IN THE MATTER OF TOWN OF SEABROOK, N.H.

NPDES Appeal Nos. 93–2 and 93–3

ORDER DENYING REVIEW

Decided September 28, 1993

Syllabus

Edwin F. Adams and Kenneth G. Bouchard each seek review of the denial of their separate evidentiary hearing requests on issues relating to an NPDES permit issued by U.S. EPA Region I to the Town of Seabrook, New Hampshire for the operation of a proposed municipal wastewater treatment plant. Both petitioners are citizens who live in or near the Town of Seabrook. They participated in the permit proceeding on their own behalf and, in the case of Bouchard, also on behalf of the Seabrook Beach Association and the Salisbury Beach Betterment Association. In general, the petitioners are concerned about potential adverse effects on beach conditions and water quality that might result because of discharges of treated effluent from the facility's proposed 2,100 foot ocean outfall. Region I denied each request in its entirety. On appeal Petitioners raise various substantive and procedural grounds for reversing the Region's decision, including inter alia the following contentions: dilution figures at the outfall are erroneous: the permit violates the Ocean Discharge Criteria in 40 C.F.R. Part 125, Subpart M; issuance of the permit is improper because the Region failed to consider alternative locations for the outfall; and the New Hampshire Wetlands Board violated State law by issuing a permit for this outfall. The Region opposes granting review because the petitioners did not comply with certain threshold procedural requirements in order to properly request a hearing and that their appeals therefrom fail to satisfy the criteria for obtaining discretionary review by the Board.

Held: Petitioners have not satisfied the standard for obtaining discretionary review of the Region's decision under 40 C.F.R. § 124.91. Review is not granted unless the denial of the evidentiary hearing request is clearly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed. Here, the petitioners' evidentiary hearing requests did not satisfy certain threshold procedural requirements set forth in 40 C.F.R §§ 124.74, 124.75 and 124.76. Bouchard's and Adams' evidentiary hearing requests generally did not comply with the requirement to identify the disputed permit conditions. Although the Region tended to overlook this shortcoming as a basis for denying the requests, the Board will not follow suit, particularly where, as here, not knowing what permit conditions are disputed hampers the Board's ability to determine whether a petitioner has shown clear error for purposes of obtaining review. Where Adams did comply with this requirement, for instance in regard to conditions he wished to have added to the permit, he nevertheless failed to demonstrate good cause for failing to raise the issue of inclusion during the public comment period as required by 40 C.F.R. § 124.76. His claim that the permit violates the Ocean Discharge Criteria was also not raised during the public

comment period, and he has not shown good cause for failing to do so. Adams' claim that the Region failed to consider other outfall locations is not material to this permit determination, and thus fails to comply with 40 C.F.R. §§ 124.74(b)(1) and 124.75(a)(1). In this case, where the National Environmental Policy Act (NEPA) is not applicable, the Region does not have a legal obligation to consider alternative outfall locations beyond determining compliance with Clean Water Act requirements at the site proposed by the applicant. Finally, Adams' claim that the New Hampshire Wetlands Board erroneously issued a permit for this outfall is not a claim that this NPDES permit was erroneously issued, and thus is not subject to review in these proceedings.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

Edwin F. Adams and Kenneth G. Bouchard each seek review of the denial of their separate evidentiary hearing requests on issues relating to the NPDES permit issued by U.S. EPA Region I to the Town of Seabrook, New Hampshire for the operation of a proposed municipal wastewater treatment plant. The petitioners also seek review of certain legal and "policy" decisions underlying the final permit. As requested by the Environmental Appeals Board, Region I responded to the petitions for review. In the interest of efficiency, both petitions are addressed in this decision. We conclude that the petitioners have failed to demonstrate a basis for granting review under 40 C.F.R. § 124.91.

