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

In re:	)	
	)	
AURORA ENERGY, L.L.C.	)	
	)	NPDES Appeal No. 03-11
NPDES Permit No. AK-005333-3	)	
	)	
	)	

ORDER DENYING REVIEW

I. *BACKGROUND*

This case involves a petition for review filed by Mr. Paul A. Barrett ("Petitioner")[1] challenging a National Pollutant Discharge Elimination System ("NPDES") permit issued by U.S. Environmental Protection Agency ("EPA" or "Agency"), Region 10. The permit allows Aurora Energy's Chena River Power Plant ("Chena Plant") in Fairbanks, Alaska, to discharge into the Chena River once-through cooling water that exceeds the otherwise applicable temperature limitation for such discharges. The permit was issued pursuant to CWA § 316(a), 33 U.S.C. § 1326(a).

[1] Mr. Barrett is an attorney representing himself in this matter.

A. *Statutory and Regulatory Background*

In 1972, Congress enacted the Clean Water Act ("CWA" or "Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). Through the CWA, Congress sought to ensure "that the discharge of pollutants into the navigable waters [would] be eliminated by 1985."[2] *Id*. Among the chief components of the CWA regulatory program are the effluent limitation provisions and the related pollutant discharge permit requirements. *See* CWA §§ 301-406, 33 U.S.C. §§ 1311-1346. The issues raised in this case involve the NPDES permit program. *See* CWA § 402, 33 U.S.C. § 1342; 40 C.F.R. part 122 (regulations implementing the NPDES permit program).

In general, any "point source"[3] that releases pollutants into the waters of the United States[4] must have an NPDES permit, and any covered discharge[5] that occurs without a permit is

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[2] EPA's regulations define pollutants as "dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2001 *et seq*.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 40 C.F.R. § 122.2; *see also* CWA § 502(6), 33 U.S.C. § 1362(7). Sewage from vessels and materials discharged in connection with oil or gas production are specifically excluded from this definition. *Id.*

[3] A point source is "any discernible, confined, and discrete conveyance * * * from which pollutants are or may be discharged. This term does not include return flows from irrigation agriculture or agricultural storm water runoff." 40 C.F.R. § 122.2; *see also* CWA § 502(14), 33 U.S.C. § 1362(14).

[4] "Waters of the United States" is defined in EPA's regulations at 40 C.F.R. §122.2.

[5] "Discharge" means "discharge of a pollutant," which is defined at 40 C.F.R. § 122.2. *See also* CWA § 502(12), 33 U.S.C. § 1362(12).

a violation of the CWA. CWA § 301(a), 33 U.S.C. § 1311(a); 40 C.F.R. § 122.1(b)(1). NPDES permits are issued either by a State agency (if the State has an approved permit program) or by the EPA. *See* CWA § 402(a)-(b), 33 U.S.C. § 1342(a)-(b). NPDES permits typically establish discharge limitations and impose specific, related monitoring and reporting requirements, derived from the effluent limitations[6] applicable to the pollutants being discharged and the relevant State water quality standards.[7] CWA § 402(a)(1)-(2), 33 U.S.C. § 1342(a)(1)-(2). In general, the discharge limitations in an NPDES permit for an industrial point source must reflect the "application of the best available control technology economically achievable," CWA § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A), or "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations * * * or any other Federal law or regulation, or required to implement any applicable water quality standard," CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

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[6] Effluent limitations are "restriction[s] imposed by [EPA or other permitting authority] on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' into 'waters of the United States,' the waters of the 'contiguous zone,' or the ocean." 40 C.F.R. § 122.2.

[7] Water quality standards are addressed at CWA § 303, 33 U.S.C. § 1313. *See also* 40 C.F.R. §§ 131.10-.12. States are primarily responsible for establishing water quality standards applicable to water bodies within their borders. *See* CWA § 303, 33 U.S.C. § 1313; *In re Teck Cominco Alaska Inc.*, NPDES Appeal No. 03-09, slip op. at 10 (EAB, June 15, 2004), 11 E.A.D. __. Alaska's water quality standards are codified in Title 18, Chapter 70, of the Alaska Administrative Code and impose (as relevant to this case) a general thermal limit of 20 degrees Celsius ("°C") and specific thermal limits for fish migration routes, spawning areas, rearing areas, and egg & fry incubation of 15°C. U.S. EPA, Fact Sheet, NPDES Permit No. AK-005333-3, Administrative Record ("AR") B.2, app. C, at C-1 - C-2 (July 8, 2002) (accompanying the Draft NPDES permit for the Chena Plant) ("Fact Sheet").

> For thermal discharges, however, if the owner or operator of a source can
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> demonstrate to the satisfaction of the Administrator * * * that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection [sic] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator * * * may impose an effluent limitation under such sections for such plant * * * that will assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife in and on that body of water.

CWA § 316(a), 33 U.S.C. § 1326(a). In other words, to the extent thermal discharge limitations that are less stringent than the otherwise applicable effluent limitations will nonetheless preserve a balanced community of indigenous aquatic life in the receiving waters, EPA may incorporate such less stringent limits into an NPDES permit. Such an alternative limit is commonly referred to as a "thermal variance." *See, e.g., In re USGen New England, Inc*., NPDES Appeal No. 03-12, slip op. at 4 (EAB, July 23, 2004) (Order Denying Motion for Evidentiary Hearing), 11 E.A.D. __.

B. *Factual Background*

On November 15, 2000, Aurora Energy, L.L.C. ("Aurora"), submitted a supplemental NPDES permit application ("permit application"), pursuant to 40 C.F.R. § 122.21, for certain discharges from the Chena Plant. The Chena Plant is located in downtown Fairbanks, Alaska, and has operated continuously since 1951. The Chena Plant, a co-generation facility, provides electrical power, steam heat, and hot water to customers in and around Fairbanks. Region 10 Response to Petition for Review ("Reg. Br.") at 1. The Chena Plant currently discharges approximately 20 million gallons per day ("mgd") of heated cooling water into the Chena River.[8] *Id.* Notably, the permit at issue is intended to bring a historical discharge under the coverage of the NPDES program for the first time.[9]

The Fairbanks portion of the Chena River has a noteworthy history. The water body originally consisted of the combined waters of the Chena River and a channel of the Tanana River (called the Chena Slough). *See* Reg. Br. at 4. In the 1930s, due to flood concerns, a dike

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[8] The Plant shares a common discharge outfall with the adjacent water treatment facility, which, like the Chena Plant itself, was previously owned by the City of Fairbanks. *See* Letter from Bartly K. Coiley, Aurora Energy, L.L.C., to Robert R. Robichaud, EPA Region 10, at 1 (Nov. 10, 2000) (transmitting Aurora's supplemental permit application). The permit, however, addresses only Aurora's discharges.

