the future, despite its recent lower operations—and, on that basis, requested that the permit authorize Petitioner to run the plant at higher levels (i.e., a 45% to 60% capacity factor).[5]

[4] Additional provisions of the 316(b) regulations further support a permitting authority accounting for operations that may occur at a facility. For instance, the regulations apply to a facility based on its design flow, not its actual flow, thus placing the focus on possible impact, not just what may be a temporary lesser actual impact. 40 CFR § 125.91(a)(2). The regulations also authorize a permitting authority determining the BTA for entrainment reduction to consider flow reductions associated with unit retirements, *id.* § 125.98(f)(3)(iii), suggesting that a permitting authority should factor less permanent flow reductions into the entrainment BTA analysis only to the extent the permit includes a mechanism to enforce them.

[5] Petitioner asserts in the Reply that the 40% capacity factor thermal discharge limit in the permit is "an 'apples to oranges' comparison [when juxtaposed against unspecified cooling water withdrawal limits], because the relevant periods and averaging times are different." Reply at 6 n.7. Yet, the "relevant periods" are not as "different" as Petitioner suggests, because entrainable organisms are present from May to August. *See* RTC at III-81 to -82, III-84 to -85. In addition, it is not clear what "averaging time[]" Petitioner is referring to with regard to withdrawal limits, since it never proposed any specific withdrawal limits. But in any event, Petitioner fails to explain the significance of the supposed distinctions it identifies or why they are material.

AR-1871 at 1-2. Petitioner fails to explain why it was unreasonable for the Region to consider that operations could possibly increase during the life of the permit, when Petitioner suggested just that to justify a permit that would allow the possibility for it to operate the facility at higher levels. AR-1871 at 2.

B. Petitioner Makes New Arguments to Support its Challenge to the Compliance Schedule for Installing New Fish Returns

The Final Permit requires installation of new fish returns within 6 months of the permit's effective date. Final Permit at Part I.E.7.d. The Region explained in the Response to Comments that it based this schedule on information from the Facility. RTC at III-36 n.17. In the Petition, GSP asserted that the compliance schedule is unworkable and not supported by the record. Pet. at 23-25. In the Reply, Petitioner raises several new arguments to bolster its claim.

First, Petitioner argues for the first time that a record document sustains its otherwise unsupported claim that the compliance schedule was too short because of a purported need to obtain required regulatory permits from other agencies. Reply at 13-14. The Petition could have made the substantive case that other permits are required but it did not. Instead, it simply asserted in a conclusory fashion that they will be required. *See* Pet. at 23 (listing a "CWA § 404 dredge and fill permit" as a sole example without providing any explanation for that conclusion or any explanation of how that would affect the schedule). Perhaps recognizing the weakness in its argument, Petitioner now introduces a new argument in the Reply asserting that the "record is clear . . . that GSP will need to obtain permits from other regulatory agencies to complete these fish return systems and other §316(b) work."[6] Reply at 13 (citing AR-4). But a petitioner must

[6] "[O]ther §316(b) work" is not the issue. Petitioner's claim is that *fish returns* will require other permits. Similarly, Petitioner's new comparison to the compliance schedule for wedgewire screens that allows

raise all claims and supporting arguments in its petition; an attempt to substantiate a claim with new arguments or otherwise supplement a deficient appeal through later filings must be rejected as tardy. *Arecibo & Aguadilla*, 12 E.A.D. at 123 n.52; *see also Taunton*, 17 E.A.D. at 151 n.17.

In addition to being late, the new reference to record support for its claim is without merit. In the Reply, citing generally to AR-4 (a 108-page report), Petitioner, in a carefully-worded assertion, states that the document "repeatedly referenc[es] that permit consultations will be necessary under the various proposed compliance options." *Id.* The Region's review of AR-4 reveals a handful of references by PSNH's (and now Petitioner's) engineering consultant, Enercon, about contacting "applicable regulatory agencies" regarding "the permit restrictions associated with" certain technologies evaluated in AR-4. But none of those references are specific to the installation of new fish returns, and none support the claim that fish returns will require other permits or identify specific schedule needs. More specifically, AR-4 contains Enercon's assessment regarding other permits for wedgewire screens, AR-4 at 15,17, 18, which, of course, is not at issue here. The report also contains this assessment with respect to an option to employ an aquatic filter barrier that would have to be "anchored to the bottom of the water body" and would have significantly impacted recreational use of the river. AR-4 at 21, 32; *see also id.*, att. A at 8. But Petitioner does not allege that new fish returns must be anchored to the river bottom or will negatively impact recreational use of the river. Additionally, AR-4 presents Enercon's permit consultation assessment of an option to employ fine mesh traveling screens. AR-4 at 51, 55. But Enercon suggests in AR-4 that consultations with other regulatory agencies would be necessitated only insofar as that option requires new cooling water intake structures

time for additional permitting proves nothing. Reply at 14. Petitioner fails to explain how a recognition that wedgewire screens may require additional permits demonstrates that a separate technology in a separate location likewise requires additional permits.

constructed further out in the river, *id.* at 55 ("[T]he applicable regulatory agencies would have to be contacted regarding the permit restrictions *associated with the construction of the new CWISs* and any impacts resulting from the implementation of fine mesh traveling screens."), 56 (same). Moreover, only the alternative to install wedgewire screens includes any specific reference to the U.S. Army Corps of Engineers in particular, *see* AR-4 at 17—the agency that issues "dredge and fill permits" in New Hampshire pursuant to CWA § 404 and the sole specific example of a "required permit" that GSP provides. In short, GSP failed in the Petition to substantiate its claim that new fish returns will require other permits, and its new attempt to offer evidence in the Reply to substantiate that claim should be rejected as untimely and inadequate.

