IN RE CITY OF FORT WORTH

NPDES Appeal No. 95-8

ORDER DENYING REVIEW

Decided April 5, 1996

Syllabus

The City of Arlington, Texas ("Arlington") has petitioned for review of the denial of its request for an evidentiary hearing in connection with the renewal of an NPDES permit for the Village Creek Wastewater Treatment Plant ("Village Creek WTP"), which is owned and operated by the City of Fort Worth, Texas ("Fort Worth"). This facility was built, in part, with grant funds under the Clean Water Act ("CWA") based upon representations that the facility would serve 22 neighboring municipalities, including Arlington. The facility serves the western portion of Arlington pursuant to a contract between Arlington and Fort Worth, which by its terms expires on February 14, 2001. The applicable areawide wastewater treatment management plan prepared pursuant to CWA § 208 indicates that the Village Creek WTP will serve Arlington until approximately that date; it makes no representations beyond that date. The permit at issue is by its terms effective from August 1, 1994 until July 31, 1997.

Arlington makes five arguments for granting review. Three of Arlington's five arguments pertain to the Region's denial of Arlington's request to have the permit include a condition requiring the Village Creek WTP to serve western Arlington's wastewater treatment needs after the expiration of the contract between the two cities. First, Arlington contends that the Region clearly erred because it failed to follow the law by issuing a permit that is not consistent with an areawide wastewater treatment plan approved under CWA § 208. Second, citing the grant provisions in the CWA and its implementing regulations, Arlington contends that it is entitled as a matter of law to use the Village Creek WTP for the useful life of the facility, and that the permit must reflect this. Third, Arlington asserts that it was entitled to an evidentiary hearing on the facts underlying its legal entitlement to the requested permit condition.

Arlington also contends that the Region erred in denying its public hearing request on the permit because the permit involves a significant degree of public interest in that it affects the 80,000 residents of western Arlington. Lastly, Arlington contends that the Region erroneously denied Arlington's request for an evidentiary hearing on Fort Worth's alleged violations of its permit.

Held: The petition for review is denied. Including the requested "duty to serve" condition in the permit would have no practical effect on Fort Worth's obligation to provide wastewater service to western Arlington, as Fort Worth is contractually obliged to provide this service during the entire period covered by this three-year permit. Accordingly, the petition does not raise any important policy issues requiring review. In addition, Arlington's legal claims are without merit. While it is true that CWA § 208(e) and 40 C.F.R. § 122.44(d)(6) require that NPDES permits be consistent with any applicable areawide wastewater treatment management plan, Arlington has not demonstrated any inconsistency between the permit and the plan in this case. No inconsistency can arise from the permit's silence on the issue of whether Ft. Worth has a duty to serve

western Arlington beyond the year 2000. Further, contrary to Arlington's assertions, the plan does not indicate that it is entitled to use the Village Creek WTP for the useful life of that facility. Moreover, even if Arlington has correctly construed the CWA grant provisions and their implementing regulations as giving Arlington the right to use the facility for its useful life, Arlington has failed to show that this right needs to be reflected in this NPDES permit. Under 40 C.F.R. § 122.44(n), an NPDES permit must reflect applicable grant conditions only if the grant conditions are reasonably necessary for the achievement of effluent limitations. Arlington does not argue that the effluent limitations in this permit will be affected in any way by the absence of its requested "duty to serve" condition. Because there is no legal obligation to include a "duty to serve" condition in this permit, any dispute over the factual basis for such a condition is not material to the permit, and therefore does not require an evidentiary hearing.

Arlington also failed to show that the Region abused its discretion in deciding not to hold a public (non-evidentiary) hearing on the permit. Nor has Arlington demonstrated clear error in the Region's failure to hold an evidentiary hearing on Fort Worth's alleged violations of its permit. An evidentiary hearing request must refer to contested permit conditions. Arlington's evidentiary hearing request fails to identify any contested permit condition implicated by its allegations.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge McCallum:

Pursuant to 40 C.F.R. § 124.91, the City of Arlington, Texas has petitioned for review of the denial of its request for an evidentiary hearing in connection with the renewal of an NPDES permit for the Village Creek Wastewater Treatment Plant, which is owned and operated by the City of Fort Worth, Texas. The main issues raised by this petition involve the petitioner's legal claims that the permit should include a condition establishing a duty upon the City of Fort Worth, as the permittee, to provide wastewater treatment to the petitioner for the useful life of the permitted facility. Specifically, Arlington claims that Fort Worth has a duty to serve Arlington's wastewater treatment needs because of Fort Worth's acceptance of federal grants to build the permitted facility, and because the applicable areawide wastewater treatment management plan indicates that the permitted facility serves Arlington. For the reasons set forth below, we conclude that the Region did not clearly err in denying the petitioner's evidentiary hearing request, and that review of the petitioner's legal claims is not warranted. Accordingly, the petition for review is denied.