[9] Aurora purchased the facility in 1999; prior to that time, the Chena River Plant was owned and operated by the City of Fairbanks. The City of Fairbanks applied for an NPDES permit in the 1970s, and EPA prepared a draft permit in 1977 which proposed to allow discharges of 19.6 mgd (daily average) and 22.5 mgd (daily maximum). *See* Letter from Bartly K. Coiley, Aurora Energy, L.L.C., to Robert Robichaud, EPA Region 10 (May 7, 2002) (letter marked "draft" and unsigned). No final permit was ever issued, and the Plant has operated according to the conditions of the draft permit since 1977. *See id*; Reg. Br. at 2.

was built to cut off the flow of water from the Tanana into the Chena Slough.[10] *Id; see* U.S. Geological Survey, Water-Resource Investigations Report 00-4227, at figs. 1-3 (2000) ("USGS Report") (showing maps of the Chena River and related waterways). Following a flood in 1967, a dam was build across both the Chena Slough and the Chena River, upstream of the intersection of the two waterways. Reg. Br. at 5, USGS Report at figs. 2-3. In Fairbanks, the Chena River is now 250 feet wide, and flows at an average rate of 1,360 cubic feet per second ("cfs").[11] *See* Reg. Br. at 5.

According to Aurora's permit application, the maximum temperature of discharges from the Chena Plant have typically been about 25.6° C during the winter and 30.7° C during the summer. *See* Permit Application at V-1. Aurora also reported typical 30-day average maximum temperatures of 22.6° C in winter and 26.6° C in summer, and long-term average temperatures of 19.5° C and 22.4° C, respectively. Permit Application at V-1.[12]

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[10] While the waters of the Tanana River are sediment rich, the waters of the Chena River are clear; thus, when the Tanana River waters were excluded from the Chena Slough, the character of that waterway underwent a significant change. *See* Reg. Br. at 5.

[11] Currently, flood control structures limit the maximum flow rate to 12,000 cfs, although in 1967 the maximum flow rate was more than 74,000 cfs. The current variability in the flow of the Chena River is not immediately evident from the record.

[12] As discussed below, these values were incorporated into Aurora's permit, in Region 10's words, to "formalize the existing discharge daily and monthly temperature maxima." Reg. Br. at 9.

During the winter, the Chena Plant's discharge creates open water[13] in the river for some distance downstream.[14] *See* Letter from Paul A. Barrett to Robert Robichaud, EPA Region 10 at 2 (Jan. 22, 2002). Among other tangible impacts, this open water provides a winter habitat for ducks.

C. *Procedural Background*

On November 15, 2000, Aurora submitted its NPDES permit application for the Chena Plant. Aurora's permit application requested a thermal variance from the State of Alaska's water quality standards. Because Alaska does not have a federally approved NPDES permit program, EPA treated the request as an application for a federal variance under section 316(a) of the Clean Water Act ("CWA").

On May 24, 2002, Region 10 issued for comment a draft permit for the Chena Plant. Additionally, on June 24, 2002, Region 10 held a public hearing to allow interested individuals to present testimony regarding the proposed permit. During the permit consideration process, Region 10 also consulted with the National Marine Fisheries Service ("NMFS") regarding potential impacts on protected species, including salmon. *See* Reg. Br. at 6; Letter from Cindi

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[13] "Open water" as used herein refers to unfrozen surface water.

[14] Notably, in her comments on the draft permit, the Mayor of Fairbanks' North Star Borough observed that "the Chena River has many open spots upstream and down due to current, depth, flow and upsurge of natural water sources." Letter from Rhonda Boyles, Mayor, to Pete McGee, Alaska Department of Environmental Conservation (Oct. 26, 2001).

Godsey, EPA, to James W. Balsiger, NMFS (July 2, 2001); letter from James W. Balsiger, NMFS, to Robert R. Robichaud, EPA (July 2, 2002) (expressing that "[t]he effluent limitations incorporated into the draft permit appear adequate to protect movement of anadromous salmonids through the area" and that "NMFS has no objection to this project"). Region 10 consulted as well with the U.S. Fish and Wildlife Service ("FWS") regarding the potential for impact on other threatened or endangered species. *See* Reg. Br. at 6; Letter from Cindi Godsey, EPA, to Larry Bright, FWS (July 2, 2001); letter from Patrick Sousa, FWS, to Cindi Godsey, EPA (July 16, 2001) (indicating that no listed species or critical habitat under the Endangered Species Act occur in the project area).

On August 26, 2003, Region 10 issued a final NPDES permit decision ("Permit"), allowing the discharge of heated water at a temperature above the otherwise applicable effluent limitations. The Petitioner filed this timely petition for review ("Petition") on September 26, 2003.[15]

[15] Assuming that the Permit was served by mail, petitions for review were due before the Board no later than September 29, 2003.

II. *DISCUSSION*

A. *Standard of Review*

In general, the Board will grant petitions for review under 40 C.F.R. § 124.19(a) only if it appears from the petition that the permitting authority's decision involved a clearly erroneous finding of fact or conclusion of law, or that the decision involves an important policy consideration which the Board, in its discretion, should review. 40 C.F.R. § 124.19(a) (2003); *see In re Teck Cominco Alaska Inc.,* NPDES Appeal No. 03-09, slip op. at 21 (EAB June 15, 2004), 11 E.A.D. __; *In re City of Moscow*, 10 E.A.D. 135, 140-41 (EAB 2001). It is clear from the preamble to the part 124 regulations that the Administrator intended for the Board to exercise its broad powers of review "only sparingly," and that "most permit conditions should be finally determined at the Regional level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see Teck Cominco,* slip op. at 21, 11 E.A.D. __; *In re Rohm & Hass Co.,* 9 E.A.D. 499, 504 (EAB 2000). Moreover, the burden of demonstrating that review is warranted rests squarely with the petitioner. 40 C.F.R. § 124.19(a); *see Rohm & Hass,* at 9 E.A.D. 504; *In re Wash. Aqueduct Water Supply Sys*., NPDES Appeal No. 03-06, slip op. at 11 (EAB, July 29, 2004), 11 E.A.D. __.

To obtain review, a petitioner must clearly and specifically identify the basis for its objection(s) to the permit, and explain why, in light of the permit issuer's rationale, the permit is

clearly erroneous or otherwise deserving of review.[16] In order to carry this burden the petitioner must address the permit issuer's responses to relevant comments made during the process of permit development; the petitioner may not simply reiterate comments made during the public comment period without substantively confronting the permit issuer's subsequent explanations. *See In re Knauf Fiber Glass, GmbH,* 9 E.A.D. 1, 5 (EAB 2000) ("Petitioners for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review."); *In re City of Irving, Texas Mun. Separate Storm Sewer Sys*., 10 E.A.D. 111, 129-30 (EAB 2001).