I. *BACKGROUND*

On November 13, 1992, Region I issued an NPDES permit [1] to the Town of Seabrook for the operation of a proposed municipal wastewater treatment plant located on Wright's Island, New Hampshire. The proposed plant, consisting of a collection and transportation system, a treatment facility, and sludge processing facilities, will have one outfall, which will discharge into the Gulf of Maine, off the Atlantic Ocean. "The outfall pipe will be buried approximately seven feet. The outfall, which is a diffuser, will be about 2100 feet offshore, 1000 feet north of the New Hampshire/Massachusetts border, in 30 feet of water." Response to Comments at 1. Pursuant to § 401 of the Clean Water Act, 33 U.S.C. § 1341, the State of New

[1] *See* 33 U.S.C. § 1311(a). The National Pollutant Discharge Elimination System (NPDES) is the principal permitting program of the Clean Water Act. 33 U.S.C. § 1342. "The NPDES program requires permits for the discharge of pollutants from any point source into waters of the United States." 40 C.F.R. § 122.1(b)(1).

Hampshire certified that the final permit will comply with the State's water quality standards. [2]

Petitioner Edwin F. Adams (NPDES Appeal No. 93–2) owns an ocean-front house on Seabrook Beach, New Hampshire, and has participated in this permit proceeding on his own behalf. Petitioner Kenneth G. Bouchard (NPDES Appeal No. 93–3) lives near the Town of Seabrook and appears in these proceedings on behalf of himself, the Seabrook Beach Association and the Salisbury Beach Betterment Association (Salisbury Beach, Massachusetts). Adams and Bouchard each sought an evidentiary hearing on a variety of concerns. Region I denied each request in its entirety, concluding that each request failed to set forth material issues of fact. Adams seeks review of the Region's decision to deny his entire request; Bouchard seeks review of only a few of the numerous concerns raised in his evidentiary hearing request denied by the Region.

II. *ANALYSIS*

A. *Standard of Review*

Under the rules governing NPDES permit proceedings, there is no review as a matter of right of the denial of an evidentiary hearing request. *See In re Broward County, Florida,* NPDES Appeal No. 92–11, at 5 (EAB, June 7, 1993). Ordinarily, a petition for review of a denial of an evidentiary hearing request is not granted unless the denial of the request is clearly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed. *See id.;* 40 C.F.R. § 124.91(a). The Agency's longstanding policy is that NPDES permits should be finally adjudicated at the Regional level, and that the Board's power to review NPDES permit decisions should be exercised only "sparingly." *See* 44 Fed. Reg. 32,887 (June 7, 1979). The petitioner, therefore, has the burden of demonstrating that review should be granted. *Id.*

B. *Denial Of Evidentiary Hearing Requests*

The inadequacies in petitioners' evidentiary hearing requests are best explained by examining each of the "threshold" requirements

[2] Upon review of the draft permit, the State of New Hampshire granted its certification, provided that certain revisions were made to the permit prior to its final issuance. These revisions were made and are part of the final permit. *See* Letter from Edward J. Schmidt, Director, Water Supply & Pollution Control Division, State of New Hampshire Department of Environmental Services, to Edward K. McSweeney, Chief, Wastewater Management Branch, U.S. EPA Region I (Oct. 26, 1992).

that an evidentiary hearing request must meet, set forth in volume 40 of the Code of Federal Regulations (C.F.R.). These "threshold" requirements are that an evidentiary hearing request must meet the pleading requirements of § 124.74, raise only issues allowed under § 124.76, and demonstrate a material issue of fact relevant to the permit proceeding under § 124.75. *See In re Great Lakes Chemical Corp.,* NPDES Appeal No. 84–8, at 4 (CJO, Sept. 3, 1985).

1. *Pleading Requirements*

Under 40 C.F.R. § 124.74(b)(1), an evidentiary hearing request "shall state each legal or factual question alleged to be at issue and their relevance to the permit decision." In addition, § 124.74(c)(5) requires that such requests shall also contain "[s]pecific references to the contested permit conditions, as well as suggested revised or alternative permit conditions (including permit denials) which, in the judgment of the requester, would be required to implement the purposes and policies of the [Clean Water Act]." We read these provisions as requiring a requester to set forth each specific permit condition alleged to be inadequate and why, or to set forth why the permit should contain a condition that it does not, and, in as much detail as possible, what that condition should be.

