

**EMERGENCY**

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**IN THE SUPREME COURT FOR THE STATE OF ALASKA**

ALASKA COMMUNITY ACTION ON  
TOXICS, ALASKA CENTER FOR THE  
ENVIRONMENT, ALASKA SURVIVAL,  
COOK INLETKEEPER, AND THE  
NATIVE VILLAGE OF EKLUTNA,  
Petitioners (Appellants),

vs.

LARRY HARTIG, COMMISSIONER,  
ALASKA DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,  
AND ALASKA RAILROAD  
CORPORATION  
Respondents (Appellees).

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) Superior Court No.: 3AN-10-08781CI

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) Supreme Court No.: S-13940

**PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF AN EMERGENCY MOTION FOR CONTINUANCE OF STAY**

Pursuant to Alaska Rule of Appellate Procedure (RAP) 502, Petitioners Alaska  
Community Action on Toxics, Alaska Center for the Environment, Alaska Survival,  
Cook Inletkeeper, the Native Village of Eklutna, and Prince William Soundkeeper  
(collectively ACAT) submit this Emergency Motion seeking the continuance of a  
temporary stay issued on July 12, 2010, by Alaska superior court, Judge William Morse

presiding.<sup>1</sup> ACAT respectfully requests this Court to issue a continuance of the stay by July 15, 2010.

If this Court does not act by July 15, 2010, the Alaska Railroad Corp. (ARR) will begin spraying toxic herbicides<sup>2</sup> along its right-of-way on July 16, 2010, pursuant to pesticides permit #10-SOL-01, which the Alaska Department of Environmental Conservation (ADEC) issued on April 30, 2010. Spraying herbicides along the right-of-way will result in contamination of surface- and groundwaters near the treatment areas, significant human health impacts, and harm fish, wildlife, soil and edible plants. Once spraying begins, it cannot be undone. There is no remedy for the immediate harm to human health, or the contamination of surface- and groundwater, fish, wildlife, soil and edible plants. In addition, because the ADEC issued the permit based upon a legally deficient application and there is no stay in place to protect ACACT's constitutional interests in life, liberty, and property while it exhausts its administrative remedies, ACAT's due process rights will continue to be violated. Thus, ACAT, its individual members and the public generally will suffer immediate irreparable harm once herbicide spraying begins, and seek this emergency motion for a continuance of the July 12, 2010 stay enjoining spraying by the ARR under pesticides permit # 10-SOL-01.

## **I. FACTUAL AND PROCEDURAL BACKGROUND.**

Alaskans overwhelmingly oppose the use of herbicides as a means of controlling vegetation along the ARR right-of-way and at the Seward Rail Yard. This consistent,

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<sup>1</sup> Judge Morse issued his decision from the bench, then, on the afternoon of July 13, 2010, issued a written order. *See* Order and Stay, OAH No. 3AN-10-08781CI (July 13, 2010) [hereinafter Order and Stay] [attached as Exhibit 22 to ACAT's Petition for Review].

<sup>2</sup> "Pesticides" includes herbicides. 18 AAC 90.990(37).

near-universal opposition to the use of herbicides prompted then-Governor Jay Hammond to ban the use of herbicides by state agencies in 1978. Since 1983, Alaskans have successfully opposed the spraying of herbicides and other harmful chemicals by the ARR. In 2006, when the ARR last applied for a permit to apply herbicides, the ADEC recognized the public's justified concerns over potential water contamination and declined to issue the permit, observing that "any spray method, no matter how precautionous, would likely result in the proposed herbicides reaching waters of the state."<sup>3</sup>

Despite public opposition, on May 22, 2009, the ARR filed a new application to spray glyphosate, the active herbicide in Roundup, and Agridex, a surfactant with an unknown chemical formulation and unknown health impacts, along its right-of-way between Indian and Seward and at the Seward Rail Yard.<sup>4</sup> On April 30, 2010, the ADEC issued pesticides permit #10-SOL-01, which allows the ARR to spray herbicides along 30 miles of its right-of-way for a two-year period that began on June 9, 2010.<sup>5</sup> Spraying as allowed under this permit will contaminate nearby surface- and groundwaters, cause significant human health impacts, and harm fish, wildlife, soil and nearby edible plants.<sup>6</sup>

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<sup>3</sup> ADEC, *Decision Document Re: Alaska Railroad Corporation Permit Application for Pesticide Use for Vegetation Management on Railways and Rail Yards* "Response to Comments Received Regarding the Alaska Railroad Corporation Pesticide Use Permit Application" 4 (Feb. 2007) [hereinafter ADEC 2007 Decision] [attached as Exhibit 3 to ACAT's Petition for Review].

<sup>4</sup> See generally, ARR, *Pesticide Permit Application* (May 22, 2009) [hereinafter ARR 2009 Application] [attached as Exhibit 1 to ACAT's Petition for Review].

<sup>5</sup> See generally, ADEC, *Permit to Apply Pesticides No. 10-SOL-01* (Apr. 30, 2010) [hereinafter Pesticides Permit #10-SOL-01] [attached as Exhibit 2 to ACAT's Petition for Review].

<sup>6</sup> See ADEC 2007 Decision, Ex 3 to ACAT's Petition for Review, at 4; Porter, Warren, *Literature Review on Biological Effects of Roundup Herbicide and Evaluation of Materials Safety Data Sheet and Use Instructions for Aquamaster 3-4* (2010) [hereinafter

On June 1, 2010, pursuant to 18 AAC 15.200, *et seq.*, ACAT submitted to the ADEC a request for an adjudicatory hearing and request for a stay of its April 30, 2010, decision to issue the permit.<sup>7</sup> In its request, ACAT argued that: (1) the Commissioner and ADEC violated ACAT's due process rights by failing to provide adequate notice and opportunity for participation in the decision-making process, and by failing to grant an automatic stay pending ACAT's exhaustion of its administrative remedies;<sup>8</sup> (2) the DNR's April 30, 2010, decision violated ACAT's common use and access to navigable water rights guarantees by Article VIII, §§ 3 and 14;<sup>9</sup> (3) the ARR's 2009 application was legally deficient because it failed to include certain required information, such as an identification of the target pests, the vegetation in the treatment area, the soil type and drainage characteristics, each potentially affected water within 200 feet of the treatment area, the average annual precipitation, the proposed date and time of pesticide application, special precautions to protect human health and the environment, and information that demonstrates that the pesticide will not cause an unreasonable adverse effect;<sup>10</sup> and (4) that the DNR's April 30, 2010, decision was arbitrary in its consideration, or lack of consideration, of the risks to human health, water, fish, wildlife, soil, and edible plants that would occur from spraying, and the alternative non-toxic

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Porter Literature Review] [attached as Exhibit 4 to ACAT's Petition for Review]; Porter Decl. at 22-27 [attached as Exhibit 5 to ACAT's Petition for Review].

<sup>7</sup> *See generally*, ACAT, Request for an Adjudicatory Hearing on Decision of April 30, 2010, to issue Pesticides Permit #10-SOL-01, *ACAT et al., v. ADEC* 3 and 16-18 (June 1, 2010) [hereinafter ACAT Request] [attached as Exhibit 6 to ACAT's Petition for Review].

<sup>8</sup> *See id.* at 3 and 16-18.

<sup>9</sup> *Id.* at 3-4.