Additionally, when a petitioner seeks review of a permit based on issues that are fundamentally technical in nature, the Board assigns a particularly heavy burden to the petitioner. *See City of Moscow*, 10 E.A.D. at 142; *Teck Cominco*, slip op. at 22, 11 E.A.D. __. In such cases,

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[16] The petitioner must include in its petition for review "a statement of the reasons supporting that review," and "a showing that the condition in question is based on" a finding of fact or conclusion of law that is clearly erroneous, or an exercise of discretion or an important policy consideration that the Board should, in its discretion, review. 40 C.F.R. § 124.19(a). That is, a petitioner may not simply raise generalized objections to the permit, but must argue with specificity why the Board should grant review – "mere allegations of error" are insufficient to warrant review. *In re P.R. Elec. Power Auth*., 6 E.A.D. 253, 255 (EAB 1995); *accord Wash. Aqueduct*, slip op. at 37, 11 E.A.D. __; *In re Phelps Dodge Corp*., 10 E.A.D. 460, 496, 520 (EAB 2002). Similarly, a petitioner must include all of its argument and the basis for those arguments in its petition – it may not count on getting another opportunity for briefing. *See* EAB Practice Manual at 32 (available at http://www.epa.gov/boarddec/manual.htm) ("petitioners should be aware that '[a] petition for review under § 124.19 is not analogous to a notice of appeal that may be supplemented by further briefing. Although briefing may occur after review has been granted, the discretion to grant review is to be sparingly exercised, and therefore * * * a petition for review must specifically identify disputed permit conditions and demonstrate why review is warranted.'") (quoting *In re LCP Chemicals - N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993)).

> we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record. The Region's rationale for its conclusions, however, must be adequately explained and supported in the record.

Teck Cominco, slip op. at 22, 11 E.A.D. __ (citations omitted). To the extent that technical questions relate to the representativeness of the data that the permit issuer relied upon in making its decision, the Board has consistently held that such choices are generally left to the discretion of the permitting authority. *E.g., Wash. Aqueduct*, slip op. at 12-13, 11 E.A.D. __ (citing *In re Encogen Cogenerating Facility*, 8 E.A.D. 244, 256-57 (EAB 1999), and *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 147 (EAB 1999)). Such deference may be withheld, however, where the permitting authority has failed to adequately justify its decision in the record. *See Knauf Fiber Glass*, 8 E.A.D. at 147 ("We will be inclined to support a permitting authority's technical judgment * * * provided that its decision is adequately justified in the record."); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342-43 (EAB 2002) ("Without an articulation by the permit writer of his [or her] analysis, we cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality.").

B. *Analysis*

The Petitioner has identified six issues that he argues justify Board review. Petitioner argues: (1) that Aurora failed to meet its burden of proving the existence of circumstances warranting issuance of a thermal variance; (2) that Region 10 failed to require and Aurora failed to submit certain mandatory information (such as early screening data and a detailed plan of study); (3) that balanced indigenous conditions would not be assured with a thermal variance due to the presence of ducks on the Chena River during wintertime; (4) that Region 10 failed to consider the adverse impacts of the thermal discharge on wintertime, surface-ice recreation; (5) that Region 10 failed to consider certain alternatives to the thermal discharge; and (6) that Region 10 failed to consider the impact of thermal discharges on public safety.[17] We address each of these issues in turn below.

1. *The Impact of the Chena Plant's Discharges on Aquatic Life*

In our view, the Petitioner's first two issues are related, in that they both raise general objections regarding the adequacy of the demonstration underlying the permitting decision. Therefore, we address these two issues collectively under the categorical heading identified

[17] As a prefatory matter, we note that the Petition is remarkably lacking in detail. The Petition deals with all six of the issues it raises, in full, in less than five pages of text – without a single citation to specific information in the record, and with only a handful of general references to record documents, such as "the Foster Wheeler report," "Alaska Department of Fish & Game reports," and the Petitioner's own comments on the draft permit (which were almost uniformly identical to his arguments in the Petition itself). *See* Petition for Review ("Pet.") at 2-3.

above. We have bifurcated our discussion of these argument, as indicated by the sub-headings below.

a. *Aurora's Burden of Proof*

The Petitioner argues that CWA section 316(a) establishes a burden of proof on the part of the permit applicant that Aurora has not satisfied in this instance. Specifically, Petitioner states:

> All first time applicants for a thermal variance under section 316(a) are required to submit certain "early screening information," and thereafter to submit "a detailed plan of study which the discharger will undertake to support its section 316(a) demonstration." [40 C.F.R. § 125.72.] No attempt was made to comply with these requirements.
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> Compliance with these requirements cannot be waived for "existing dischargers" under [40 C.F.R. § 125.73(c)(1)], as the Agency attempted. This section merely states that the required demonstration may be based on the absence of past harm, rather than predicting studies. But it does not replace the requirements that first time applicants provide early screening information and the detailed plan of study.

Pet. Br. at 2. This argument is nearly identical to arguments the Petitioner made in his comments on the draft permit. *See* Petitioner's July 8, 2002 comments, AR B.9.dd ("July 8 comments"), at 1-2.

In response to the Petitioner's comments on this point, the Region 10 Response to Comments document ("RTC") included three arguments in support of Region 10's permit decision. First, Region 10 explained that it interpreted the early screening requirements as inapplicable to sources identified as "existing dischargers."[18] *See* RTC at 6. The RTC included the following exchange:

> Comment: Numerous commentors state that the applicant failed to submit the required information [40 C.F.R. 125.72] to apply for a variance under Section 316(a) of the CWA and failed to demonstrate that the proposed discharge would assure the protection and propagation of a balanced, indigenous population of shell fish, fish, and wildlife in and on the body of water.
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> Response: EPA decided that the early screening information would not be applicable to a discharge that pre-dated the regulations implementing Section

[18] The regulations regarding existing dischargers provide in part "existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies." 40 C.F.R. § 125.73(c)(1); *see* Reg. Br. at 14. In this case, Region 10 relied upon data received from Alaska Department of Fish & Game and other sources to conclude that there was an absence of prior appreciable harm. *See* Fact Sheet app. D at D-2 to D-3; RTC at 6-7, 10, 12-13, 15.

> 316(a) of the CWA as well as the CWA itself by such a long period of time. Early screening is interpreted to mean studies done prior to the discharge occurring because the Interagency 316(a) Technical Guidance Manual addresses only predictive demonstrations with no discussion of early screening demonstrations. Since there is no evidence of studies occurring prior to the introduction of the thermal discharge into the Chena Slough, it would not be appropriate to require predictive demonstrations to ascertain what would happen if a discharge were to occur. Consequently, EPA applied the regulation [40 C.F.R. 125.73(c)(1)] applicable to existing dischargers and considered the information received for [sic] the Alaska Department of Fish and Game to be sufficient indication that no harm has been noted.

RTC at 6.

Next, Region 10 argued that even to the extent that early screening information may be understood to include information other than predictive studies, Region 10 did collect and consider appropriate information. *See* Reg. Br. at 16; RTC at 6-7.[19] After describing its interpretation of 40 C.F.R. § 125.73(c)(1) as not requiring submission of early screening

[19] In its Response Brief, Region 10 identifies this information as including: a description of the alternative effluent limit; a demonstration that the State water quality standard is more stringent than necessary to protect indigenous aquatic life; data, studies, experiments and other information upon which EPA relies; selection of an appropriate representative species; records of consultation between the discharger and the EPA; and records of communication between EPA and the Department of Interior, the Department of Commerce, and the State of Alaska. Reg. Br. at 16-17.

information from existing dischargers, Region 10 stated "[t]hat is not to say that information applicable to the early screening requirements of 40 C.F.R. 125.72(a) [has] not been collected during the permit development process. Below is a list of the information collected and how it correlates to the regulations." RTC at 6-7. The Region then went on to describe the information in the record and how it related to the requirements in each paragraph of 40 C.F.R. § 125.72(a).[20] *Id.* at 7.