I. *BACKGROUND*

A. *Statutory Background*

The Clean Water Act ("CWA" or "Act") embodies a network of policies and goals that further the national objective of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). One goal of the

CWA is to eliminate the discharge of pollutants into navigable waters. CWA § 101(a)(1). To this end, the CWA makes it unlawful to discharge pollutants into navigable waters except in compliance with the Act. CWA § 301(a), 33 U.S.C. § 1311(a). The discharge of pollutants is in compliance with the Act if, among other things, the discharger has received a National Pollutant Discharge Elimination System (NPDES) permit under CWA § 402, 33 U.S.C. § 1342. A discharger may receive an NPDES permit if, *inter alia*, the discharge meets the requirements of CWA § 301 setting forth limitations on effluents in discharges. More specifically, a discharge from a publicly owned treatment works ("POTW"), such as the facility involved here, must meet the technology-based effluent limitations prescribed in CWA § 301(b)(1)(B).[1] If compliance with the technology-based effluent limitations is insufficient to achieve or maintain the desired water quality,[2] a discharge from a POTW must also meet additional, more stringent, water quality-based effluent limitations under CWA § 301(b)(1)(C). The CWA contains specific deadlines for achieving compliance with these effluent limitations. The purpose of an NPDES permit is to apply these statutory standards; each permit establishes specific and enforceable limitations on the amount of pollutants that can be contained in each discharge within its scope. NPDES permits may be issued for terms not to exceed five years, CWA § 402(b)(1)(B), and may be renewed.

To achieve its water quality goals, the CWA incorporates two policies relevant here. First is the policy "that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State." CWA § 101(a)(5). Consequently, CWA § 208, 33 U.S.C. § 1288, requires State and local officials "to develop plans for areawide waste treatment management in areas with critical water pollution control problems." S. Rep. No. 2770, 92d Cong., 1st Sess. at 9 (1971). These plans are subject to approval by the EPA. CWA § 208(b)(3). To be approved, a plan must identify "treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of an area over a twenty-year period." CWA § 208(b)(2)(A). Pursuant to CWA § 208(e), "[n]o

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[1] The technology-based effluent limitations for POTWs are known as "secondary treatment" or "equivalent to secondary treatment" and are prescribed by 40 C.F.R. Part 133. In general, secondary treatment refers to the introduction of microorganisms to the wastewater in order to oxidize the organic matter present in the wastewater. *See* Office of Water Enforcement and Permits, *Training Manual for NPDES Permit Writers* at 49 (May 1987) ("Training Manual").

[2] Another goal of the CWA is to achieve and maintain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." CWA § 101(a)(5), 33 U.S.C. § 1251(a)(5).

permit under section 1342 of this title [NPDES permit] shall be issued * * * which is in conflict with a plan approved pursuant to * * * this section." Likewise, the regulations implementing the NPDES permit program provide that each NPDES permit shall "[e]nsure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of CWA." 40 C.F.R. § 122.44(d)(6).

The second policy relevant here is "that Federal financial assistance be provided to construct publicly owned waste treatment works." CWA § 101(a)(4). The purpose of this grant program is "to assist the development and implementation of waste treatment management plans and practices which will achieve the goals of this chapter." CWA § 201(a), 33 U.S.C. § 1281. In particular, the grant program is intended to help POTWs meet the CWA's deadlines for achieving applicable effluent limitations. Training Manual at 54. CWA § 204 details the determinations that the Agency must make before awarding a grant. For example, in order to approve a grant for a POTW in an area covered by the areawide waste treatment management planning requirement, the Agency must determine that the proposed treatment works is included in that plan. CWA § 204(a)(1), 33 U.S.C. § 1284(a)(1). Moreover, any grant under CWA § 201 may not conflict with any applicable plan approved under CWA § 208. CWA § 208(d). Conditions in a grant made under CWA § 201 shall be reflected in the recipient's NPDES permit only if the condition is "reasonably necessary for the achievement of effluent limitations under section 301 of CWA." 40 C.F.R. § 122.44(n). Regulations in 40 C.F.R. Part 35, Subpart E, govern the administration of the grant program.

B. *Factual Background*

The Village Creek Wastewater Treatment Plant ("Village Creek WTP"), which discharges into the Trinity River, is located in and owned and operated by the City of Fort Worth, Texas ("Fort Worth"). It serves 22 other municipalities, including the City of Arlington, Texas ("Arlington"), pursuant to service contracts between Fort Worth and those municipalities. Fort Worth has received large amounts of federal grant funds to expand and improve the Village Creek WTP based upon the fact that the facility serves these other municipalities in its region in accordance with a regional wastewater management plan approved under CWA § 208. The contract between Fort Worth and Arlington was executed in 1966, and by its own terms will expire on February 14, 2001. Under this contract Fort Worth agrees to provide, for a fee, wastewater treatment services for the western portion of Arlington. (The remaining portions of the City of Arlington receive wastewater treatment services from the Trinity River Authority of

Texas.) The 1995 regional wastewater management plan for the Upper Trinity River Basin prepared by the North Texas Council of Governments pursuant to CWA § 208 reflects Fort Worth's contractual relationships with Arlington and the other municipalities served by the Village Creek WTP.[3] This plan indicates that through the year 2000, Arlington's wastewater treatment needs will be met by the Village Creek WTP. 1995 Annual Water Quality Management Plan for North Central Texas ("1995 Plan") at 1-35 to 1-40.