<sup>10</sup> *See id.* at 4-9.

means of vegetation control readily available to the ARR.<sup>11</sup>

The ADEC issued public notice of the request for stay pursuant to 18 AAC 15.210(c) and (d), and the Commissioner accepted public comment and responsive memoranda from the ADEC and the ARR. The 20-day comment period for the stay ended on June 24, 2010, with the overwhelming majority of the comments supporting ACAT's requests and opposing spraying along the right-of-way.<sup>12</sup> The ADEC and ARR submitted their responsive memoranda on June 18, 2010.<sup>13</sup>

On June 28, 2010, before the Commissioner ruled on ACAT's request for a stay, the ARR gave notice to the ADEC and ACAT—but not to the public—of its intent to begin herbicide spraying at 9:00 a.m. on July 9, 2010.<sup>14</sup>

On June 30, 2010, the Commissioner substantially denied ACAT's stay request, despite concluding that ACAT “[has] shown a likelihood of success on the merits” of at least some of its assertions.<sup>15</sup> The Commissioner found that ACAT identified several surface- and groundwaters within the spray area that were not included in the ARR's 2009 Application nor considered by the DEC,<sup>16</sup> that the permitted chemicals “could

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<sup>11</sup> See *id.* at 9-15.

<sup>12</sup> See ADEC Commissioner Hartig, *Order Granting in Part and Denying in Part Request for Stay*, OAH No. 10-0278-DEC 7 and 9 (June 30, 2010) [hereinafter Commissioner's June 30, 2010, Decision] [attached as Exhibit 7 to ACAT's Petition for Review].

<sup>13</sup> See ARR, *Opposition to Request for Stay of Permit No. 10-SOL-01* (June 18, 2010) [attached as Exhibit 8 to ACAT's Petition for Review]; ADEC, *Response to Request for Stay* (June 18, 2010) [attached as Exhibit 9 to ACAT's Petition for Review].

<sup>14</sup> See Letter from Matt Kelzenberg, Manager of Environmental Operations, ARR, to Karin Hendrickson, ADEC (June 28, 2010) [attached as Exhibit 10 to ACAT's Petition for Review].

<sup>15</sup> Commissioner's June 30, 2010, Decision, Ex. 7 to ACAT's Petition for Review, at 2.

<sup>16</sup> See *id.* at 8.

contain likely human carcinogens,”<sup>17</sup> and that most public comments had “understandable”<sup>18</sup> “concerns about the health, safety, economic and environmental consequences of pesticide use.”<sup>19</sup> Nonetheless, in spite of the evidence before it, the Commissioner denied the stay in the vast majority of the permit area.<sup>20</sup> ACAT’s request to the Commissioner for an adjudicatory hearing to address the merits of its challenge to the permit is pending with the Office of Administrative Hearings, which must make a decision on whether it will grant ACAT’s request by August 5, 2010.

On July 2, 2010, ACAT filed a notice of appeal of the stay decision to superior court.<sup>21</sup> Because the ARR had planned to begin spraying on July 9, 2010, ACAT also filed an emergency motion seeking to have the superior court enjoin spraying under the permit until ACAT’s request for adjudicatory hearing was resolved.<sup>22</sup> With such a short time frame before spraying was to begin, the emergency motion was assigned to Judge William Morse, acting presiding judge, while all other matters associated with the appeal were assigned to another judge according to the superior court’s normal procedures. Judge Morse was to hear and rule on the emergency motion, then relinquish the case.

Citing the irreparable harms that immediately will occur once spraying begins, the non-chemical means readily available to the ARR for vegetation management and

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<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at 9.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.* at 14.

<sup>21</sup> See ACAT, *Notice of Appeal*, Case No.: 3AN-10-08781CI (July 2, 2010) [attached as Exhibit 11 to ACAT’s Petition for Review].

<sup>22</sup> See ACAT, *Emergency Motion and Appellants’ Memorandum of Points and Authorities in Support of an Emergency Motion*, Case No.: 3AN-10-08781CI (July 2, 2010) [hereinafter ACAT Emergency Motion] [attached as Exhibit 12 to ACAT’s Petition for Review].

ACAT's likely success on the merits, ACAT sought an emergency motion to enjoin spraying by the ARR until the ADEC had an opportunity to review and resolve ACAT's request for adjudicatory hearing.<sup>23</sup> On July 6, 2010, the ARR filed its response to ACAT's emergency motion and a motion to dismiss.<sup>24</sup> On July 7, 2010, the ADEC filed its response to ACAT's emergency motion and ACAT filed an opposition to the ARR's motion to dismiss.<sup>25</sup>

On the morning of July 8, 2010, Judge Morse heard oral argument from all parties. That afternoon, in recognition that no post-spraying remedy would be available to ACAT, Judge Morse temporarily enjoined spraying through July 12, 2010, when he planned to announce his ruling on ACAT's emergency motion for a preliminary injunction.

On July 12, 2010, Judge Morse denied granting a longer-term preliminary injunction, but, based on the recognition that once spraying occurs ACAT would have no remedy if it ultimately prevails on the merits of its claims, Judge Morse extended his temporary stay of the permit through midnight on July 15, 2010, to give ACAT an opportunity to file an emergency petition for review and emergency motion for a continuance of the stay.

## **II. LEGAL STANDARDS FOR ISSUANCE OF AN EMERGENCY MOTION FOR CONTINUANCE OF STAY.**

An emergency motion is appropriate when, "to avoid irreparable harm, relief is

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<sup>23</sup> *Id.* at 13-51.

<sup>24</sup> ARR, *Motion to Dismiss and Memorandum of Support*, Case No.: 3AN-10-08781CI (July 6, 2010) [attached as Exhibit 13 to ACAT's Petition for Review].

<sup>25</sup> ADEC, *Opposition to Emergency Motion*, Case No.: 3AN-10-08781CI (July 7, 2010) [attached as Exhibit 14 to ACAT's Petition for Review]; ACAT, *Opposition to Motion to Dismiss*, Case No.: 3AN-10-08781CI (July 7, 2010) [attached as Exhibit 15 to ACAT's Petition for Review].

needed in less time than would normally be required for the court to receive and consider a response” and “it clearly appears from specific facts . . . that immediate and irreparable injury, loss or damage would result.”<sup>26</sup> This standard essentially is the same as that applicable to a motion for temporary restraining order or preliminary injunction under Alaska Rules of Civil Procedure 65.<sup>27</sup>

The showing required to obtain relief on an emergency motion depends on the nature of the threatened injury. If the petitioner faces the danger of irreparable harm—that is, the harm is permanent and cannot be undone—and if the opposing party is adequately protected, the Court applies a balance of hardships approach in which the petitioner must only raise serious and substantial questions going to the merits of the case that are not frivolous or obviously without merit.<sup>28</sup> If, however, the petitioner’s threatened harm is less than irreparable or the opposing party cannot be adequately protected, the Court requires a higher showing.<sup>29</sup> Under this heightened requirement, even where the petitioner’s threatened harm is not irreparable *and* the opposing party lacks adequate protection, the Court may properly grant an emergency motion upon the petitioner’s showing of probable success on the merits.<sup>30</sup>

Where the Court must evaluate the merits of a case insofar as is required for

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<sup>26</sup> Alaska RAP 504.

<sup>27</sup> See Alaska R. Civ. P. 65(b) (providing that the motion may be granted if “it clearly appears from specific facts . . . that immediate and irreparable injury, loss, or damage will result”).

<sup>28</sup> *Alaska Pub. Utils. Comm’n v. Greater Anchorage Area Borough*, 534 P.2d 549, 554 (Alaska 1975); see also *State of Alaska v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1272-73 (Alaska 1992)..

<sup>29</sup> *City of Kenai v. Friends of Recreation Center, Inc.*, 129 P.3d 452, 546 (Alaska 2009).