Finally, with respect to the Petitioner's argument that the regulations require the permit applicant to submit a plan of study, Region 10 explained that it interpreted the regulations as providing ample discretion for a permit issuer to require no plan of study in appropriate circumstances. In the RTC, the Region stated:

> If the discharge had been proposed rather than ongoing or there was any indication that aquatic life were [sic] being affected, the facility would have been required to conduct aquatic studies to demonstrate how the requested thermal

[20] Among other things, the RTC indicated that Region 10 "based it initial determination on the studies and reports referenced in the Fact Sheet." RTC at 7. These included: ROBERt L. Burrows et al., USGS Water-Resources Investigation Report 00-4227 (2002); U.S. EPA, Review of Water Quality Standards, Permit Limitations and Variances for Thermal discharges at Power Plants (prepared by Wade Miller Associates, Inc., and the Office of Wastewater Enforcement and Compliance); Robert F. Carlson et al., Institute of Water Resources, University of Alaska, Fairbanks, Effects of Thermal Discharge Upon a Subarctic Stream (Completion Report: OWRT Project B-020-ALAS); Foster Wheeler Environmental Corporation, Draft Preliminary Evaluation of Aurora Energy's Thermal Discharge to the Chena River (2001) ("Foster Wheeler report"). Fact Sheet at 10. The Fact Sheet also referenced records of several telephone conversations and e-mail communications between Region 10, Alaska Department of Fish & Game, and the Alaska Department of Environmental Conservation ("ADEC"). *Id.*

> limits would impact aquatic life. Because the discharge has been occurring for over 50 years with no adverse impact on fish (the representative appropriate species)[21] due to the increased temperatures in the vicinity of the outfall, EPA did not find it necessary to require studies to further support what was observed in the existing environment. * * *
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> Although 40 C.F.R. 125.72(b) says that a detailed plan of study will be submitted,[22] the Guidance for a low potential impact determination states that further studies are essentially whatever the agency and the applicant agree upon. The information that EPA has reviewed suggests that there is a balanced indigenous population. Therefore, the decision was to draft a permit granting the variance without requiring further studies. As such, there was no need for a plan to be submitted.

RTC at 7-8 (footnotes added).[23]

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[21] Pursuant to 40 C.F.R. § 125.72(a)(4), Region 10 selected salmonids and arctic grayling, two indigenous fish species, as the appropriate representative species for purposes of its analysis. *See* RTC at 7 ("[T]he most stringent [water quality standards] address the protection of fish so a logical representative appropriate species would be the fish present in the area, both the migrating salmon species as well as the resident grayling which spawn in the vicinity of the discharge."). The Petitioner does not challenge this decision.

[22] The regulations provide that "[w]ithin 60 days after the application is filed, the discharger shall submit for the Director's approval a detailed plan of study which the dischargers will undertake to support its section 316(a) demonstration." 40 C.F.R. § 125.72(b).

[23] Region 10 also indicated that the "Interagency 316(a) Technical Guidance Manual allows for a Low Potential Impact Determination and from the information provided and collected, EPA determined that granting the variance for this discharge would have a low

While we are perplexed by Region 10's interpretation of EPA's regulations as categorically excluding existing dischargers from the obligation to submit early screening information under 40 C.F.R. § 125.72(a),[24] we need not reach this issue. Because the Petitioner fails to meaningfully respond to Region 10's explanation in the record that it did, in fact, consider appropriate early screening information, the petition falls short in any case. As indicated above, Region 10 explained that it had collected the type of information appropriate under 40 C.F.R. § 125.72(a) to support a variance, and specifically identified the information collected in support of the permit application and the regulatory provisions to which the information relates. RTC at 7. The Petitioner simply ignores this response, and does not substantively address the underlying information at all.[25] The Petitioner, similarly, does not address Region 10's response to the comments regarding the need for a detailed plan of study, and consequently fails to explain why Region 10's conclusion that a plan of study is not necessary in this instance is impermissible.

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potential impact." RTC at 7.

[24] As the Petitioner observes, the early screening provision, by its own terms, applies to "[a]ny initial application for a section 316(a) variance," 40 C.F.R. § 125.72(a), and it is not at all clear from Region 10's discussion why early screening information should not potentially include any and all available data about the impact of a source's discharges, regardless of whether the source is existing or proposed. Nor is it evident why early "screening information would not be applicable to a discharge that pre-dated the regulations implementing Section 316(a) of the CWA as well as the CWA itself ," and Region 10 does not explain the basis for its conclusions in this regard. RTC at 6.

[25] According to Region 10, the fact that none of this information is labeled as "early screening information" is inconsequential. Reg. Br. at 17. With respect to the Petitioner's obligation to address the Region's arguments in the RTC, we agree. Despite Region 10's failure to initially identify this data as early screening information, because the Region clearly responded to the issue in its RTC, and specifically identified the information it was relying upon to serve as early screening data, it was incumbent on the Petitioner to substantively confront the Region's response (and perhaps the underlying data) in order to obtain review. The Petitioner did not do so.

The Petitioner also appears to challenge Region 10's conclusions on technical grounds, arguing in essence that the information in the record is substantively insufficient to support Region 10's final permit decision. The Petition states:

> Section 316(a) of the [CWA] provides that a variance from the state [water quality standards] for thermal discharges may issue under certain, strictly limited, circumstances. This section clearly and explicitly places the burden of proving the existence of those circumstances on the applicant. In this instance it was incumbent on Aurora Energy to "demonstrate" that its proposed discharge would nonetheless "assure the protection and propagation of a balanced, indigenous population of shell fish, fish, and wildlife in and on the body of water."
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> As of the time of the conclusion of the public hearing there was no such demonstration. There has *never* been a study of the biological effects of this discharge. In fact, the record contains Alaska Department of Fish and Game reports which state that the existing [water quality standards] are, at best, marginal in protecting fish. The permitted discharge far exceeds the [water quality standard]. This complete failure by the applicant to make the required demonstration mandates denial of the permit.

Pet. at 1-2 (quoting CWA § 316(a), 33 U.S.C. § 1326(a)) (internal citation deleted). Neither the Petitioner's comments nor the Petition itself provide any more explanation of the basis for the Petitioner's objections in this regard.

Petitioner accurately observes that these issues were raised during the comment period. Indeed, the Petition is a nearly verbatim repetition of the Petitioner's comments on the draft permit. *See* July 8 comments at 1. Again, however, the Petition itself provides no additional detail or more focused factual or legal analysis than the Petitioner included in his comments on the draft permit. Additionally, the Petitioner mistakenly indicates that Region 10 did not substantively respond to these comments upon permit issuance. *See* Pet. at 2.