In the mid-1980s, Fort Worth began negotiating renewed contracts with the 22 municipalities. Before long, contract renewal negotiations between Fort Worth and Arlington broke down, primarily over disputes as to the rates for continued service. On December 12, 1988, Fort Worth informed Arlington that the Village Creek WTP would no longer serve western Arlington after the expiration of the contract in 2001.

Instead of pursuing further contract negotiations with Fort Worth for wastewater treatment service after 2001, Arlington filed suit in a State court seeking a declaration that as long as the Village Creek WTP is operating, Fort Worth has a duty under the CWA to provide wastewater treatment services to Arlington. According to the trial court, Arlington's claim "hinged on [these] operative facts: that Fort Worth is a regional management agency and that it got that designation and federal money by representing to the federal and state authorities that it served a portion of Arlington." Response to Petition for Review, Ex. 17D at 4-5. The court, however, rejected Arlington's claim that Fort Worth is required to provide wastewater treatment services to western Arlington after the expiration of the contract in 2001. This decision was upheld on appeal, where the appellate court stated:

> Under Texas case law, a ruling, *premised upon any theory*, that Fort Worth has a duty to provide wastewater treatment service to Arlington indefinitely after February 14, 2001, would violate the police powers doctrine. This being the case, any decision other than the one made by the trial court would have been erroneous.

City of Arlington v. City of Fort Worth, 844 S.W.2d 875, 877 (Tex. App. — Fort Worth 1992) (emphasis added). The appellate court held that

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[3] This plan was the only one provided to this Board in connection with this appeal. It was submitted by the City of Fort Worth with its response to the petition for review. *See* n. 8 *infra*. It is not clear from the plan itself whether the Agency has approved it. Nevertheless, as we have received no objections to our consideration of this document, we will rely upon it here.

because the police powers doctrine prohibits Fort Worth from making an agreement to provide wastewater treatment to western Arlington for the useful life of the Village Creek WTP,[4] Arlington cannot rely on any other theory, *even one based upon the CWA*, "to establish a duty for Fort Worth that Fort Worth is powerless to undertake on its own." 844 S.W.2d at 878-79.

The State courts have not been the only forum through which Arlington has sought to obtain a legal decision that Fort Worth must provide wastewater treatment services to western Arlington after the expiration of the contract. In 1986, in connection with Fort Worth's application for a renewal of its State wastewater discharge permit, Arlington requested a public hearing on the issue of whether Fort Worth had an obligation to provide service to Arlington based upon Fort Worth's receipt of federal grant money and the status of the Village Creek WTP as a regional facility described in the applicable CWA § 208 regional wastewater management plan. The Texas Water Commission rejected Arlington's request for a public hearing on the ground that the issue was not germane to the permit proceeding. Later, in 1993, when Fort Worth was seeking another renewal of its State discharge permit, Arlington again requested a public hearing to show that the State "should order the City of Fort Worth to continue to provide waste water treatment service to Arlington beyond the year 2001 as part of the [State's] renewal of the permit." Response to Petition for Review, Ex. 17I at 2. To support its request, Arlington again argued that both the applicable CWA § 208 regional wastewater management plan and the federal grant money given to Fort Worth for

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[4] The Texas appellate court explained the police powers doctrine as follows:

> A municipality's operation of a sewer system in Texas is the exercise of a governmental function. * * * When discharging a governmental function, a municipality, as an agent of the state, is exercising the state's police power, which is a grant of authority from the people to the government for the protection of the public health, safety, and welfare. * * * As such, the police power cannot be abdicated, or bargained away.
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> An agreement to provide sewer service for an indefinite period of time bargains away a city's governmental responsibilities and abdicates its police power. Such an agreement strips the city of its power to determine whether, on a particular date, it is in the best interests of all its customers and the public in general to extend water and sewer service to a particular person or entity.

844 S.W.2d at 878.

the Village Creek WTP require Fort Worth to treat Arlington's wastewater after the contract expires in 2001. Again, the Texas Natural Resource Conservation Commission (the successor to the Texas Water Commission) rejected this request on the same basis.

Having failed in these fora, Arlington is now attempting to use these NPDES permit proceedings to secure an obligation on the part of Fort Worth to provide wastewater treatment to western Arlington after the expiration of the current contract between the two parties. These permit proceedings began in May 1993 when Fort Worth applied for renewal of the NPDES permit for the Village Creek WTP. Even before a draft permit was made publicly available for comment, Arlington filed its comments on the proposed permit action. The thrust of Arlington's comments was that any permit issued for the Village Creek WTP should contain a condition requiring continuing service to western Arlington for the useful life of the Village Creek WTP. According to Arlington, the failure to include such a "duty to serve" condition in the permit would violate the law in two respects. First, it would violate CWA § 208(e), which provides that no NPDES permit "shall be issued for any point source which is in conflict with a plan approved" pursuant to that section. Secondly, Arlington commented that the failure to include such a condition in the permit would violate provisions of the CWA and its implementing regulations pertaining to grants for wastewater treatment plants. According to Arlington, these statutory and regulatory provisions provide that Arlington is entitled "by law to use the [Village Creek WTP] for its entire useful life." Response to Petition for Review, Ex. 8 at 8.