<sup>30</sup> *Id.*



emergency motion purposes, the Court reviews questions of law and issues of constitutional interpretation “*de novo* under the substitution of judgment standard.”<sup>31</sup> The Court applies “the *de novo* standard if the administrative agency’s expertise provides little guidance to the court, or if the case concerns ‘statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and experience.’”<sup>32</sup> Where an agency’s interpretation implicates the constitutional or legal rights of an individual, the Court must resolve any question of law or constitutional interpretation “*de novo* under the substitution of judgment standard.”<sup>33</sup> When evaluating purely factual determinations by an agency, the Court will give deference to an agency’s purely factual determination so long as the agency’s determination is supported by “substantial evidence” on the record, is not arbitrary, and does not otherwise implicate the constitutional or legal rights of an individual.<sup>34</sup>

Here, under both the lower or heightened standard, ACAT has made the requisite showing and this Court therefore should grant ACAT’s emergency motion for a continuance of the stay. The injury that ACAT will suffer once spraying commences will

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<sup>31</sup> *Brandal v. State, Commercial Fisheries Entry Comm’n*, 128 P.3d 732, 735 (Alaska 2006); see *State Dep’t of Nat. Res. v. Greenpeace, Inc.*, 96 P.3d 1056, 1061 (Alaska 2004) (citing *Revelle v. Marston*, 898 P.2d 917, 925 n. 13 (Alaska 1995)); *Waiste v. State*, 10 P.3d 1141, 1144 (Alaska 2000) (citing *Todd v. State*, 917 P.2d 674, 677 (Alaska 1996)).

<sup>32</sup> *Greenpeace, Inc.*, 96 P.3d at 1061 n. 10 (quoting *Kelly v. Zamarello*, 486 P.3d 906, 916 (Alaska 1971))

<sup>33</sup> *Brandal*, 128 P.3d at 735; see *Simpson v. State, Commercial Fisheries Entry Comm’n*, 101 P.3d 605, 609 (Alaska 2004); *Greenpeace, Inc.*, 96 P.3d at 1061 (citing *Revelle*, 898 P.2d at 925 n. 13); *Waiste*, 10 P.3d at 1144 (citing *Todd*, 917 P.2d at 677).

<sup>34</sup> *Handley v. State, Dep’t of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992); see *Brandal*, 128 P.3d at 735; *Crivello v. State, Commercial Fisheries Entry Comm’n*, 59 P.3d 741, 744 (Alaska 2002); *Kachemak Bay Watch, Inc. v. Noah*, 935 P.2d 816, 821 (Alaska 1997).

be irreparable and without remedy. It could also mean that ACAT will not have final resolution of these issues before the two-year permit expires, which allows ADEC to evade review and allows questionable or illegal decisions to proceed without legal recourse. The ARR's interests can be adequately protected through readily available nontoxic vegetation control methods and nothing in the record indicates that the ARR will suffer significant economic injury.

**A. The Superior Court Applied an Improper Standard of Review and, as a Result, Erred in Denying ACAT's Emergency Motion.**

In reviewing ACAT's emergency motion, the superior court applied an improper standard of review leading it erroneously to deny ACAT's emergency motion.<sup>35</sup> The superior court should have reviewed ACAT's emergency motion under the standards outlined in RAP 504, as explained in the preceding paragraphs. As RAP 504 plainly states, an emergency motion is appropriate when, "to avoid irreparable harm, relief is needed in less time than would normally be required for the court to receive and consider a response" and "it clearly appears from specific facts . . . that immediate and irreparable injury, loss or damage would result."<sup>36</sup>

Instead of reviewing ACAT's emergency motion under the applicable standards of RAP 504, the superior court, based on only a partial record and without the benefit of full briefing by any of the parties, applied a deferential standard to review the Commissioner's decision to deny ACAT's request for a stay.<sup>37</sup> Stated another way, the superior court applied a standard of review that would be appropriate to an appeal of an agency's interpretation of its own regulations that did not implicate constitutional or legal

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<sup>35</sup> See Order and Stay, Ex. 22 to ACAT's Petition for Review, at 5-7.

<sup>36</sup> Alaska RAP 504.

<sup>37</sup> See Order and Stay, Ex. 22 to ACAT's Petition for Review, at 5-7.

rights of individuals. Because ACAT's constitutional and legal rights are implicated—and it was inappropriate for the superior court to make a ruling beyond the emergency motion because the agency had not provided a record and the parties, including ACAT, had not briefed the merits of its case—the superior court applied an incorrect standard of review and, as a result, erred in denying ACAT's emergency motion.

### III. ARGUMENT

The ADEC's decision to issue pesticides permit #10-SOL-01 based on an incomplete, misleading and legally deficient application resulted in the permit being issued without proper notice to the public or interested municipalities or local governments in violation of ACAT's due process rights under the Alaska and U.S. Constitutions. By the Commissioner's failure to grant a stay of spraying under the permit, such that ACAT is exposed to the risk of immediate and irreparable harms while forced to challenge the substance of the permit through administrative channels after damage is done, ACAT's fundamental rights to due process and access to the courts are further violated. Because spraying under the permit, which does not require any public notice or posting of the spray area, will effectively prevent ACAT and the public from its common use of fish, wildlife and waters, and access to navigable waters, the ADEC also has violated ACAT's rights under Article VIII §§ 3 and 14 of the Alaska Constitution.

ACAT also has outlined various legal deficiencies in the permit application,<sup>38</sup>—deficiencies that go to the heart of protecting public health, water and fish, which is the mission of the ADEC—and the Commissioner acknowledged that ACAT has “shown a

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<sup>38</sup> See ACAT Request, Ex. 6 to ACAT's Petition for Review, at 2-18.

likelihood of success on the merits” on at least some of its claims.<sup>39</sup> The superior court also acknowledged some likelihood of success.<sup>40</sup>

**A. ACAT’s Due Process Rights Were Violated in Both the Notice Provided for Issuance of the Permit and the Lack of a Stay Pending a Decision on the Merits.**

The Due Process Clause of the Alaska Constitution provides, “No person shall be deprived of life, liberty, or property, without due process of law” and guarantees a right of meaningful access to the courts in civil actions.<sup>41</sup> The U.S. Constitution has nearly identical language, providing that “no person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>42</sup> The fundamental right to due process applies not only when a property interest is at stake, but also when interests in life and liberty are at stake. ACAT, as citizens of the state, certainly have a general property interest in the public trust resources of the state—land, water, wildlife, and fish<sup>43</sup>—but what are particularly at stake here are ACAT’s interests in life and liberty.<sup>44</sup>

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<sup>39</sup> Commissioner’s June 30, 2010, Decision, Ex. 7 to ACAT’s Petition for Review, at 2.

<sup>40</sup> See Statements by Judge Williams Morse (July 12, 2010).

<sup>41</sup> Alaska Const. art. 1, § 7.

<sup>42</sup> U.S. Const. amend. V.