These pleading requirements are "essential to allow for an informed decision by the Regional Administrator, and meaningful review of the Regional Administrator's decision by the Board." *Broward County* at 18. As noted above, the Board's function is to determine whether the denial of an evidentiary hearing request warrants review pursuant to § 124.91. Under that regulation, a petitioner has no right to have a denial reviewed. Review is discretionary, and is to be granted only in those limited circumstances where the petitioner has met its burden of showing that the denial of the evidentiary hearing request was clearly erroneous or raises reviewable questions of policy or discretion. The Board cannot reasonably conclude that the Region's decision is clearly erroneous or otherwise reviewable without knowing what permit conditions are contested, and thus whether an alleged factual or other issue is material and relevant.

In this case, both evidentiary hearing requests fail to meet these requirements. Petitioner Bouchard's request fails in its entirety to meet the requirement to plead the permit conditions at issue. Bouchard's evidentiary hearing request consists mostly of one sentence conclusory declarations, such as "[t]here was little or no discussion as to the effect of this project on the lobstering in the area of the

discharge."[3] Bouchard's evidentiary hearing request fails to identify any condition of the permit purportedly invalidated by his factual contentions, or any condition not in the permit but required under law in light of his factual contentions.[4] For this reason, we cannot conclude that the Region clearly erred in denying Bouchard's evidentiary hearing request, and therefore Bouchard's petition for review is denied.

Adams' evidentiary hearing request is similarly deficient, but not in its entirety. With respect to Adams' request for an evidentiary hearing on the accuracy of the effluent dilution figures[5] submitted by the Town of Seabrook in its permit application, Adams provides data supporting his calculation of the dilution figures,[6] but fails

[3] This also illustrates another fatal pleading deficiency in Bouchard's evidentiary hearing request. Bouchard fails to provide or refer to any evidence in support of his bald assertions. Bouchard argues that "[w]ith regard to all of the Regional Administrator's comments that the petitioners failed to raise a material issue of fact because only conclusory statements were alleged, it should be noted that the petitioners were operating under the assumption that he [sic] would be able to supplement his assertions by expert testimony at the time of the hearing. In fact, it was the Regional Administrator's office which lead [sic] the petitioners to believe this." Bouchard Petition at 4. We construe these remarks to mean that Bouchard did not believe he had any responsibility to submit information or written materials with his evidentiary hearing request. This is contrary to § 124.74(b), which provides that "[i]nformation supporting the [evidentiary hearing] request or other written documents relied upon to support the request shall be submitted as required by § 124.73 unless they are already part of the administrative record." Further, Bouchard has failed to point to anything in the record suggesting that the Region misled Bouchard as to the requirements of an evidentiary hearing request.

[4] Bouchard's request does contend that "[t]here is insufficient monitoring of the discharge wastes." Bouchard Evidentiary Hearing Request at 4. This is as close as Bouchard gets to identifying a permit condition at issue, but it is far from satisfying § 124.74, because the permit contains numerous monitoring requirements, and it is impossible to tell from Bouchard's evidentiary hearing request which one is allegedly insufficient, or to what extent. *See Broward County* at 18, n.28.

[5] The dilution figures represent the concentration of the effluent in the receiving waters.

[6] Some of this information is included in Adams' reply to the Region's response to the petitions. Data supporting a request for an evidentiary hearing can be provided during the public comment period or with the evidentiary hearing request, *See In re Boise Cascade Corp.*, NPDES Appeal No. 91–20, at 10 (EAB, Jan. 15, 1993), but cannot be provided for the first time on appeal from the denial of an evidentiary hearing request. *See Broward County* at 18, n.29. In addition, the procedural rules applicable here do not provide for filing reply briefs as a matter of right, and as a result, the Board expects parties to obtain leave to file reply briefs. *See, e.g., In re American Cyanamid Co.*, RCRA Appeal No. 89–8 (Adm'r, Aug. 5, 1991) (where RCRA permit rules are silent as to filing of reply briefs, leave should be obtained prior to filing). Adams did not secure such leave prior to filing his reply, and therefore there is merit to the Region's motion to strike this reply. Nevertheless, because Adams is a citizen petitioner unrepresented by counsel in this proceeding, this error will

to explain which parts of the permit are invalidated by his claims, or what conditions not in the permit are required under law by his claims. Without this information, we have no basis for concluding that the Region clearly erred in denying Adams' evidentiary hearing request on this issue. *See In re LCP Chemicals—New York,* RCRA Appeal No. 92–25, at 5 (EAB, May 5, 1993) (under 40 C.F.R. § 124.19, a party seeking review of a RCRA permit decision bears the burden of identifying questionable permit conditions, and it is "not this Board's obligation to search through the permit for the specific permit conditions" that are encompassed by a petitioner's objections). Accordingly, Adams' petition for review on this issue is denied.