In February 1994, a draft permit for the Village Creek WTP was made available for public comment. Arlington requested a public hearing on the draft permit, repeating (almost verbatim) its prior comments and asserting that there is a significant public interest justifying a public hearing on the permit under 40 C.F.R. § 124.12(a)(1) because the permit action affects the "approximately eighty thousand citizens of western Arlington who depend upon the Village Creek facility for their wastewater treatment services." Response to Petition for Review, Ex. 13 at 11.

The Region issued the final permit decision on June 25, 1994. At that same time, the Region responded to Arlington's comments and denied Arlington's public hearing request. The Region rejected Arlington's legal claims that the CWA requires a "duty to serve" condition in this permit. The Region stated that "Arlington would use the permit condition it now seeks to obtain favorable terms in a renegotiated agreement or to force Fort Worth to treat its wastewater with-

out any service agreement whatsoever. These NPDES permit proceedings * * * provide no forum for resolution of the dispute between Arlington and Fort Worth." Response to Petition for Review, Ex. 14B at 3. Consequently, the Region concluded that a public hearing on the permit was not necessary "[b]ecause the dispute between Arlington and Fort Worth is irrelevant to any condition EPA might impose in Fort Worth's NPDES permit." *Id.* By its own terms, the permit is effective from August 1, 1994 until July 31, 1997. In addition, the permit makes no mention of any of the municipal users of the Village Creek WTP, including Arlington.

On July 25, 1994, Arlington filed a request for an evidentiary hearing. This request again repeated Arlington's arguments that as a matter of law the permit must contain a condition requiring Fort Worth to provide wastewater treatment to Arlington after the expiration of the contract. Arlington also asserted that an evidentiary hearing is required because there is a significant degree of public interest in the permit. Before the Region responded to Arlington's request, Arlington filed a "Supplement to Request for Evidentiary Hearing" on April 12, 1995. This supplemental filing requested an evidentiary hearing on "Fort Worth's continuing use of the old sludge drying beds" allegedly in violation of Fort Worth's current NPDES permit. According to Arlington, this practice by Fort Worth has resulted in contamination of Arlington's groundwater.[5]

On June 30, 1995, the Region denied Arlington's request, as supplemented, for an evidentiary hearing. The Region first pointed out that the standard for granting an evidentiary hearing request is not whether there is significant public interest in the permit, but whether the request sets forth a material issue of fact relevant to the permit decision under 40 C.F.R. §§ 124.74 and 124.75. Under this standard, the Region denied the request on the ground that Arlington did not demonstrate that there were any disputed factual issues material to a determination of any permit term or condition. Instead, the contention that the permit should contain a condition imposing upon Fort Worth a duty to serve Arlington's wastewater treatment needs for the useful life of the facility raised only legal issues that the Region concluded lacked merit. Further, the Region concluded that the issues raised by Arlington concerning Fort Worth's alleged violations of its current per-

[5] Arlington also requested an evidentiary hearing on whether the method used by Fort Worth to charge users of the Village Creek WTP complies with 40 C.F.R. § 35.929, which establishes requirements for a grant recipient's system of calculating fees. This issue, however, has not been pursued in Arlington's petition for review.

mit were not raised during the public comment period and thus were not preserved for review under 40 C.F.R. § 124.76.[6]

C. *Petition for Review*

On August 7, 1995, Arlington petitioned the Environmental Appeals Board for review of the Region's denial of its evidentiary hearing request under 40 C.F.R. § 124.91, which provides that a petition for review must demonstrate that the denial of an evidentiary hearing request was clearly erroneous, or involves an exercise of discretion or policy that is important and deserves review. Arlington makes five arguments for granting review.

Three of the arguments specifically concern the requested "duty to serve" permit condition. First, Arlington claims that the Region clearly erred because it failed to follow the law by issuing a permit that is not consistent with an approved CWA § 208 plan. According to Arlington, the requirement that a permit must be consistent with an approved plan cannot be met in this case without "an explicit condition in the permit that the plant will continue to provide service to western Arlington as required by the approved section 208 Plan." Petition for Review at 9. Second, citing CWA §§ 201 and 204, and regulations implementing the construction grant program for POTWs, Arlington contends that it is entitled as a matter of law to use the Village Creek WTP for the useful life of that plant. In Arlington's view, the permit's failure to include a "duty to serve" condition contradicts Arlington's rights as a "beneficiary" of the grants to Fort Worth.[7] Third, Arlington asserts that the Region clearly erred in denying its evidentiary hearing request which set forth material issues of fact. Specifically, Arlington states that "an evidentiary hearing was required for the Regional Administrator to determine the facts necessary to take the 'appropriate action' to implement the Section 208 Plan and to satisfy the duty to require Fort Worth to meet the obligations it undertook in seeking and obtaining federal construction grants." Petition for Review at 22. In other words, Arlington asserts that an evidentiary hearing was required to determine the facts justifying a "duty to serve"

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[6] This regulation provides in pertinent part that "[n]o issues shall be raised by any party that were not submitted to the administrative record required by § 124.18 as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them."