<sup>43</sup> See Alaska Const. art. VIII, §§ 3 and 4. In *Owsichek v. State, Guide Licensing and Control Bd.*, this Court recognized the importance of the rights afforded to members of the public over public trust land and resources: “[s]ince the right of common use is guaranteed expressly by the constitution [under Article VIII, section 3], it must be viewed as a highly important interest running to each person within the state.” 763 P.2d 488, 492, n. 10 (Alaska 1988). The Court explained that the common use clause of the Alaska Constitution “is intended to provide independent protection of the public’s access to natural resources,” and that “a minimum requirement of this duty is the prohibition against any monopolistic grants or special privileges.” *Id.* In addition, although the Court in *Greenpeace, Inc.*, expressly declined to “decide whether Greenpeace had a property interest in the DNR permit dispute,” it nevertheless concluded that “[o]nce Greenpeace challenged TWUP A00-10 administratively, it was entitled to due process,

Because the ADEC's regulations require a person to exhaust administrative remedies before seeking a remedy in court, meaningful access to the courts and Alaska's judicial system require a fair adjudicatory hearing by the ADEC.<sup>45</sup> Additionally, meaningful access to court cannot be guaranteed, as required by the Alaska Constitution, if ACAT is required to exhaust the ADEC's administrative remedies, but is denied procedural due process throughout the ADEC proceeding and even when the spraying occurs. This occurred when the herbicide was scheduled to be applied as soon as the permit became effective and would be complete before ACAT received relief on its request for adjudicatory hearing. As this Court has recognized, "there is a certain level of

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i.e., notice and an opportunity to be heard, while the agency resolved the permit dispute, including the stay issue." 96 P.3d at 1056.

<sup>44</sup> This Court has held that due process attaches to an interest that is not a tangible property right, but is nonetheless "an individual interest of sufficient importance to warrant constitution protection." *Nichols v. Eckert*, 504 P.2d 1359, 1362 (Alaska 1973). For example, in *Nichols*, the Alaska Supreme Court held that although "government employment is a privilege and not a property right," due process requires that non-tenured teachers who can only be dismissed for cause be afforded a hearing prior to their dismissal, notwithstanding that statutory scheme does not afford post-dismissal hearings to non-tenured teachers. *Id.* at 1362-1363; *see also White v. State, Dep't of Natural Res.*, 984 P.2d 1122, 1126 (Alaska 1999) (assignee's rights to oil and gas exploration lease are "of sufficient importance to warrant constitutional protection"); *City of Homer v. Campbell*, 719 P.2d 683, 684 (Alaska 1986) (holding that plaintiffs' statutory and proprietary interest in a zoning contract is of sufficient importance to warrant due process protection under constitutional due process requirements); *Miner's Estate v. Commercial Fisheries Entry Comm'n*, 635 P.2d 827, 832 (Alaska 1981) (concluding that applicant's interest in applying for a limited fishery entry permit under the Limited Fishery Entry Act and regulations warranted due process protections); *Herscher v. State, Dep't. of Commerce*, 568 P.2d 996, 1002 (Alaska 1977) (proprietary interest in hunting guide license was of sufficient importance to warrant due process protections); *McCarrey v. Commissioner of Natural Res.*, 526 P.2d 1353 (Alaska 1974) (due process applies to termination of grazing lease).

<sup>45</sup> *See* 18 AAC 15.300(c); *Stein v. Kelso*, 846 P.2d 123, 126 (Alaska 1993).

procedural fairness that must be accorded to an affected party.”<sup>46</sup> That procedural fairness was not present in this case.

ACAT was denied due process in this case because notice and an opportunity to be heard was not provided as follows: (1) the ADEC failed to supply adequate notice before issuing the permit because required information was not provided in the permit application, making it incomplete and misleading; (2) the Commissioner failed to impose a stay, automatic or otherwise, of the ADEC’s April 30, 2010, decision to issue the permit to the ARR pending ACAT’s exhaustion of administrative remedies; and (3) the ADEC failed to require the posting of notice in the spray area when spraying was to occur.

The superior court’s determination that ACAT’s due process claim is a “thin gloss”<sup>47</sup> on the real claim, which in the court’s opinion was a regulatory challenge, ignores the fundamental right at stake, contributing to the incorrect standard of review—one of reasonableness and deference—being applied. It is worth noting that the superior court did not even mention ACAT’s due process rights in its written order.<sup>48</sup>

*1. ACAT’s Due Process Rights were Violated Because it did not Receive Adequate Notice Before the Permit was Issued.*

“[P]rocedural due process under the state constitution requires ‘notice and opportunity for hearing appropriate to the nature of the case.’”<sup>49</sup> Due process requires an

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<sup>46</sup> *Nichols*, 504 P.2d at 1364; *See Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970) (providing that the Alaska Constitution offers greater due process protections than the U.S. Constitution).

<sup>47</sup> Log Notes from July 12, 2010, hearing before Judge Morse 2:04:17 PM [hereinafter Log Notes] [attached as Exhibit 23].

<sup>48</sup> *See* Order and Stay, Ex. 22 to ACAT’s Petition for Review.

<sup>49</sup> *Carvalho v. Carvalho*, 838 P.2d 259, 262 (Alaska 1992) (*quoting Aguchak v. Montgomery Ward Co.*, 520 P.2d 1252, 1356 (Alaska 1974)).

“opportunity to be heard and the right to adequately represent one’s interests.”<sup>50</sup> Because the ARR’s application did not include all required information—such as what surface- or groundwaters (including residential wells) exist within or near the permit area, the dates and times of herbicide application, and soil and vegetation types that may be affected—it was misleading, incomplete and did not allow for meaningful public involvement in the decision-making process. The ADEC’s April 30, 2010, decision to issue the permit based on the ARR’s incomplete and misleading application violates the due process rights of ACAT and its individual members. Without the omitted information, discussed below in section E.3., it was impossible for ACAT and its members to be aware of or consider the potential risks and costs of herbicide spraying along the right-of-way. Absent ACAT or its members individually walking the tracks to map waters and groundwater wells along the right-of-way and testing affected soil and vegetation types—a burden that was not ACAT’s to bear in the first instance, but the ARR’s and DEC’s—ACAT had no way to obtain the missing information. And the dates and times of spraying are unknowable to ACAT or the public, but again, are required to be included within a pesticides permit application.

2. *ACAT’s Due Process Rights were Violated Because no Stay, Automatic or Otherwise, was Imposed Pending a Decision on the Merits.*

The substantive and procedural due process protections guaranteed by the Alaska and U.S. Constitutions require the ADEC to impose a stay of its April 30, 2010, decision to issue the permit so long as ACAT is required to pursue administrative remedies and the ADEC has not made a final decision that ACAT may appeal to Alaska superior court.

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<sup>50</sup> *Greenpeace, Inc.*, 96 P.3d at 1063-64 (quoting *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192-93 (Alaska 1980)).

This is especially true in this situation where the herbicide application was scheduled to occur as soon as the permit became effective and would be complete before ACAT receives relief on its request for adjudicatory hearing. Because ACAT, and its individual members, all have interests in, and are concurrent users of, the fish, wildlife and water resources that will be adversely affected by spraying under the permit, and will suffer other serious adverse health impacts from spraying, the ADEC must impose a stay of its decision pending the resolution of ACAT's request for an adjudicatory hearing and a final decision by the ADEC that, if adverse, ACAT may appeal to the Alaska superior court. Because the ADEC failed to issue an immediate stay of its April 30, 2010, decision and substantially denied ACAT's request for a stay, the ADEC violated ACAT's due process rights under the Alaska and U.S. Constitutions.

The U.S. Supreme Court has addressed a similar issue to the one here involving the federal Administrative Procedure Act.<sup>51</sup> In *Darby*, the Court discussed the legislative history of the exhaustion provision in the APA, which stated:

In no case may appeal to 'superior agency authority' be required by rule unless the administrative decision meanwhile is inoperative, because otherwise the effect of such a requirement would be to subject the party to the agency action and to repetitious administrative process without recourse. There is a fundamental inconsistency in requiring a person to continue 'exhausting' administrative processes after administrative action has become, and while it remains, effective.<sup>52</sup>

The Supreme Court further noted:

Agencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and,

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<sup>51</sup> See *Darby v. Cisneros*, 509 U.S. 137, 148 (1993).