Indeed, Petitioner's claim that "[t]here has *never* been a study of the biological effects of this discharge," and that "the applicant here provided no evidence of the absence of past harm, and there is none in the record from any source," Pet. at 2, is belied by the administrative record. It is clear that Region 10 did reference numerous sources of information seemingly relevant to its consideration of the permit request (including studies specifically addressing conditions in the Chena River). For example, in the RTC, Region 10 explained that

> EPA based its initial determination on the studies and reports referenced in the Fact Sheet.[26] Since issuing the draft permit, more studies and information have been added as a result of research conducted to respond to the comments received

[26] *See supra* note 20.

during the public comment period and at the public hearing (see comment 15). The additional information is listed in the reference section of this Response to Comments.[27]

RTC at 7 (footnotes added).[28]

While the Petitioner references unspecified "Alaska Department of Fish & Game reports," which he interprets as showing that "the existing [water quality standards] are, at best, marginal in protecting fish," Pet. at 2, the Petitioner provides no specific citation or technical discussion, and fails to explain the relevance of the statement in the context of the applicable statutory and regulatory requirements and the underlying factual circumstances. In his comments on the draft permit the Petitioner did reference language in a Region 10 guidance

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[27] These new materials include: William C. Armstrong, Effects of Thermal Discharge Upon the Chena River (undated Master Thesis); Jacqueline D. LaPerriere & Robert F. Carlson, Institute of Water Resources, University of Alaska, Fairbanks, Thermal Tolerances of Interior Alaska Arctic Grayling (1973); William P. Ridder, Alaska Department of Fish and Game, Stock Status of Chena River Arctic Grayling in 1997, and Radiotelemetry Studies, 1997-1998 (1998) (Fisheries Data Series No. 98-39). RTC at 15. The RTC also references several EPA guidance documents as well as an August 24, 2001 e-mail exchange between Alaska Department of Fish & Game and EPA, and a memorandum documenting an August 1, 2002 telephone conversation between Alaska Department of Fish & Game, ADEC, and EPA.

[28] To the extent the Petitioner intends to suggest that the information upon which Region 10 relied was somehow improper because it did not come directly from the permit applicant, he fails to offer any legal rationale. Moreover, the Petitioner does not address Region 10's discussion in the record, explaining that it initially accepted relevant data from the State agencies because "there was confusion as to the permitting mechanism to be used in addressing this variance request. It was initially thought that ADEC was able to certify the variance into the permit under [State law] 18 AAC § 70.220 so when the decision was made that EPA would have to make the variance determination, ADEC had already collected some information." RTC at 7.

document as generally supporting his position in this regard. *See* July 8 comments at 2 (referencing Region 10, U.S. EPA, Draft EPA Region 10 Guidance for State and Tribal Temperature Water Quality Standards (Oct. 2001) ("Draft Temperature Guidance")). Region 10 responded to Petitioner's comment, however, explaining that while certain EPA Guidance states that relevant water quality standards "are set near the warm end of the optimal temperature range," the same text also explains that "[t]hese numeric criteria are based on the biological needs of salmonids and are set * * * at levels EPA believes will result in few if any adverse effects." RTC at 9-10 (citing Draft Temperature Guidance). Moreover, Region 10 pointed out that the same guidance document explains that "to the extent that cold water is available, salmonids will use behavioral means to avoid harmful temperatures and maintain optimal body temperatures," and therefore "optimal temperatures do not have to occur everywhere all the time." *Id.* at 10 (citing Draft Temperature Guidance). Finally, Region 10 observed that modeling in the record by Foster Wheeler and ADEC showed that "there would be either a zone of passage or, by the time the thermal plume stretches the width of the river, the temperatures would not be high enough to block passage." RTC at 10. Region 10 concluded that the permit was appropriate because "only a small portion of the river is thermally affected and because by behavioral means, salmonids can avoid the immediate area of the discharge." *Id.*

Again, the Petition does not address Region 10's response, and the Petitioner otherwise offers no explanation why the information to which Region 10 refers is inadequate, inaccurate, or otherwise inappropriate. Indeed, the Petitioner makes no effort to substantively address the

administrative record at all, and the Petition includes no technical discussion or specific citations to technical discussions in the administrative record.

As noted above a petitioner must raise *specific* objections in order to obtain review. *In re Wash. Aqueduct Water Supply Sys*., NPDES Appeal No. 03-06, slip op. at 37 (EAB, July 29, 2004), 11 E.A.D. __ (petitioners must "present us with arguments explaining how the permit issuer's ultimate decisions on the permit, after considering comments on the draft versions thereof, are clearly erroneous"); *accord In re Phelps Dodge Corp*., 10 E.A.D. 460, 496 (EAB 2002) ("absent sufficient specificity as to why [a] permit issuer's decision was erroneous" the Board cannot grant review) (citing *In re Steel Dynamics, Inc*., 9 E.A.D. 165, 235-36 (EAB 2000)); *In re P.R. Elec. Power Auth*., 6 E.A.D. 253, 255 (EAB 1995). Moreover, petitioners may not simply reiterate their comments on the draft permit without substantively addressing the permit issuers' responses to those comments. *See Rohm and Haas Co.*, 9 E.A.D. 499, 507 (EAB 2000) ("[A] petitioner may not simply reiterate its previous objections to a draft permit. Rather, a petitioner must demonstrate why the permit issuer's response to the objections (the basis for its decision) is clearly erroneous."); *accord In re Knauf Fiber Glass, GmbH,* 9 E.A.D. 1, 5 (EAB 2000); *In re City of Irving, Texas Municipal Separate Storm Sewer Sys*., 10 E.A.D. 111, 129-30 (EAB 2001).

As described above, because the Petitioner's arguments here do not raise objections to the permit with sufficient specificity, and because the Petitioner has merely repeated his comments on the draft permit without addressing Region 10's responses, the Petition does not

demonstrate that Region 10's permit decision was clearly erroneous. Accordingly, we deny review of the petition on these issues.

b. *Representativeness of the Record Data*

Petitioner also argues that the data Region 10 relied upon to conclude that there has been no adverse impact on aquatic life are not representative of the conditions allowed under the permit. *See* Pet. at 3. Specifically, the Petitioner suggests that the rate of cooling water discharge has changed significantly over time, and that "in 1998 the discharge was increased by 2,500 gallons per minute and has since been at an all time high." Pet. at 3. The Petitioner argues that "[t]he potential adverse effects of these increases, especially the 1998 increase, were ignored by the Agency." Pet. at 3.

We note at the outset that the comments Petitioner submitted prior to issuance of the final Permit on this issue were cursory at best. In his January 22 letter,[29] the Petitioner stated only that "[b]oth the temperature and the volume of the discharge have continued to increase. Currently, the rate of discharge is estimated by the applicant at about 14,000 gallons/minute." Letter from Paul A. Barrett to EPA Region 10, January 22, 2002, at 2 ("January 22 letter").[30] In his

[29] We note that this letter was submitted prior to the formal comment period on the draft permit. We have observed in the past that "comments must be submitted *during* the comment period," to be considered "comments on the draft permit" for purposes of seeking EAB review. *See Avon Custom Mixing Servs., Inc*., 10 E.A.D. 700, 707 (EAB 2002).