[7] In connection with this argument, Arlington asserts that the Region has never responded to Arlington's Freedom of Information Act (5 U.S.C. § 552) request for documents pertaining to the award of grants to Fort Worth for the Village Creek WTP. This request was renewed in Arlington's evidentiary hearing request. The authority for resolving this dispute, however, rests with the Agency's General Counsel, *see* 40 C.F.R. § 2.115, and not with this Board.

condition in the permit. Arlington contends that the Region interpreted too narrowly the standard for granting an evidentiary hearing request, and suggests that evidentiary hearings are appropriate to air concerns that were not adequately addressed during the public comment period on the draft permit.

Arlington's fourth and fifth arguments concern its public hearing and supplemental evidentiary hearing requests, respectively. Arlington argues that the Region clearly erred by denying each such request. In the case of the public hearing request, Arlington argues that the permit involves a significant degree of public interest because it involves wastewater treatment for 80,000 residents of western Arlington, and therefore it was error for the Region to deny the request. In the case of the supplemental evidentiary hearing request, which seeks to address Arlington's contention that Fort Worth's use of sludge drying beds resulted in contamination of Arlington's groundwater in violation of its NPDES permit, Arlington states that it did not have evidence of any groundwater contamination until after it filed its evidentiary hearing request, and therefore it had good cause for failing to raise the issue during the comment period. Arlington argues that under 40 C.F.R. § 122.64, the regulation specifying the grounds for terminating an effective permit for cause, the Region had an absolute duty to pursue Arlington's allegations of violations through an evidentiary hearing in this case, and that the Region's failure to do so was clearly erroneous.

The Region responded to the petition, supporting its denial of the evidentiary hearing request on the ground that the none of the issues raised by Arlington involve disputes of fact that are material to the permit. Fort Worth, the permittee, also filed a response to the petition supporting the denial of the evidentiary hearing request.[8]

For the reasons set forth below, the petition for review is denied.

II. *ANALYSIS*

Under the rules governing NPDES permit proceedings, there is no review as a matter of right form the denial of an evidentiary hearing request. *In re Liquid Air Puerto Rico Corp.*, 5 E.A.D. 247, 252 (EAB 1994). Ordinarily, a petition for review of a denial of an evidentiary hearing request is not granted unless the denial of the request is clear-

[8] The Region's response to the petition for review was filed pursuant to a request from the Board, which customarily solicits such responses. *See* EAB, *The Environmental Appeals Board Practice Manual* at 6 (Nov. 1994). Fort Worth's response to the petition was unsolicited, but we nonetheless have considered it in the interest of having all views on the record before us.

ly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed. *Id.* The Agency's long-standing policy is that NPDES permits should be finally adjudicated at the Regional level, and that the power to review NPDES permit decisions should be exercised only "sparingly." *Id.* The petitioner has the burden of demonstrating that review should be granted. *Id.*

The City of Arlington does not challenge any term or condition presently contained in the permit at issue; instead, Arlington's principal objective is to have a condition added to the permit that will require the Village Creek WTP, owned and operated by Fort Worth, to serve the wastewater treatment needs of western Arlington after the current contract between Arlington and Fort Worth expires on February 14, 2001, and until the useful life of the facility ends.[9] For the reasons stated below, we conclude that the Region's decision to issue this permit without a "duty to serve" condition was neither clearly erroneous nor an exercise of discretion or policy that warrants review.

A. *Duty to Serve Arguments*

The principal factor influencing our decision is the proposed condition's lack of relevance and materiality to the Village Creek WTP's discharges and operations during the course of the permit's three year term. Until February 14, 2001, Fort Worth is obligated, by virtue of its contract, to provide wastewater treatment service to western Arlington at the Village Creek WTP; whereas the permit, by its own terms, is effective from August 1, 1994, until July 31, 1997.[10] Thus, for the scheduled entire life of this permit, Fort Worth is under a contractual obligation to provide wastewater treatment to western Arlington even absent a "duty to serve" condition. Accordingly, the presence or absence of a "duty to serve" condition in the permit would not seem

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[9] *See* 40 C.F.R. § 124.74(c)(5) (evidentiary hearing requests shall 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]"); *In re Town of Seabrook, N.H.*, 4 E.A.D. 806, 809 (EAB 1993) ("We read [the applicable regulations] 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.") (emphasis added).