<sup>52</sup> *Id.* (quoting S.Rep.No. 752, 79th Cong., 1st Sess., 27 (1945)); Administrative Procedure Act: Legislative History 1944-1946, S.Doc. No. 248, 79th Cong., 2d Sess., 213 (1946) (emphasis added).



second, by providing that the initial decision would be “inoperative” pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review.<sup>53</sup>

These are the very problems ACAT faces in this case. The ARR filed an application for a pesticide permit, which the ADEC then took eight months to issue despite the incomplete information available to it and the lack of on-the-ground identification and/or verification of water and groundwater wells. The ADEC’s decision came on the verge of the season for herbicide spraying, and given that such a permit had not been issued in 26 years and denied three years ago, it was a surprise to those opposing the permit in the public process (which included the vast majority of those participating). Further delay occurred because of the Commissioner’s refusal to expedite the stay issue due to the regulatory requirement to allow a 20-day public comment on the request for adjudicatory hearing and stay. A decision on the stay therefore occurred three weeks after the permit became effective. The only reason spraying had not occurred prior to a decision on ACAT’s request for a stay was because the ARR physically was not prepared to spray the herbicides.

If the administrative exhaustion requirements of the ADEC’s regulations are to serve their useful purposes and afford ACAT its due process rights under the Alaska and U.S. Constitutions, then the ADEC must stay its decision pending exhaustion of administrative remedies and, failing that, this Court must grant ACAT’s emergency motion for a continuance of the stay of the permit until ACAT’s adjudicatory hearing request is resolved. This is because, without a stay, no later hearing or remedy at law can undo the arbitrary deprivation of ACAT’s due process rights and the harm that would be

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<sup>53</sup> *Darby*, 509 U.S. at 148.

caused by the arbitrary requirement that ACAT pursue administrative exhaustion without a stay in place.<sup>54</sup>

Because the ADEC failed to issue a stay yet still required ACAT to pursue administrative remedies through the adjudicatory hearing process prior to appeal to the Alaska superior court, but for the short stay granted by the superior court, the ARR currently would be allowed to spray (and likely would have already completed spraying) under its ADEC-issued permit thereby causing untold harm to important water, fish, wildlife, soil and edible plant resources, and causing potentially significant human health impacts. The harm that will be caused if the ARR is allowed to spray will be severe and cannot subsequently be remedied through any administrative process or at law because the actions under the permit will be complete. If the ARR is allowed to spray while ACAT is required to pursue administrative exhaustion through the adjudicatory hearing process, the ADEC will violate the fundamental right of ACAT to due process guaranteed by the Alaska and U.S. Constitutions. Thus, this Court must grant ACAT's emergency motion for a continuance of the superior court's stay of pesticides permit #10-SOL-01 pending ACAT's exhaustion of administrative remedies before the ADEC.

*3. ACAT's Due Process Rights were Violated Because the ADEC Failed to Require the Posting of Notice in the Spray Area.*

ACAT's due process rights were violated because the superior court found that members of ACAT and the public could avoid the spray area.<sup>55</sup> The superior court made this finding despite the fact that the permit does not require notice to the public of when spraying will occur (only to the ADEC), and there is no requirement that the ARR post

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<sup>54</sup> See *Greenpeace Inc.*, 96 P.3d at 1064-1065 (citing *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972)).

<sup>55</sup> See Log Notes, Ex. 23 at 1:58:54 PM.

the area to let the public know that the area has been sprayed so that people can make the informed choice to avoid the area. While this is not a denial of a traditional “notice and opportunity for a hearing,” it is denial of a notice that deprives the public of making a choice that may, or likely will, result in a loss of life or liberty, as demonstrated by the Declarations of Ms. Locke and Ms. Irland.<sup>56</sup> As such, this deprivation of adequate notice deprives ACAT of constitutional due process.

**B. ACAT will Suffer Immediate and Irreparable Harm from Spraying.**

The superior court noted on numerous occasions that, once spraying commenced, it would be impossible for ACAT to obtain a remedy if it ultimately prevails on the merits of its challenge to the permit.<sup>57</sup> In fact, because it is impossible to undo the spraying and no amount of money damages could properly compensate ACAT or its members for the deprivation of their constitutionally guaranteed rights or the potentially debilitating health impacts, the immediate harm to ACAT is irreparable. Although the superior court noted that ACAT had no adequate post-spraying remedy available to it, the superior court improperly gave great deference to the ADEC’s conclusions that glyphosate and Agridex, the permitted chemicals, are nontoxic. This conclusion by the ADEC is arbitrary, and not supported by substantial evidence or the ADEC’s own conflicting actions. As such, the ADEC’s conclusion that the permitted chemicals are nontoxic does not deserve deference from this Court. Even if some weight is given to the ADEC’s factual conclusions regarding toxicity, those conclusions do not address any constitutional violations, or alone, answer the question of whether ACAT’s injury is

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<sup>56</sup> See Locke Decl. [attached as Exhibit 24]; Irland Decl. [attached as Exhibit 25].

<sup>57</sup> See Statements by Judge William Morse (July 8 and 12, 2010).

irreparable. ACAT's injury is irreparable based on various factors, including those that follow.

*1. Herbicide Spraying will Cause Irreparable Harm to Human Health.*

The ADEC, despite the ample evidence before it to the contrary,<sup>58</sup> concluded that glyphosate and Agridex do not pose serious risks to human health. The ADEC argued that glyphosate and Agridex are not toxic to human health or the environment based in large part on the fact that Roundup—which contains glyphosate but not Agridex—is one of the most commonly applied chemicals in America. However, just because a chemical is common, as DDT once was for example, does not mean that the chemical is safe. Additionally, Roundup is a different formulation than the glyphosate/Agridex combination; glyphosate and Agridex in this case is used in a commercial context, not an individual, at home context; and glyphosate and Agridex require a permit to apply by certified operators. But even Roundup is generally dealt with using rubber gloves and has application instructions on the label.

The overwhelming weight of scientific literature demonstrates that these chemicals cause severe human health impacts “including but not limited to effects on reproduction, embryonic development, endocrine, immune and neurological function as well as cancer risks.”<sup>59</sup> The ADEC even concedes that the permitted chemicals “could

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<sup>58</sup> See Porter Literature Review, Ex. 4 to ACAT's Petition for Review, at 1-3 (surveying the available literature on health impacts from glyphosate); ACAT Request, Ex. 6 to ACAT's Petition for Review, at 9-13.

<sup>59</sup> Porter Literature Review, Ex. 4 to ACAT's Petition for Review, at 3-4 (internal citations omitted); see ACAT Request, Ex. 6 to ACAT's Petition for Review, at 9-13; Porter Decl., Ex. 5 to ACAT's Petition for Review, at 22-27.

contain likely human carcinogens”<sup>60</sup> and included numerous restrictions in the permit that evidence a very real risk that the chemicals adversely impact human health.<sup>61</sup> In order to protect employees of the ARR from the harmful effects of the chemicals, the ADEC requires various safety protocols and significant protective clothing.<sup>62</sup> Yet the ADEC incongruously concludes that the chemicals are safe for the public and can cause no harm, despite the fact that the ADEC fails to even require posting of the area or notice to the public that spraying will occur so that individuals concerned for their health can avoid exposure to the toxic herbicides.<sup>63</sup>

Individuals exposed to glyphosate have an increased risk of non-Hodgkin Lymphoma<sup>64</sup> and multiple myeloma.<sup>65</sup> Glyphosate causes increased risks of birth

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<sup>60</sup> Commissioner’s June 30, 2010, Decision, Ex. 7 to ACAT’s Petition for Review, at 6.