[30] In fact, there is rebuttal information from Aurora also in the record. *See* Letter from Bartly K. Coiley, Aurora Energy, to Robert Robichaud, Region 10, at 1-2 (May 7, 2002)

comments on the draft permit, the Petitioner addressed this issue in a similarly perfunctory manner: "I also note that, even if there was evidence of no past harm, the current level of discharge (since 1998) is at an all time high, thus rendering past evidence questionable." July 8 comments at 2. The comments did not explain the origin of the Petitioner's factual assertions, cite to any data in the record, or provide any specific technical analysis in support of his argument. Nor does the Petition include any such detail.[31]

While the RTC did not directly address the Petitioner's statements in this regard, it did address the underlying concern that was the target of the Petitioner's comments. The consequence of the purported increase in discharge rates, in the Petitioner's words, is to "render[] past evidence [of no adverse impacts on aquatic life] questionable," July 8 comments at 2, thus creating some uncertainty regarding the protectiveness of the discharge rates allowed in the final permit. To the extent that any such uncertainties might exist, however, the record contains supplementary information specifically intended to confirm the absence of harm at the permitted discharge rate under varying river flow conditions. For example, Region 10 observed:

> [M]odeling done by Foster Wheeler Environmental Corporation* * * shows that even in the most conservative of situations - the highest effluent flow and

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(explaining in detail why the Petitioner's conclusion is erroneous and concluding that "Aurora Energy is applying for lower flow and temperature limits than is reflected in the 1997 draft permit").

[31] Indeed, the Petition does little more than outline a broad conceptual basis for challenging the permit decision, without explaining, based on the existing record, what facts compel Board review and why. *See* Pet. at 3.

> temperature higher (32.3°) than that included in the proposed permit, combined with the lowest summertime flow (3Q2) and reasonable maximum receiving water temperature (14.5°) - that by approximately 800 feet downstream, the point at which the plume stretches across the entire width of the river, the temperature is only 0.5° above ambient.

Fact Sheet, app. D at D-3.[32]

Region 10 concluded that "there would be either a zone of passage or, by the time the thermal plume stretches the width of the river, the temperatures would not be high enough to

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[32] While the Petitioner states in his petition, as he did in his comments on the draft permit, that "the Foster Wheeler report * * * was based on data samples collected on two consecutive days, and at a time when the river was flowing at 32 times its winter time low flow rate," Pet. at 3; July 8 comments at 2, he fails to acknowledge, let alone address, Region 10's response to those comments, in which the Region explains:

> The data collected for the draft Foster Wheeler report was collected as a means of calibrating a model to predict the behavior of the thermal plume as a result of the discharge. The modeling was conducted to predict plume behavior during critical periods (i.e., times when the ambient temperature of the river is at its annual highest point, in the case of the Chena River June and July). The timing of the data collection was opportunistic rather than planned for a certain flow event. The fact that the data was collected during a time when the Chena River was 32 times the winter flow rate is not necessarily detrimental to the accuracy of the model. Once the model is calibrated it becomes possible to attempt to predict the behavior of the thermal plume under varying ambient and discharge conditions.

RTC at 11-12. Moreover Region 10 notes in its brief that to the extent any uncertainties may remain regarding the impact of discharges during periods of low river flow, it has addressed these concerns by "requir[ing] in Part 1.B of the final permit that the permittee conduct additional ambient monitoring during low flow periods." Reg. Br. at 17.

block passage," thus, "by behavioral means, salmonids can avoid the immediate area of the discharge."[33] RTC at 10. Accordingly, Region 10 determined that the combination of data – including evidence of past discharges without adverse impacts and supplemental modeling of the thermal plume – were sufficient (in light of other record data)[34] to demonstrate that the permitted discharge levels were protective of aquatic life in the vicinity of the outfall. *See* Fact Sheet, app. D at D-2; RTC at 10-12.

In the end, even if there were a colorable factual basis for the Petitioner's arguments regarding increases in discharge rates, the modeling that Region 10 describes in the RTC appears to provide just the kind of confirmation that the Petitioner seems to suggest is needed. Since the Petitioner has offered no viable challenge to those portions of the record, his challenge here must

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[33] In response to the Petitioner's argument that the computer modeling results "were inconsistent, with at least some results being unacceptable," and that the results were acceptable only "when it was assumed that the plant would be running at only two-thirds capacity during the months of June and July of each year," Region 10 explained:

> A point of confusion in interpretation of the model results may be that the draft report attempts to apply a water quality standard from the State of Washington in its analysis. To assume that the model results in an analysis of running the facility at full capacity are unacceptable may not be appropriate since the report was applying a water quality standard which does not apply. Despite attempting to apply an inappropriate water quality standard the output from the model runs still provide useful information in the prediction of the thermal plume behavior in varying conditions.

RTC at 12. Additionally, Region 10 specifically references portions of the studies that it relied upon dealing directly with the potential impact of thermal discharges, including maximum discharges during low river flow. *Id.* at 12-13. The Petitioner does not address any of these responses, or otherwise specifically confront the underlying data.

[34] Such as data regarding the impact of various water temperatures on indigenous fish populations. *See* RTC at 12-13.

fail as well.[35] Because the Petitioner's arguments do not show that Region 10's permitting decision was clearly erroneous, we deny review of Aurora's permit on this issue.

2. *The Presence of Ducks During the Winter*

Petitioner observes that the Plant's discharge of warm water causes open water in which ducks are present throughout the winter. Petitioner therefore argues that Aurora cannot demonstrate that the thermal variance will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife as required by the Act. *See* CWA § 316(a), 33 U.S.C. § 1326(a). According to the Petitioner, "[t]he introduction of ducks into this winter ecosystem is not indigenous, and disqualifies a section 316(a) variance." Pet. Br. at 3. The Petitioner provides no additional explanation or detail with respect to this argument.

The Petitioner offered a similar argument in connection with his comments on the draft permit.[36] In its response to Petitioner's comments, Region 10 observed that the Petitioner had

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[35] As previously noted, the burden on a petitioner is particularly high when challenging a permit issuer's technical decisionmaking, including decisions regarding the representativeness of the available data. *See In re Wash. Aqueduct Water Supply Sys*., NPDES Appeal No. 03-06, slip op. at 12-13 (EAB, July 29, 2004), 11 E.A.D. __ ("with respect to questions pertaining to the 'representativeness' of data used as the basis for establishing permit condition * * * the choice of appropriate data sets is generally left to the discretion of the permitting authority."); *see also In re Encogen Cogenerating Facility*, 8 E.A.D. 244, 256-57 (EAB 1999); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 147 (EAB 1999). *See also supra* section II.A.