[10] Because Arlington has not challenged any condition contained in the permit, there is no reason to believe that any portion of the permit has been stayed pending resolution of this petition for review. *See* 40 C.F.R. § 124.60(c)(1) ("[I]f a petition for review of the denial of [an evidentiary hearing request] * * * is timely filed * * * the force and effect of the *contested conditions* of the final permit shall be stayed.") (emphasis added).

to have any practical effect on Fort Worth's obligation to provide wastewater treatment service to Arlington during the term of this permit. Under these circumstances, Arlington has not demonstrated any "compelling policy consideration that suggests the Region should include in the permit [a condition addressing a problem] that does not presently exist." *In re Envotech, L.P.*, 6 E.A.D. 260, 297 (EAB 1996).

Nor do we find any compelling legal considerations for reviewing the Region's refusal to include a "duty to serve" condition in the permit. Arlington's legal arguments supporting its requested condition are without merit.[11] In the evidentiary hearing request, and throughout these proceedings, Arlington has argued that there are two legal bases under the CWA for including its requested condition in the permit. According to Arlington, these can be found in the applicable regional wastewater treatment plan approved under CWA § 208, and from the award of grant money to Fort Worth for the Village Creek WTP based upon representations that the facility will serve numerous municipalities, including Arlington.[12]

As for the first legal basis, Arlington contends that the permit is not consistent with the applicable regional wastewater management plan approved under § 208, contrary to CWA § 208(e) and 40 C.F.R. § 122.44(d)(6).[13] According to Arlington, the permit and plan are inconsistent because the plan recognizes Arlington's entitlement to use the Village Creek WTP for its useful life and the permit does not. This inconsistency, says Arlington, can be remedied only by including a "duty to serve" condition in the permit. We reject this argument for the obvious reason that no inconsistency arises from the permit's silence on this issue. If there is a "duty to serve" as alleged by Arlington the omission of any reference to that duty in this permit in no way suggests that the "duty to serve" does not exist. The permit simply does not address the question. To be inconsistent with the

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[11] We note that an argument could be made that the "duty to serve" condition would expire in 1997 along with the permit, and thus the legal issues raised by Arlington are moot. We are not denying review on this ground, however, as the issues are "capable of repetition." *See In re 539 Alaska Placer Miners, More or Less*, 3 E.A.D. 748, 753 (CJO, 1991) (*citing Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 579 (D.C. Cir. 1981)).

[12] Because these two issues are purely legal in nature, the Region did not clearly err in denying Arlington's request for an evidentiary hearing on these issues. *Town of Seabrook*, 4 E.A.D. at 817 (legal issues "cannot themselves provide a basis for an evidentiary hearing, a procedure reserved for factual issues.") Nevertheless, in this appeal, we are authorized to review such legal issues, provided the petitioner demonstrates that review is warranted under 40 C.F.R. § 124.91(a)(1). *Id.*

[13] *See* Background section, *supra*.

plan, there would have to be specific language in the permit affirmatively contravening the plan. There is none, and for that reason there is no inconsistency between the plan and the permit.

We also reject Arlington's argument because it is based upon a misreading of the applicable plan. The plan does *not* decree that Arlington is entitled to use the Village Creek WTP for its useful life. Indeed, the plan does not indicate that Arlington can expect to use the Village Creek WTP beyond the end of the year 2000, even though the useful life of the facility presumably extends beyond that date. The plan indicates only that Arlington is expected to utilize the Village Creek WTP until the end of the year 2000, which the plan does by explicitly recognizing Arlington's utilization of the Village Creek WTP until that date. 1995 Plan at 1-40.[14] The permit is obviously not inconsistent with this reading of the plan, since it makes no mention of Arlington's use of the facility in any respect whatsoever. (Nor does it mention use of the facility by any of the other municipalities with contractual relationships to Fort Worth.) Because the permit and the plan are not inconsistent, there is no merit to Arlington's argument that the permit must contain a "duty to serve" condition in the permit to be in compliance with CWA § 208.

Turning to Arlington's second legal basis for including a "duty to serve" condition in the permit, the gravamen of Arlington's contention is that CWA §§ 204(a)(1) and 208(d), and the regulations implementing the CWA's construction grant program,[15] create an obligation on the part of Fort Worth, as a recipient of grant funds, to meet Arlington's wastewater treatment needs for the useful life of the Village Creek WTP. Even if Arlington has correctly construed the CWA grant provisions and their implementing regulations as creating a duty upon Fort Worth to serve western Arlington's wastewater treatment

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[14] The plan does not make any representations with respect to the years 2001 and beyond.