<sup>61</sup> Pesticides Permit #10-SOL-01, Ex. 2 to ACAT’s Petition for Review, at 1-3.

<sup>62</sup> *See id.* at 1-2.

<sup>63</sup> *See generally, id.* (providing no public notice or signage of the spray area).

<sup>64</sup> *See* Hardell, L., and Eriksson, M., *A Case-Control Study of Non-Hodgkin Lymphoma and Exposure to Pesticides*, 85 *Cancer* 1353, 1353–60 (1999); Hardell L, Eriksson M and Nordstrom M., *Exposure to Pesticides as Risk Factor for non-Hodgkin's Lymphoma and Hairy Cell Leukemia: Pooled Analysis of Two Swedish Casecontrol Studies*, 43 *Leuk Lymphoma* 1043, 1043-49 (2002); De Roos, et al., *Integrative Assessment of Multiple Pesticides as Risk Factors for non-Hodgkin's Lymphoma Among Men*, 60 *Occup. Environ. Med.* 9 (2003); American Cancer Society, *Detailed Guide: Lymphoma, Non-Hodgkin Type: What Is Non-Hodgkin Lymphoma?* Cancer Reference Information, available at [http://www.cancer.org/docroot/CRI/content/CRI\\_2\\_4\\_1X\\_What\\_Is\\_Non\\_Hodgkins\\_Lymphoma\\_32.asp](http://www.cancer.org/docroot/CRI/content/CRI_2_4_1X_What_Is_Non_Hodgkins_Lymphoma_32.asp); *see also* ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 10.

<sup>65</sup> *See* De Roos, A. J. D., et al., *Cancer Incidence among Glyphosate-Exposed Pesticide Applicators in the Agricultural Health Study*, 113 *Env’tl Health Perspectives* 49, 49-54 (2005); National Cancer Institute, *What You Need to Know About: Multiple Myeloma* (2008) available at <http://www.cancer.gov/cancertopics/wyntk/myeloma/page2>; *see also* ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 10.

defects, late abortion, and endocrine disruption.<sup>66</sup> It is linked directly to parkinsonian syndrome; following an accidental exposure to glyphosate, a 54-year old man “developed disseminated skin lesions [six] hours after the accident” and one month later developed parkinsonian syndrome.<sup>67</sup>

The ADEC also relies on the fact that the U.S. Environmental Protection Agency (EPA) has registered glyphosate; however, the EPA’s registration process is flawed.

Many of [the] fundamental biological processes are not part of the EPA registration process. Moreover, the registration process only addresses the active ingredient and not the other ingredients, i.e. nonionic solvents and surfactants, which can have as much or more biological impact. Some of those other ingredients, such as POEA, have been banned from countries like Australia . . . . The instructions to users of Aquamaster<sup>68</sup> to choose their own nonionic solvents means that compounds like POEA can be used with impunity with no repercussions to the manufacturer in terms of regulatory requirements or legal liability. The recommendations for use to users that many other herbicides can also be mixed with Aquamaster is also irresponsible since there have been no tests for any mixtures effects for the EPA biological effects categories. In the few cases where mixtures have been studied, it is evident that there are significant added biological effects

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<sup>66</sup> See Garry, V. F., et al., *Birth Defects, Season of Conception, and Sex of Children born to Pesticide Applicators Living in the Red River Valley of Minnesota, USA*, 110 (Suppl3) *Environ Health Perspect* 441, 441–49 (2002); Arbuckle, T.E., Z. Lin, and L.S. Mery., *An Exploratory Analysis of the Effect of Pesticide Exposure on the Risk of Spontaneous Abortion in an Ontario Farm Population*, 109 *Environmental Health Perspectives* 851, 851-57 (2001); Walsh, L. P., et al., *Roundup Inhibits Steroidogenesis by Disrupting Steroidogenic Acute Regulatory (StAR) Protein Expression*, 108 *Environ Health Perspect* 769, 769–76 (2000); see also ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 10.

<sup>67</sup> Barbosa, E.R. et. al., *Parkinsonian After Glycine-Derivate Exposure*, 16(3) *Movement Disorders*, 565-568 (2001).

<sup>68</sup> Aquamaster is a trade name for an herbicide containing glyphosate and water. See Porter Literature Review, Ex. 4 to ACAT’s Petition for Review, at 3-4; see also, Monsanto, Aquamaster Technical Fact Sheet 1 (January 2002) available at <http://www.monsanto.com/ito/pdfs/aquaFactSheet.pdf>.

which again are not part of the registration process.<sup>69</sup>

Aquamaster is the product that the permit authorizes the ARR to use here.

Various solvents and surfactants such as Agridex, which the ADEC has approved for use under the permit, can further exacerbate the problems associated with glyphosate and pose serious health risks in its own right.<sup>70</sup> Because the ADEC admits that it is not privy to the actual ingredients in Agridex, it therefore cannot make a determination about the chemical's risks, which makes a determination that these chemicals are nontoxic arbitrary and not supported by the record.<sup>71</sup>

The adjuvants in Agridex have been shown to kill human cells and cause other adverse impacts to embryonic, placental and umbilical cord cells at extremely low concentrations.<sup>72</sup> Polyethyloxylated tallowamine, despite commonly being characterized

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<sup>69</sup> Porter Literature Review, Ex. 4 to ACAT's Petition for Review, at 3-4 (internal citations omitted); *see* ACAT Request, Ex. 6 to ACAT's Petition for Review, at 9-13; Porter Decl., Ex. 5 to ACAT's Petition for Review, at 22-27.

<sup>70</sup> *See* Marco, P., et al., *32P-postlabeling Detection of DNA Adducts in Mice Treated with the Herbicide Roundup*, 31 *Environmental and Molecular Mutagenesis* 55, 55-59 (1998); Dallegrave, E., et al., *The Teratogenic Potential of the Herbicide Glyphosate-Roundup® in Wistar Rats*, 142 *Toxicology Letters*, 45, 45-52 (2003); Dallegrave, E., et al., *Pre- and Postnatal Toxicity of the Commercial Glyphosate Formulation in Wistar Rats*, 81 *Arch Toxicol* 665, 665-73 (2007); Marc, J., Mulner-Lorillon, O., and Bellé, R., *Glyphosate-based Pesticides Affect Cell Cycle Regulation*, 96 *Biology of the Cell* 245, 245-49 (2004); *see also* ACAT Request, Ex. 6 to ACAT's Petition for Review, at 10-11.

<sup>71</sup> *See* ADEC, *Responsiveness Summary* 38-39 (Apr. 30, 2010) [hereinafter ADEC Responsiveness Summary] [attached as Exhibit 17 to ACAT's Petition for Review] (stating that it does not know the ingredients in Agridex).