We note that instead of denying the evidentiary hearing requests on this ground, the Region went ahead and considered whether the petitioners' requests met the substantive requirement of § 124.75 to set forth a material issue of fact relevant to the issuance of the permit. The Region's approach, however, is not binding upon the Board. The Board's vantage point in reviewing Regional decisions for clear error is very different from the Region's in deciding whether to grant an evidentiary hearing request. It is possible that a Region may choose to overlook certain pleading deficiencies when considering an evidentiary hearing request because of its intimate involvement in the development of the permit and its familiarity with a petitioner's concerns. The Board, however, lacks these unique perspectives, and in the absence of minimal compliance with § 124.74, the Board would have no choice but to speculate as to how the petitioner's objection might affect the permit, a burdensome exercise and one which does not further sound jurisprudence. *See Broward County* at 18, n.28. Therefore, the Board may elect to ignore a Region's decision to relax the criteria applicable to evidentiary hearing requests, particularly if, as here, that decision also affects the Board's ability to determine whether a petitioner has shown clear error for purposes of obtaining review by the Board.

2. *Issue Preservation*

In general, under 40 C.F.R. § 124.76, an evidentiary hearing request can only raise those issues and arguments that were raised

be excused, and the Board will consider his reply in the interest of a full airing of the issues. Accordingly, the Region's motion to strike is hereby denied. Because we are considering Adams' reply, the Region's alternative request—seeking leave to file a supplemental memorandum responding to Adams' reply—is hereby granted, and we will consider the supplemental memorandum submitted by the Region with its motion.

during the public comment period.[7] Other issues and arguments can be raised in an evidentiary hearing request only if the failure to raise such issues and arguments during the public comment period is justified on the basis of good cause, as defined in § 124.76. The purpose of this requirement is "to encourage resolution of issues at the time of comments on a draft permit, rather than in the far more burdensome context of an evidentiary hearing, and to link that hearing explicitly to the preceding stages of permit issuance." 44 Fed. Reg. 32,885 (June 7, 1979).

In his evidentiary hearing request, Adams requested the addition of two conditions to the permit. As stated by Adams:

> I believe that one condition should be to make the Town post the area with large legible signs in English and French that would inform people who are not from this area of the dangers of ingesting local shellfish, the classification, the chances of viral contamination from bathing, the phrase DANGER—these waters do not meet State and Federal standards for human consumption or ingestion * * * the reason for the posting, a map and description of the sewage outfall and the type of treatment and disinfection used. Another condition should be to have certified divers visually inspect the manifold for damage caused by storms or other related causes of destruction at certain intervals and especially immediately after bad storms to prevent the loss of initial dilution.

Adams Evidentiary Hearing Request ("Adams EHR") at 4. We examine these contentions now.

The Region's response to the evidentiary hearing request indicates that inclusion of these permit conditions was not within the scope of issues raised during the public comment period by Adams or anyone else, and our review of the Region's response to comments confirms this. Adams concedes as much and attempts to explain this shortcoming with respect to the "DANGER" sign by saying, "I had no way of knowing at the time of the public hearing that the U.S. Government would require labeling of small quantities of ingestible

[7] A commenter is obliged to raise all reasonably ascertainable issues and make all reasonably available arguments before the close of the public comment period pursuant to 40 C.F.R. § 124.13.

water. Therefore I did not have the opportunity to raise this issue." Adams Petition at 3. The meaning of this explanation is unclear, with the Region remarking that it "is not sure what Mr. Adams is talking about." Response to Petitions at 17. Neither are we. In any event, we agree with the Region that this argument "falls well short of establishing good cause for [the] failure to timely raise this issue." *Id.*

Regarding the visual inspections by divers, Adams asserts that "the Regional Administrator either knew or should have known that information exists on the public records of other U.S. Government agencies regarding this issue and that this information is in the U.S. Army Corps of Engineers' files." Adams Petition at 3. We also agree with the Region, as explained below, that Adams has not met the good cause requirement in this instance either.