[15] Arlington relies upon 40 C.F.R. § 30.309, which provides in pertinent part that "the award of an assistance agreement constitutes a public trust." Arlington also relies upon 40 C.F.R. § 35.840(h), which provides in pertinent part that "[t]he [grant] applicant will demonstrate to the satisfaction of the Regional Administrator * * * in the case of projects serving more than one municipality, that the participating communities have such interests or rights as the Regional Administrator finds sufficient to assure their undisturbed utilization of the project for the estimated life of the project." We note that this regulation is not contained in the current 1995 volume of the C.F.R. *See* 60 Fed. Reg 33,926 (June 29, 1995) (40 C.F.R. Part 35, Subpart C "was made obsolete by passage of the CWA and its implementing regulations at 40 C.F.R. Part 35, Subparts E, I and J, as well as completion of most of the projects funded by Subpart C grants, which date to the period prior to the passage of the CWA in 1972.").

needs for the useful life of the Village Creek WTP,[16] such a duty need not be reflected in this NPDES permit. Under 40 C.F.R. § 122.44(n), an NPDES permit shall include:

> Any conditions imposed in grants made by the Administrator to POTWs under sections 201 and 204 of CWA *which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.*

Id. (emphasis added). Thus, in order to show that the Region clearly erred in omitting a "duty to serve" condition from this permit based upon Fort Worth's receipt of CWA grant funds, Arlington must show that the "duty to serve" condition is "reasonably necessary for the achievement of effluent limitations." Arlington, however, does not argue, and therefore has made no showing, that achievement of any effluent limitation will be remotely affected, much less undermined, if a "duty to serve" condition is not included in this permit. Indeed, as stated previously, at no time in these permit proceedings has Arlington made any argument whatsoever with respect to the permit's effluent limitations. Accordingly, Arlington has not demonstrated a requirement that this NPDES permit contain a "duty to serve" condition.

We turn now to Arlington's contention that an evidentiary hearing was required in this case to determine the facts supporting Arlington's legal claims that a "duty to serve" condition must be included in this permit. Arlington maintains that "an evidentiary hearing was required for the Regional Administrator to determine the facts necessary to take the 'appropriate action' to implement the Section 208 Plan and to satisfy the duty to require Fort Worth to meet the obligations it undertook in seeking and obtaining federal grants." Petition for Review at 22. We reject this contention. As just explained, Arlington has not demonstrated that a "duty to serve" condition is required in this permit under 40 C.F.R. § 122.44(d)(6) (requiring con-

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[16] The Region asserts that Arlington has not correctly construed these regulations, explaining:

> 40 C.F.R. §30.309 creates no fiduciary obligation between an EPA grantee and a third party like Arlington. The "public trust" to which the regulation refers runs from grantees to the United States and its citizens, obliging grantees to spend federal funds wisely. The version of 40 C.F.R. §35.840 on which Arlington relies creates no rights whatsoever. It simply requires a demonstration that rights already exist, presumably by submission of the legal rights creating them, e.g., intermunicipal service agreements.

Response to Petition for Review at 6 n.2.

sistency between permits and § 208 plans) or 40 C.F.R. § 122.44(n) (requiring permits to reflect those grant obligations reasonably necessary to achieve effluent limitations). Having failed to establish any legal basis for including a "duty to serve" condition in the permit, it logically follows that holding an evidentiary hearing to establish a factual basis for implementing the CWA § 208 plan and to satisfy Fort Worth's construction grant responsibilities would be unproductive, for regardless of the facts established at the hearing there would be no legal duty to include the condition in the permit. Thus, any dispute over the factual basis for Arlington's requested "duty to serve" condition would not affect this particular permit, and therefore is not material to the permit.[17]

B. *Other Arguments*

Apart from its arguments pertaining to the "duty to serve" condition, Arlington's petition for review asserts two other bases for granting review. One such basis is the Region's failure to grant Arlington's request for a public hearing on the permit.[18] Under 40 C.F.R. § 124.12(a), the Region "shall hold a public hearing whenever [it] finds, on the basis of requests, a significant degree of public interest in a draft permit." Arlington argues that "there can be no real question that there was (and is) a 'significant degree of public interest'" in

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[17] Under 40 C.F.R. §§ 124.74(b)(1) and 124.75(a)(1), an evidentiary hearing is appropriate only to resolve genuine disputes over facts that are material to the permit, that is, that may affect the outcome of the proceeding. *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780-781 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994).

Further, Arlington's evidentiary hearing request fails to set forth any genuine dispute as to the facts underlying its claim for a "duty to serve" condition. Although the request claims to raise factual issues, it does not specify any particular facts that are in dispute. Instead, the request asserts that an evidentiary hearing is required because there is a significant public interest in the permit. Response to Petition for Review, Ex. 15 at 15. The degree of public interest in the permit, however, is the standard for granting public hearings under 40 C.F.R. § 124.12, not for granting evidentiary hearing requests under 40 C.F.R. § 124.75(a)(1). Obviously, Arlington was confused as to the applicable standard, and thus failed to meet the pertinent one.

Lastly, we note that Arlington has misunderstood the circumstances in which an evidentiary hearing is appropriate. The purpose of an evidentiary hearing is not, as Arlington suggests, "to air significant concerns that were not adequately addressed in the draft permit comment period." Petition for Review at 22-23. As we have explained, the "[t]ime 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 fact to be resolved." *Town of Seabrook*, 4 E.A.D. at 815.