<sup>72</sup> *See* Benachour, N., & Seralini, G.E., *Glyphosate Formulations Induce Apoptosis and Necrosis in Human Umbilical, Embryonic, and Placental Cells*, 22 *Chemical Research in Toxicology* 97, 97-105 (2008); *see also* ACAT Request, Ex. 6 to ACAT's Petition for Review, at 9-12.

as “inert,” accounts for more than 86% of glyphosate’s toxicity.<sup>73</sup> In addition, the adverse impacts from glyphosate, and its accompanying solvents and surfactants, are amplified with time and can have great impacts on human reproduction and fetal development.<sup>74</sup>

Once these dangerous herbicides are applied to the ARR’s right-of-way, they will cause immediate harm to the health of anyone exposed to the chemicals themselves, or the waters, fish, wildlife, soil or edible plants contaminated with the chemicals. Two ACAT members that live in Seward, Alaska, Ms. Dorothy Locke and Ms. Mary Jane Irland, have developed various serious and debilitating symptoms as a result of exposure to the chemical, DowTherm SR-1 (ethylene glycol), while at work, starting on August 10, 2009.<sup>75</sup> Ms. Locke and Ms. Irland are both recovering from the exposures and are under treatment for the exposures, but based upon their experience of adverse reactions when exposed to other chemicals, both must avoid all exposure to toxic chemicals—even those that are not responsible for their original work-related injuries—and state that they are very likely to be bedridden, hospitalized, and/or permanently disabled by further

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<sup>73</sup> See Tsui, M. and Chu, L., *Aquatic Toxicity of Glyphosate-based Formulations: Comparison Between Different Organisms and the Effects of Environmental Factors*, 52 *Chemosphere* 1189, 1189-97 (2003); see also ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 11.

<sup>74</sup> See Benachour N, et al., *Time and Dose-dependent Effects of Roundup on Human Embryonic and Placental Cells*, 53 *Arch Environ Contam Toxicol.* 126, 126-33 (2007); Richard S, et al., *Differential Effects of Glyphosate and Roundup on Human Placental Cells and Aromatase*, 113 *Environ Health Perspect* 716, 716-20 (2005); Arbuckle, T. E., Lin, Z., and Mery, L. S., *An Exploratory Analysis of the Effect of Pesticide Exposure on the Risk of Spontaneous Abortion in an Ontario Farm Population*, 109 *Environ Health Perspect* 851, 851-57 (2001); see also ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 9-12.

<sup>75</sup> Locke Decl., Ex. 24, at 2-4, ¶¶ 4-12; Irland Decl., Ex. 25, at 2, ¶¶ 4-6.



chemical exposure such as would result from spraying by the ARR.<sup>76</sup>

Eklutna Villagers and Eklutna Tribal Members rely on the woods and wetlands near the ARR right-of-way for hunting moose and grouse that forage on vegetation along the right-of-way.<sup>77</sup> If herbicides are applied to this vegetation, these animals will become contaminated by ingesting dangerous chemicals, and individuals hunting in the area will face exposure to toxic glyphosate and Agridex. Villagers also collect raspberries, high bush cranberries, and currants near the right-of-way.<sup>78</sup> Herbicides migrate through water, root systems, and airborne particulates, inevitably contaminating vegetation outside of the spray area.<sup>79</sup> Villagers and members of the public will be forced to either curtail their recreational activities adjacent to the permit area or face exposure to glyphosate.

The responses received by the ADEC in response to ACAT's requests for a stay and adjudicatory hearing also were overwhelmingly opposed to the ARR's herbicide spraying. While the Commissioner acknowledged the comments of an epidemiologist in Juneau, no particular weight was given to those comments or any others.<sup>80</sup> Further, no mention was made of the comments submitted by Ms. Betsy Arbelovsky, a woman diagnosed with Young Onset Parkinson's likely due to exposure to herbicides at a young age living here in Alaska.<sup>81</sup> Ms. Arbelovsky states that she is "terrified of the prospect of

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<sup>76</sup> Locke Decl., Ex. 24, at 6-7, ¶¶ 19-20; Irland Decl., Ex. 25, at 3-4, ¶¶ 12-14.

<sup>77</sup> ACAT Request, Ex. 6 to ACAT's Petition for Review, at 9.

<sup>78</sup> *Id.*

<sup>79</sup> *See id.* at 9-12; Marcia G. Nishioka, et. al., *Distribution of 2, 3-D in Air and on Surfaces inside Residences after Lawn Applications: Comparing Exposure Estimates from Various Media for Young Children*, 109 Environ. Health Perspective 11 (2001).

<sup>80</sup> *See* Commissioner's June 30, 2010, Decision, Ex. 7 to ACAT's Petition for Review, at 7, n.45; Email from Peter Holck to Gary Mendivil (June 17, 2010) [attached as Exhibit 21].

<sup>81</sup> *See* Email from Betsy Arbelovsky to Gov. Sean Parnell and Gary Mendivil (June 24, 2010) [attached as Exhibit 27].

exposing other Alaskans & desperate to avoid further exposure for myself.”<sup>82</sup> These comments demonstrate the irreparable harm to health at issue should these herbicides be applied by the ARR. While many do not immediately suffer from particular sensitivity to chemicals, those that do are particularly susceptible and there is no way to know what toxic chemicals may result in such adverse health effects when an exposure occurs, as with Ms. Arbelovsky.

*2. Herbicide Spraying will Cause Irreparable Harm to by Contaminating Nearby Waters, Fish, Wildlife, Soil and Edible Plants.*

Glyphosate and Agridex, the chemicals authorized for spraying under the permit, have numerous potential adverse impacts to water, fish, wildlife, soil and edible plants such as those found near the permit area. Members of ACAT’s organizations use and enjoy these resources, and will suffer irreparable harm once these resources are exposed to the herbicides.<sup>83</sup>

Aquatic species in particular will suffer adversely if the ARR is allowed to spray along its right-of-way. The EPA recognizes that glyphosate has the potential to contaminate surface water resources because, unlike some other less toxic alternatives, sunlight and water does not cause glyphosate to break down.<sup>84</sup> Even when glyphosate is not sprayed directly into aquatic environments, it poses the risk of water contamination because it is easily transported to nearby waters through soil particles suspended in runoff

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<sup>82</sup> *Id.*

<sup>83</sup> See Locke Decl., Ex. 24; Irland Decl., Ex. 25; ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 2-13.

<sup>84</sup> See EPA, Office of Prevention, Pesticides and Toxic Substances, Glyphosate Summary Document Reregistration Review: Initial Docket 10 (2009); ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 11-12.

waters, leaching, and drift.<sup>85</sup> Contamination of surface water can lead to adverse human health impacts, as well as congestion of the lungs and increased breathing rates over short exposure periods, and MCL kidney damage and reproductive harms over long-term exposure periods.<sup>86</sup> In addition, contaminated surface waters threaten wildlife that is dependent on the surface waters near the ARR right-of-way.

The ADEC cites to various restrictions in the permit for its claim that the spraying will not contaminate waters and cause resulting harm. However, as discussed below, the ADEC fails to identify or consider the prevalence of numerous surface- and groundwaters within or near the spray area.<sup>87</sup> The EPA requires glyphosate to be labeled as “toxic to fish,”<sup>88</sup> and, as the ADEC concluded in 2007 when it rejected a similar prior application by the ARR, “any spray method, no matter how precautionous, would likely result in the proposed herbicides reaching waters of the state.”<sup>89</sup>

Aquatic environs are especially vulnerable to the effects of glyphosate and, as other research has shown, the impacts of surfactants such as those contained in Agridex must be considered when evaluating the possible consequences of herbicide spraying.<sup>90</sup>

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<sup>85</sup> See Benachour, *supra* note 72, at 97-105; ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 10-12.

<sup>86</sup> See *id.*

<sup>87</sup> See ACAT Emergency Motion, Ex. 12 to ACAT’s Petition for Review, at 42-47; ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 5-7; John Strassenburgh, *Comments and Exhibits in Opposition to Granting the ARR Permit* 1-2 and 16-18 (Sept. 12, 2009) [hereinafter Strassenburgh Comments] [attached as Exhibit 16 to ACAT’s Petition for Review].