First, it is difficult to see how EPA's state of knowledge about this information is relevant to Adams' claim of good cause. If EPA were deliberately suppressing the information in the other agency's possession, and as a result, Adams was prevented from proposing the condition prior to making his request for an evidentiary hearing, there might be some basis for excusing his delay. Adams has not, however, given us any indication that Region I engaged in any such deception. Second, as to Adams' contention that EPA should have known about the information in the other agency's files, Adams misconstrues the permit process and EPA's role under it. Although EPA possesses its own expertise, and undertakes to write permits based upon the best information available, it would not be feasible for EPA alone to gather and sort through all of the information conceivably relevant to any single permit determination. Nor would such information necessarily cause EPA to insert a condition in the permit that corresponds to the one proposed by Mr. Adams. EPA therefore depends upon the permit applicant and interested members of the public to assist in the development of a sound record on which to base the permit determination. The procedures by which their participation and assistance are governed are set forth in the applicable rules. *See generally* 40 C.F.R. Parts 124 and 125. In accordance with those procedures, persons desiring to correct perceived deficiencies in EPA's permit determinations bear the burden of bringing those deficiencies and related matters to the Agency's attention in the first instance, and on a timely basis. *See e.g.,* 40 C.F.R. §§ 124.13 (obligation to raise issues, etc.) and 124.76 (obligation to submit evidence). Good cause for failing to raise an issue at the appropriate time (or submit information sooner) is not established, therefore, by

asserting, as Adams has, that EPA "should have known" about information in another agency's files. To hold EPA to such an imputed-knowledge standard is contrary to the rules and would quickly render the permit process inoperative. Accordingly, we conclude that Adams has failed to demonstrate good cause in this instance.

Adams also requested an evidentiary hearing on whether the issuance of the permit violated the Ocean Discharge Criteria in 40 C.F.R. Part 125, Subpart M, which prohibit the issuance of an NPDES permit for a discharge that will cause an unreasonable degradation of the marine environment. *See* 40 C.F.R. § 125.123(a).[8] Adams' evidentiary hearing request contended that the NPDES permit cannot be issued here because the discharge will unreasonably degrade the marine environment by depreciating the recreational value of the water,[9] causing a significant loss in the commercial value of the shellfish beds near the discharge,[10] and exposing the public to viruses.[11] The issue of whether the discharge will not degrade the marine environment, and thereby comply with the Ocean Discharge Criteria, was not raised during the public comment period,

[8] The Ocean Discharge Criteria apply to this discharge because the discharge is into a territorial sea. *See* 40 C.F.R. § 125.120.

[9] In support of his claim that the discharge will unreasonably depreciate the recreational value of the water, Adams states that the State water quality standards, with which the discharge will comply, do not cover depreciation of recreational value. Further, Adams states that if the discharge is allowed, he and others "will have to seek another beach to use * * *. If only one person has to leave this beach, it would be a depreciation of recreational value." Adams Petition at 1. Adams also contends that "minimum standards" were used in issuing the permit when "beautiful beaches such as these require at least maximum standards," *id.*, and that the discharge will prevent an upgrade in the State classification of the water. Finally, Adams asserts that there is no truth to the Region's statement that the proposed facility will enhance the recreational value of the water because overflowing septic systems currently threaten the beach. None of these arguments in support of his claim were raised in Adams' evidentiary hearing request, and therefore cannot be entertained for the first time on appeal. *See Broward County* at 18, n.29 ("the lack of requisite specificity in the evidentiary hearing request cannot be cured by providing greater specificity, for the first time, on appeal.").

[10] Adams also argues on appeal that issuance of the permit violates State laws protecting the shellfish beds from environmental degradation. Even though this claim is raised for the first time on appeal and therefore is not cognizable in these proceedings, *see supra* note 9, we also note that the State of New Hampshire provided in its certification of the permit that the State may adopt the final NPDES permit as the applicable State permit.