[18] A public hearing is distinct from an evidentiary hearing, and, if held, takes place during an earlier phase of the permit proceedings. Arlington does not contend that the Region should have conducted an evidentiary hearing on this issue.

a permit necessary for the wastewater treatment for the 80,000 residents of western Arlington. Petition for Review at 21.

The decision to hold a public hearing under 40 C.F.R. § 124.12(a) is "largely discretionary." *In re Avery Lake Property Owners Association*, 4 E.A.D. 251, 252 (EAB 1992). The Region explained its exercise of that discretion in this case as follows:

> "On the basis of requests" EPA Region 6 received in response to its proposal to renew Fort Worth's permit, there does not even appear to be "a significant amount of public interest" in the dispute between Fort Worth and Arlington. The *only* request for hearing Region 6 received was submitted by Arlington's attorney; not one of the "eighty thousand citizens of Arlington" even submitted a comment. There was no reason for a public hearing.

Response to Petition for Review at 7. Although Arlington plainly disagrees with the Region's conclusion with respect to the degree of public interest in this permit, it has not met its burden of showing that the Region clearly erred or abused its discretion in deciding not to hold a public hearing "on the basis of [the] requests" it received.[19] Review of this issue is therefore denied.

The fifth and final alleged error raised in Arlington's petition for review concerns the Region's denial of Arlington's request for an evidentiary hearing on Fort Worth's alleged violation of its current NPDES permit with respect to the use of the sludge drying beds. According to the petition, Arlington had good cause for its failure to raise this issue during the public comment period.[20] Without explanation, Arlington contends that its allegations concerning the sludge drying beds raise "factual question[s] directly related to the issuance of this permit." Petition for Review at 28. Citing 40 C.F.R. § 122.64, Arlington claims that the Region had an "absolute duty" to pursue the alleged violations, presumably by granting an evidentiary hearing on the matter.

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[19] We acknowledge that a municipality may be viewed in some respects as a representative of many of its citizens. Nevertheless, the absence of individual citizens coming forward in these proceedings is a legitimate consideration in our analysis.

[20] As noted in the Background section of this opinion, Arlington claims that it did not have evidence of Fort Worth's alleged violations until after it filed its evidentiary hearing request, when it discovered that its groundwater was contaminated.

We conclude that this portion of Arlington's petition also lacks merit. Even if Arlington had good cause for its failure to raise this issue during the public comment period, it still has not demonstrated any link between the violations alleged and the conditions of the permit at issue. Under 40 C.F.R. § 124.74(c)(5), an evidentiary hearing request must 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 [CWA]." Without knowing exactly what permit conditions are contested (or suggested), the Board cannot reasonably conclude whether an alleged factual or other issue is material and relevant. *Town of Seabrook*, 4 E.A.D. at 809. Consequently, the failure to meet this requirement justifies denial of the petition for review. *Id.* Upon examination, Arlington's evidentiary hearing request fails to identify any contested permit condition implicated by its allegations.[21] It follows, then, that Arlington's petition does not "present a link to a condition of the * * * permit at issue here sufficient to invoke the Board's authority to review the permit decision." *Envotech*, 6 E.A.D. at 274.

Further, Arlington's reliance upon 40 C.F.R. § 122.64 is misplaced. That regulation governs the termination of a currently effective NPDES permit. It provides that termination may be warranted based upon noncompliance with a permit.[22] The initiation of termination proceedings by the Region under that regulation is discretionary. *In re Marine Shale Processors, Inc.*, 5 E.A.D. 461, 470-71 (EAB 1994). We are aware of no authority, and Arlington cites none, to support Arlington's claim that the Region has an "absolute duty" under this regulation to investigate allegations of permit violations through a NPDES evidentiary hearing or otherwise. In any event, any pursuit of Arlington's allegations in this case would have to be linked to a con-

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[21] If current permit conditions are being violated, such an issue is appropriately addressed through the Agency's enforcement process, and not through these permit issuance proceedings. *See In re City of Haverhill*, 5 E.A.D. 211, 217 n.9 (EAB 1994) (compliance with a permit is an enforcement matter dealt with through enforcement process); *see also In re Beckman Production Services*, 5 E.A.D. 10, 22 (EAB 1994) ("should [permittee] fail to comply with the terms of its permit it may be subject to an enforcement action or permit revocation proceeding"); *In re Brine Disposal Well, Montmorency County*, 4 E.A.D. 736, 746 (EAB 1993) (Board's authority to assess permit's validity under governing statutes and regulations does not include oversight of permit implementation and enforcement).

[22] We do not interpret Arlington's argument as calling for the denial of the permit at issue based upon the alleged violations. Such an argument could not be reconciled with Arlington's request for a "duty to serve" condition in the permit, which, in our opinion, is Arlington's primary objective in these proceedings.

dition of the permit at issue, as discussed above, and Arlington has failed to satisfy that requirement.

III. *CONCLUSION*

Arlington has failed to show that the Region clearly erred in denying its request for an evidentiary hearing, or that review of its legal claims is warranted under 40 C.F.R. § 124.91. Therefore, the petition for review is denied.

So ordered.