[36] Petitioner commented:

> There was ample evidence in the record, and at the hearing, that ducks are present in the open water throughout the winter. Ducks are not, of course, indigenous to

provided "no evidence * * * that the presence of ducks in the winter are [sic] harming the rest of the indigenous populations so their presence is not an issue in determining whether a variance may be granted." RTC at 9. Region 10 argues further in its brief that because the Petitioner simply repeats his comments on this issue, and does not address Region 10's substantive response, the Board must deny review. We agree.

In essence, the Petitioner advanced a position in its comment on the draft permit that under section 316(a) no discharge may create conditions that allow for the year-round presence of a species that is otherwise only seasonal. Region 10 responded by indicating that the statute and regulations require the protection of the indigenous population of aquatic life, and that the Petitioner had not demonstrated how the presence of ducks in the winter threatened any other indigenous species.[37] The Petition does not address Region 10's response.[38] Similarly, the Petition does not explain how the presence of ducks in the winter relates to the statutory

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> Fairbanks in the winter. This is a clear example of why a Section 316(a) variance is inappropriate, as such variances are only to issue if continuing *indigenous* conditions are assured. The introduction of ducks into this ecosystem is certainly not indigenous during the winter. This fact alone disqualifies a section 316(a) variance.

July 8 comments at 3.

[37] Inherent in Region 10's response was an interpretation of the statute as allowing the issuance of a permit even where the resulting thermal discharges would attract the year-round presence of an otherwise seasonal species. RTC at 9. In this light, Region 10 observed "the Guidance Document states that the [indigenous] community may include species not historically native to an area but which are species whose value is aesthetic. Several commentors make it clear that the wintertime presence of ducks is an aesthetic pleasure to them." *Id.*

[38] Nor did petitioner address Region 10's response that "[t]he requirement to address a balanced, indigenous community does not differentiate between year-round species and seasonal species." RTC at 9.

objective of preserving a balanced indigenous population, nor does it explain how or why the statute or the regulations should be read to categorically preclude the issuance of a permit under these circumstances.[39]

Ultimately, the Petitioner fails to address Region 10's responses to the comments on the draft permit and does not offer either a factual or legal analysis sufficient to demonstrate that Region 10's decision was clearly erroneous. We therefore deny review on this issue.

3. *Impact on Wintertime Surface-ice Recreation*

Petitioner argues that Region 10 failed to adequately address the adverse impact of the permit on wintertime surface-ice recreation (e.g., cross-country skiing, ice skating, dog mushing, snowmobiling). Other than stating that Region 10 neglected to address surface ice recreation, the Petitioner provides no details regarding the alleged shortcoming in the permitting process. For example, the Petitioner offers no explanation of how Region 10 should have considered impacts on such recreation or what effect such consideration should have had on the permitting decision.

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[39] We note that the Petitioner describes the statute as requiring that permits under section 316(a) assure "continuing indigenous conditions." Pet. at 3. This, however, is not an accurate restatement of the statutory standard. The Act in fact provides that "the Administrator * * * may impose an effluent limitation under such sections * * * that will assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife in and on that body of water." CWA § 316(a), 33 U.S.C. § 1326(a).

While the Petitioner did not direct the Board to any comments on the draft permit relating to surface ice recreation, it is evident from Region 10's RTC that such comments were raised. It is equally evident, however, that Region 10 provided a substantive response to these comments, contrary to the assertions in the Petition. Observing that "[s]everal commentors note that EPA and [ADEC] * * * should not deprive Fairbanks of a winter recreational corridor through town," Region 10 explained:

> The goal of the CWA, under which the NPDES permit program is authorized, is to make the waters of the United States "fishable and swimmable." The Water Quality Standards (WQS) which States adopt to reach this goal must contain several components including designated uses. The designated use of Water Recreation contains two sub-uses which are defined below:
>
> *Contact recreation* means activities in which there is direct and intimate contact with water. Contact recreation includes swimming, diving and water skiing but not wading, and
>
> *Secondary recreation* means activities in which incidental water use can occur including boating, camping, hunting, hiking, wading and recreational fishing.
>
> The [water quality standards] are meant to protect the health of organisms we eat, the water we drink and to assure that contact with the water is not unhealthy.

> This permit has been issued to comply with the CWA and [ADEC] has certified that the permit would be protective of their [water quality standards].

RTC at 8. Region 10 also observed that "[m]any commentors noted that additional winter recreation opportunities are afforded due to the unfrozen portion of the river." RTC at 8.

Region 10 discusses this issue further in its response brief:

> There is no mention of recreational activity that requires the presence of ice. EPA should not be required to support winter recreation over other named uses. Petitioner reads the EPA's Response to Comments too narrowly. Because the State of Alaska has not expressly established water quality standards to protect winter [surface-ice] recreational uses, EPA has no obligation to exhaustively analyze the impact of the discharge on winter recreation, much less include permit limits that would protect such uses.

Reg. Br. at 20.

It is clear to us from a review of the RTC that Region 10 did address the potential for impacts on wintertime surface-ice recreational use of the Chena River. Thus, Petitioner's contention that Region 10 "ignored these interests" is incorrect. Moreover, the Petitioner himself does not address Region 10's responses regarding the goals of the CWA or the absence

of surface-ice recreational uses in the State's water quality standards. Nor does the Petitioner address Region 10's observation that there are competing interests among the public with respect to the recreational desirability of open water in the wintertime.

Because the Petitioner has failed to address Region 10's responses to related comments, and because the Petitioner has not presented its challenge to the permit with sufficient specificity, we deny review of the permit on this issue.

4. *Alternative Uses of Aurora's Cooling Water*

The Petitioner argues that Region 10 failed to adequately consider alternatives to the permitted discharge. Petitioner's argument in its entirety states:

> The Agency, in its decision, simply ignored suggested alternatives to [the permitted] discharge. Most notable was the alternative (suggested at the hearing and in my January 22, 2002 letter) that the heat be used to warm the public water supply. This was done for many years while the City of Fairbanks owned the power plant. It greatly reduced the impact of the discharge on the river. This pre-warming of the water supply reduced the risk of underground freezing of waterlines and substantially reduced the amount of electricity or fuel consumed by water heaters.

Pet. at 4.[40]

Again, however, Region 10 did generally address the comments on alternative uses of Aurora's cooling water raised in connection with the draft permit. Region 10 explained:

> EPA fully supports any efforts made by Aurora Energy to further recover energy from its discharge. The information reviewed does not indicate that the indigenous population of shell fish, fish, and wildlife in and on the body of water have been impacted due to the discharge. EPA sees no reason based on water quality concerns for the permit to contain [a provision to require additional energy recovery].

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[40] In his January 22, 2002 letter the Petitioner offered several suggestions for alternative uses of Aurora's cooling water:

> There has never been a study to identify feasible alternatives to hot water injection into the river. However, suggested alternatives include:
>
> - Use the heat to warm the public drinking water supply. * * *
> - Use the hot water in a fish hatchery * * *
> - Heat public buildings/streets/bridges/greenhouses.
> - Pipe the hot water to Ft. Wainwright [power plant] * * *.