[11] On appeal, Adams also contends that the permit wrongfully fails to address viruses, and provides a list of other reasons why the alleged failure of the permit to address viruses should be reviewed. This list of reasons is provided for the first time in these proceedings on appeal, and therefore are not subject to review. *See supra* note 9.

and Adams has not made any attempt to demonstrate good cause for the failure to raise it at that time. Accordingly, the claim is not one that is entitled to be heard in an evidentiary hearing, and the Region did not clearly err in denying Adams' request for an evidentiary hearing on this claim.[12]

3. *Material Issue of Fact Relevant to Permit Issuance*

Lastly, an evidentiary hearing request must set forth a material issue of fact relevant to the issuance of the permit.[13] *See* 40 C.F.R. §§ 124.74(b)(1) and 124.75(a)(1). To satisfy this requirement, an evidentiary hearing request must articulate a factual issue that is material, that is, that "might affect the outcome of the proceeding." *In re Mayaguez Regional Sewage Treatment Plant,* NPDES Appeal No. 92–23, at 12 (EAB, Aug. 23, 1993).[14] Time and resources needed to conduct evidentiary hearings are not unlimited, and therefore such hearings should not be held absent a demonstration that there is a genuine issue of material fact to be resolved.[15]

The Region properly denied Adams' evidentiary hearing request on Adams' claim that the permit should not have been issued because the Region failed to consider alternative locations for the outfall. Adams' evidentiary hearing request asserts that "there was no alternative site evaluated for this outfall, for example, to the north, south, or east of the present location, so one cannot be assured that this is the best place for it to be." Adams EHR at 5. The Region denied

[12] We note that even if the claim had been preserved, a discharge in compliance with State water quality standards is presumed not to cause an unreasonable degradation of the marine environment under the Ocean Discharge Criteria. *See* 40 C.F.R. § 125.122(b). The State of New Hampshire certified that this discharge complies with the State water quality standards. Adams has provided no reason to believe that the certification is clearly erroneous. *See In re Ina Road Water Pollution Control Facility, Pima County, Arizona,* NPDES Appeal No. 84–12 (CJO, Nov. 6, 1985) (dictum: EPA can impose a stricter permit condition than the one certified by the State if the State's certification is clearly erroneous).

[13] Issues of law and policy may also be raised in the evidentiary hearing request. This subject is addressed in the next section, "C. Legal and Policy Issues."

[14] As explained in *Boise Cascade Corp.* at 10, materials supporting an evidentiary hearing request can be submitted either during the public comment period or with the evidentiary hearing request. Our review is limited to such materials, and therefore we have no basis for granting a request made by Adams during the pendency of this appeal that we consider two newspaper articles published after this petition for review was filed.

[15] *See* 44 Fed. Reg. 32,885 (June 7, 1979) ("Evidentiary hearings, because they entail great delays, because they are cumbersome, and because only the well-financed can afford to participate, are disfavored as a means for solving any issues other than contested factual issues requiring cross-examination.").

Adams' evidentiary hearing request on the ground that the Region does not have a legal obligation to consider alternative locations for this outfall. *See* Denial of Evidentiary Hearing Requests ("EHR Denial") at 1, 6.

Generally, the Agency reviews NPDES permit applications for a facility's ability to meet the requirements of the Clean Water Act implemented by the NPDES program. In this case, the Region considered the plan for locating the proposed outfall in the context of whether the proposed discharge would comply with the requirements of the Clean Water Act.[16] As part of the NPDES permit decision-making process, the Region is not required to evaluate alternative sites for an outfall that meets such requirements unless review is required under the National Environmental Policy Act (NEPA).[17] The examination of "alternatives" is the linchpin of NEPA compliance.[18] NEPA review is required pursuant to § 511(c) of the Clean Water Act, 33 U.S.C. § 1371(c), for statutory "new sources" and for certain federally funded projects.[19] In this case, the Region contends that the Seabrook permit is exempt from the NEPA requirements because no federal funding is involved in the facility, and because the facility is not a new source as defined in the Clean Water Act.[20] EHR

[16] In its response to comments on the draft permit, the Region explained its responsibility in these terms:

> EPA has reviewed the proposed plan for its ability to meet existing environmental standards and criteria. If the plan does meet those standards and criteria, then the applicant may move forward with their project. Conversely, if the plan does not meet those standards or criteria, the project as proposed cannot move forward. If a proposed project is unacceptable as designed, an applicant may modify the proposed project/plan to meet EPA criteria and standards. The way in which an applicant decides to modify a project is their decision.