Second, Petitioner newly argues that there is no urgency to replacing the returns because "few, if any, fish are actually impinged at Merrimack Station each year." Reply at 15. Again, this is a new argument raised for the first time in the Reply. Petitioner could have raised it in the Petition but did not. In fact, Petitioner conceded in the Petition that the requirement to construct and operate new fish returns is appropriate. *See* Pet. at 6. In addition, the Reply fails to provide factual support for Petitioner's new argument. Notably, the only record support offered by Petitioner for this claim is a report that in 2018 no fish were impinged "during the monitoring period." *Id.* (citing AR-1729). It is important to understand, however, that under the 1992 permit, the "monitoring period" for impingement at Merrimack Station is quite limited. The 1992 permit requires no regular impingement monitoring for a seven-and-a-half month stretch each year, *see* 1992 Permit at Part A.10.b, even though impingement can occur at any time of the year at Merrimack Station. RTC at III-181. And, for the four-and-a-half month period when regular impingement monitoring *could* be required, the 1992 Permit only requires it to be performed "when flows from Garvins Falls Station drop below 900 CFS." 1992 Permit at Part A.10.b. The

very record that Petitioner cites for its new claim that "few, if any, fish are actually impinged at Merrimack Station each year," Reply at 15, states that "river flow was greater than 900 cfs at all times that Merrimack Station was withdrawing water." This means that Petitioner performed *no* impingement monitoring "during the monitoring period" in 2018. Thus, nothing in the document supports Petitioner's new argument. *See also* AR-618 at 255-61 (noting that the impingement monitoring requirements of the 1992 Permit are inadequate, and that at times hundreds or even thousands of fish have been impinged at Merrimack Station).

Third, Petitioner raises new arguments related to its brief, generic claim in the Petition of a linkage between the installation of fish returns and its challenge to the Region's entrainment BTA determination. In particular, Petitioner speculates for the first time that the configuration, scope, and design for the fish returns could differ because "BTA on remand *could* be determined to be 'other screens' besides [wedgewire screens]." Reply at 15-16 (emphasis added). Petitioner also attempts to buttress its claim of linkage with new argument using the Enercon schedules in the administrative record. Reply at 15 n.19. Petitioner did not, however, assert in the Petition that "other screens" "could be" the BTA[7] or include arguments based on the Enercon schedules. And while Petitioner asserts in the Reply that it "has explained" that "BTA on remand could be determined to be 'other screens,'" Reply at 15, it revealingly fails to include any citation to the Petition (or anywhere else) to support this assertion.

[7] To the contrary, Petitioner's argument in the Petition is that the BTA is no additional technology. *See* Pet. at 23 (asserting that the "entrainment reduction achieved by decreased operations *is more than sufficient* to meet the § 316(b) standard") (emphasis added).

In fact, Petitioner's single, fleeting reference to undefined "other screens" in a footnote in the Petition, which Petitioner states Region 1 "largely misconstrues,"[8] Reply at 15 (citing Pet. at 23 n.83), is so devoid of specifics as to fail to apprise the Board or the Region of its meaning. The Board should not allow Petitioner in a Reply to assign a specific meaning to what is an unexplained and opaque reference in its Petition. *Cf. In re Pio Pico Energy Ctr.*, 16 E.A.D. 56, 86 (EAB 2013); *In re Sutter Power Plant*, 8 E.A.D. 680, 694 (EAB 1999). The ***Petition*** must include "specific information supporting [a petitioner's] allegations." *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). "[V]ague or unsubstantiated claims" are insufficient to obtain review. *In re City of Attleboro*, 14 E.A.D. 398, 422, 443 (EAB 2009).

Moreover, even if a Reply may cure a Petition's lack of specificity, it fails to do so here. Petitioner offers no indication of what "other screens" "could be determined to be" BTA on remand. Nor does Petitioner provide any detail explaining how such unspecified "other screens" would somehow be "linked" with fish return sluices. In addition, Petitioner again fails to "explain[] why it could not later adjust the configuration of the returns if unspecified 'other screens' were eventually used at Merrimack Station and, for similarly unspecified reasons, required changes to the returns." Region 1 Resp. at 44 n.17. Petitioner's belated attempt to cure its original unsubstantiated claim of "linkage" essentially consists of italicizing three words (i.e., "or other screens") that it originally included in a terse footnote in the Petition and speculating without any explanation that some other unspecified technology *could* be determined to be BTA on remand and *could* necessitate a different fish return configuration. *Compare* Pet. at 23 n.83 *with* Reply at 15 (now italicizing "or other screens"). This is as vague, speculative, and

[8] Petitioner evidently concedes the Region's points in the Response that the fish returns are not linked temporally or spatially to wedgewire screens.

unsubstantiated as its initial argument, and both should be rejected. *See In re Cape Wind Assocs., LLC*, 15 E.A.D. 327, 337 (EAB 2011) ("The Board will not overturn a permit provision based on speculative arguments.").

III. CONCLUSION

The Board should deny review of the Permit.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that the Region's Sur-Reply in the matter of GSP Merrimack LLC, NPDES Appeal No. 20-06, contains less than 7,000 words in accordance with 40 CFR § 124.19(d)(3). This Sur-Reply contains 3,937 words, excluding the table of contents, table of authorities, statement of compliance with word limitations, and certificate of service.

Dated: November 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Sur-Reply, in the matter of GSP Merrimack LLC, NPDES Appeal No. 20-06, were served on the following persons in the manner indicated:

By Electronic Filing:

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