January 22 letter at 3. With regard to using Aurora's cooling water to warm the public water supply, the January 22 letter closely mirrors the Petitioner's argument in the petition for review. *See id.* While the Petitioner's January 22 letter was submitted outside of the formal comment period for the permit, it appears that related comments were raised during the public hearing, and Region 10 did address questions of additional energy recovery in its RTC. *See* RTC at 14.

RTC at 14. Thus, Region 10's position in the RTC was that the statute requires only a determination that the permit limit would preserve a balanced indigenous population of aquatic life. Having made this determination, Region 10 concluded that it was not necessary (and perhaps impermissible) for EPA to impose additional limitations on Aurora's discharges.[41]

The Petitioner does not directly address Region 10's response, or otherwise confront Region 10's rationale for not including additional permit limits. Nor does the Petitioner explain, based on the applicable statutory and regulatory provisions, why Region 10's failure to require additional energy recovery constitutes clear error, or indeed offer any legal or factual analysis whatsoever to support his petition in this regard.

Because the Petitioner merely reiterates his comments on the draft permit, and does not address Region 10's response to those comments, and because the Petitioner does not otherwise offer a specific argument alleging clear error, we must deny review on this issue.

5. *Safety Considerations*

Finally, the Petitioner argues that the discharge from the Chena Plant causes unstable and unsafe ice conditions down stream and ice fog that results in hazardous driving conditions.

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[41] In its response brief, Region 10 further explains that "EPA has no authority [under CWA section 316(a)] to require that power companies engage in energy recovery, whatever the method. Instead, EPA's role is limited to reviewing the discharge proposed by the applicant, and imposing permit conditions to ensure all water quality requirements are met." Reg. Br. at 21.

Specifically, the Petitioner argues that "[h]uman health and welfare are interests also protected by the CWA," Pet. at 4 (citing CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2)),[42] and observes that due to thin ice on the Chena River "several people have broken through the ice, at least one of whom drowned. Furthermore, the use of several miles of river as a 'cooling pond' results in significant ice fog generation, making winter driving hazardous." *Id.* The Petitioner concludes that "the Agency totally failed to address the hazards of unstable ice * * * [and] explicitly refused to consider the hazards related to ice fog." *Id.* at 5. These argument reflect, nearly verbatim, comments offered by the Petitioner's prior to issuance of the draft permit. *See* January 22 letter at 3.[43]

For its part, Region 10 responded to comments regarding ice fog, stating:

> The [water quality standards] are meant to protect the health of the organisms we eat, the water we drink and to assure that contact with the water is not unhealthy.

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[42] In support of this proposition, the Petitioner cites generally *United States v. Aluminum Co. of America.* Pet. at 4 (citing *United States v. Aluminum Co. of America*, 824 F. Supp. 640 (E.D. Tex. 1993)). We note that the Petitioner's citation (to 84 F. Supp. 640) is inaccurate; the case actually appears at *824* F. Supp. 640. The case involves penalties assessed under the CWA against an aluminum plant for violations of limits on the discharge of certain chlorinated hydrocarbons. Although the Petitioner does not specifically reference this language, the court in this case, by way of background, indicates that among other things "[t]he objective of the CWA is to protect human health, welfare, and the environment." 824 F. Supp. at 645 (citing CWA § 101(a), 33 U.S.C. § 1251(a)). Beyond that, the relevance of this case is not immediately evident, and the Petitioner provides no explanation of the significance of this citation.

[43] The Petitioner raised this issue again in his July 8 comments, and referenced his January 22 letter. July 8 comments at 3.

> This permit has been issued to comply with the CWA and [ADEC] has certified that the permit would be protective of their [water quality standards].
>
> The NPDES permit is not the vehicle by which to enforce ADEC's ice fog regulations found at 18 AAC § 50.80.

RTC at 8.

Region 10 does not appear to have expressly responded to comments on the draft permit regarding the potential hazards of thin ice; however, the response referenced above expresses Region 10's general interpretation that the section 316(a) permit process is intended to protect the viability of the receiving waters as habitat for indigenous fish and other aquatic life and to ensure that direct human contact with the water is not unhealthy, and not, as the Petitioner suggests, to more broadly address water-related safety concerns. This understanding of Region 10's response is consistent with Region 10's arguments in its reply brief. It its brief, Region 10 argues that Petitioner's assertion that "EPA, through the permitting process, should require that Aurora Energy assure that the Chena River produce [sic] an ice cover in the winter that would be thick enough to ensure that no one would break through and drown," is inappropriate because "[d]rowning is not one of the hazards the CWA protects Americans against." Reg. Br. at 22. Rather, Region 10 argues, "Congress was especially concerned that the Nation's waters be clean enough to use in their liquid, rather than their solid, state." *Id.*

Region 10 concludes, therefore, that the Petitioner's argument regarding drowning hazards is based on "an erroneous interpretation of the law and should be rejected." *Id.*

Here again, we note in general the striking lack of analysis or rationale in both the Petition and the Petitioner's comments during the permit proceedings. The Petitioner offers only three broad assertions: (1) that "health and welfare interests are also protected" under the CWA; (2) that Aurora's discharges have welfare impacts related to thin ice and driving hazards; and (3) that Region 10 refused to further limit Aurora's discharges based on these considerations. Pet. at 4-5. Nowhere does the Petitioner fill in this skeletal argument with, for example, a specific legal rationale for imposing permit limitations under section 316(a) solely to address impacts that are unrelated to water quality and the protection of aquatic life, or specific factual information about the alleged welfare impacts (i.e., details regarding the frequency and circumstances of thin ice and ice fog-related injuries). Lacking sufficient specificity, the Petitioner's arguments fail to demonstrate clear error. They also fail to address Region 10's response to comments indicating that section 316(a) is not an appropriate mechanism to address such safety concerns.[44]

[44] Additionally, although we need not decide the issue here, we note that nothing on the face of the statute or in the regulations suggests that Region 10's reading of the scope of its authority or obligations under section 316(a), regarding physical safety impacts, is impermissible. *See, e.g.,* CWA § 101(a), 33 U.S.C. § 1251(a). *See also In re Pub. Serv. Co. of N.H.*, 1 E.A.D. 455, 458 (Adm'r 1978) ("I emphasize * * * that my function, as that of the Agency as a whole, has been solely to determine whether the proposed thermal discharge will assure the protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife in and on the receiving waters * * *. I have not considered, nor may I consider, in the context of this proceeding, whether [the project] is desirable from an overall environmental perspective.").

Because the Petition lacks adequate specificity, and because the petitioner has failed to address Region 10's response to related issues raised during the permitting process, we deny review of the permit on this issue.

III. *CONCLUSION*

For the reasons explain above review is denied as to all issues raised in the petition for review.

So ordered this 14th day of September, 2004.[45]

ENVIRONMENTAL APPEALS BOARD

By: /s/
Scott C. Fulton
Environmental Appeals Judge

[45] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER DENYING REVIEW in the matter of Aurora Energy, L.L.C., NPDES Appeal No. 03-11, were sent to the following persons in the manner indicated:

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Dated: September 15, 2004

/s/
Annette Duncan
Secretary