Response to Comments at 4.

[17] 42 U.S.C. § 4321 *et seq.* The National Environmental Policy Act requires an environmental impact statement for "major Federal actions" affecting the environment. 42 U.S.C. § 4332(C).

[18] *See* 40 C.F.R. § 1502.14, which requires federal agencies to assess the environmental impacts of their proposed projects and alternatives to them. "This section is the heart of the environmental impact statement." *Id.*

[19] This section "makes clear that the provision of federal financial assistance for the construction of publicly owned treatment works and the issuance of discharge permits to new sources are the only actions taken by the Administrator under the [Clean Water Act] that will trigger a NEPA duty." *Natural Resources Defense Council* v. *EPA,* 859 F.2d 156, 167 (D.C. Cir. 1988).

[20] Under the Clean Water Act, a "new source" is one "the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source." 33 U.S.C. § 1316(a)(2). *See also* 40 C.F.R. § 122.2. There is no standard of performance promul-

Denial at 1. Adams does not challenge these contentions, and we have no reason not to accept them. Therefore, because the Agency has no legal obligation to consider alternative locations for the outfall involved in this permit, no genuine issue of material fact is raised by reason of Adams' contention that the Region did not consider such locations. Thus, the Region did not clearly err in denying Adams' evidentiary hearing request on this issue.

C. *Legal and Policy Issues*

Legal and policy issues can also be raised in an evidentiary hearing request, although they cannot themselves provide a basis for an evidentiary hearing, a procedure reserved for factual issues.[21] On appeal from a denial of an evidentiary hearing request, the Board is authorized to review any legal and policy issues raised in the request, *see* § 124.74(b)(1)(note), provided the petitioner demonstrates that such review is warranted under 40 C.F.R. § 124.91(a)(1).

Adams requested an evidentiary hearing on whether the "N.H. Wetlands Board is in violation of [New Hampshire statutes] by issuing a permit for this outfall when it admits that there was much testimony involving depreciation of recreation and aesthetic enjoyment." Adams EHR at 5. We agree with the Region's conclusion that "[t]his state law issue regarding another permit is not appropriate for consideration in an EPA NPDES evidentiary hearing." EHR Denial at 13. Adams' concerns about the State Wetlands Board pertain to a State issued permit, not this NPDES permit, and therefore are not subject to review in these proceedings. *See, e.g., In re Sequoyah Fuels Corp.,* NPDES Appeal No. 91–2 (EAB, Aug. 31, 1992) (agricultural activities at issue are not covered by NPDES permits, and therefore cannot be reviewed); *In re Champion International Corp.,* NPDES Appeal No. 90–1 (CJO, Sept. 5, 1990) (approval of State water quality standards is not part of NPDES permit process and therefore not subject to review). Review of this issue, therefore, is denied.

III. *CONCLUSION*

We reiterate the Region's observation that petitioners' "objections to this plant are heartfelt." EHR Denial at 13. Genuine disagreement

gated under section 1316(a)(2) applicable to this plant, and therefore the proposed facility is not a "new source."

[21] If an evidentiary hearing is granted, related legal and policy questions may be addressed. *See In re 446 Alaska Placer Miners,* NPDES Appeal No. 84–13 (CJO, Apr. 2, 1985).

with the Region's permit decision, however, is not a basis for granting an evidentiary hearing request absent compliance with 40 C.F.R. §§ 124.74, 124.75 and 124.76. Petitioners have failed to meet their burden under 40 C.F.R. § 124.91 of showing that Region I's denial of their evidentiary hearing requests is based on a clear error of law or fact, or an important policy or exercise of discretion that warrants review. Accordingly, the petitions for review are denied.

So ordered.