<sup>88</sup> Porter Literature Review, Ex. 4 to ACAT’s Petition for Review, at 3.

<sup>89</sup> ADEC 2007 Decision, Ex 3 to ACAT’s Petition for Review, at 4.

<sup>90</sup> See Battaglin, W. A., et al., *The Occurrence of Glyphosate, Atrazine, and Other Pesticides in Vernal Pools and Adjacent Streams in Washington, DC, Maryland, Iowa, and Wyoming, 2005–2006*, 155 *Environmental Monitoring and Assessment* 281, 281-307 (2008); Relyea, R., *The Lethal Impact of Roundup on Aquatic and Terrestrial*

Glyphosate can have residual effects on fish and aquatic environments, and its effects can be compounded by certain natural environmental conditions such as high sedimentation levels, temperature, pH levels, and water chemistry.<sup>91</sup> A 2005 study revealed that Roundup, a common home-use glyphosate product, is “extremely lethal” to amphibians in concentrations occurring in the environment.<sup>92</sup> Even in low concentrations, glyphosate causes serious sublethal effects in fish, including erratic swimming, gill damage, and liver structure changes.<sup>93</sup> If these herbicides enter the numerous waterways in and near the permit area, they will pollute the waters, and endanger fish and wildlife and natural resources that ACAT and the public depend upon for recreation and sustenance.<sup>94</sup>

3. *Herbicide Spraying will Cause Irreparable Harm to ACAT’s Individual Members by Violating Their Constitutional Rights.*

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*Amphibians*, 15 Ecological Applications 1118, 1118–24 (2005); Howe C.M., et al., *Toxicity of Glyphosate-based Pesticides to four North American Frog Species*, 23 Environ Toxicol Chem 1928, 1928-38 (2004); Bringolf R.B. et al., *Acute and Chronic Toxicity of Glyphosate Compounds to Glochidia and Juveniles of Lampsilis siligoidea (Unionidae)*, 26 Environ Toxicol Chem 2094, 2094-100 (2007); ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 10-12.

<sup>91</sup> See EPA, *supra* note 84, at 10; Folmar, L. C., Sanders, H. O. and Julin, A. M., *Toxicity of the Herbicide Glyphosate and Several of its Formulations to Fish and Aquatic Invertebrates*, 8 Archives of Environmental Contamination and Toxicology 269, 269–78 (1979); ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 10-12.

<sup>92</sup> Relyea, *supra* note 90, at 1118–24; *see* ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 11-12; *see also* Bringolf, *supra* note 90, at 2094–100.

<sup>93</sup> Norris, L.A., H.W. Lorz, and S.V. Gregory, *Forest Chemicals: In: Influences of Forest and Rangeland Management on Salmonid Fishes and their Habitats*, 19 American Fisheries Society Special Publication, 207–296; NOAA, McInis, R.R., *Biological Opinion of the NOAA National Marine Fisheries Service SWR-01-SA-6117: JSS* (2003).

<sup>94</sup> While the ADEC looks to a recent study on glyphosate by the University of Alaska-Fairbanks, that study did not evaluate glyphosate in combination with any surfactants, as would be used by the ARR, and did not evaluate the toxicity or any other impacts from Agridex. *See* Strassenburgh Comments, Ex. 16 to ACAT’s Petition for Review, at 9.

In addition to the immediate and irreparable harm ACAT's members will suffer from the adverse impacts herbicides have on human health and natural resources, ACAT members will suffer from violations of their due process rights under the Alaska and U.S. Constitutions and their Article VIII rights under the Alaska Constitution. Violations of constitutional rights constitute irreparable harm for injunctive relief purposes. Courts have found that even a temporary deprivation of a First Amendment freedom of expression right is generally sufficient to constitute irreparable harm.<sup>95</sup> A violation of constitutional rights under the Commerce Clause constitutes an irreparable injury for the purposes of considering an injunction.<sup>96</sup> Courts have also found that irreparable injury is present where a violation occurred of constitutional voting rights, rights under the Eighth Amendment, or rights under the Fourth Amendment.<sup>97</sup> Similarly, the ADEC's violation of ACAT's constitutional rights to due process and its rights under Article VIII of the Alaska Constitution amounts to irreparable injury.

Article VIII confers substantive rights on ACAT and the public, including reservation of rights to fish, wildlife, and waters for the common use<sup>98</sup> and free access to

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<sup>95</sup> See *Citizens for a Better Env't v. City of Park Ridge*, 567 F.2d 689, 691 (7<sup>th</sup> Cir. 1975); *Jacobsen v. U.S. Postal Serv.*, 812 F.2d 1151, 1154 (9<sup>th</sup> Cir. 1987); cf. *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120-21 (1965) (allegation of impairment of freedom of expression demonstrated an irreparable injury).

<sup>96</sup> *Citicorp Serv. Inc. v. Gillespie*, 712 F.Supp. 749, 753 (N.D.Cal. 1989); *Kendall-Jackson Winery v. Branson*, 82 F.Supp.2d 844, 878 (N.D.III. 2000) (citing *Citicorp*); *Gov't Suppliers Consolidating Serv., Inc. v. Bayh*, 734 F.Supp. 853, 864 (S.D.Ind. 1990).

<sup>97</sup> See *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997) (constitutional voting rights); *Ambrose v. Malcolm*, 414 F.Supp. 485, 493 (S.D.N.Y. 1976) (deprivation of rights under Eight Amendment is "irreparable by definition"); *Amalgamated Transit v. Sunline Transit*, 663 F.Supp. 1560, 1564 (C.D. Cal. 1987) (fourth amendment).

<sup>98</sup> Alaska Const. art. VIII, § 3.

the navigable or public waters of the State.<sup>99</sup> The Alaska Supreme Court observed:

The framers of our state constitution were united in the view that the lands and other natural resources of this abundant state are among the most prized assets. Although favoring productive use of these resources, the framers believed that development should proceed only when it benefitted the people of the state and only in compliance with applicable constitutional and statutory processes.<sup>100</sup>

Due to the toxic effects of the chemicals approved for use under the permit, the lack of public notice of when spraying will occur and lack of posting at the spray area, and the inevitable contamination of waters near the permit area, herbicide spraying under the permit will effectively exclude ACAT's members and members of the public from access to, and common use of, waters within and near to the permitted treatment area.<sup>101</sup>

As the ADEC noted in 2007, "any spray method, no matter how precautionous, would likely result in the proposed herbicides reaching waters of the state."<sup>102</sup> This is a violation of ACAT's and their individual members' constitutionally guaranteed rights under Article VIII of the Alaska Constitution. Not only will ACAT members be denied use of these resources during the spraying, but they will suffer harm into the foreseeable future from the lingering effects glyphosate and Agridex have on waters, fish, wildlife, soils and edible plants. If spraying is allowed, there will be a clear violation of ACAT's substantive constitutional rights conferred by Article VIII.

In coming to its April 30, 2010, decision, the ADEC failed to properly consider ACAT's constitutional harms, as did the superior court in its July 12, 2010, decision.

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<sup>99</sup> Alaska Const. art. VIII, § 14.

<sup>100</sup> *Moore v. State*, 553 P.2d 8, 20 (Alaska 1976).

<sup>101</sup> See Locke Decl., Ex. 24, at 7, ¶¶ 21-23; Irland Decl., Ex. 25, at 3-4, ¶¶ 10-14; ACAT Request, Ex. 6 to ACAT's Petition for Review, at 3-4.

<sup>102</sup> ADEC 2007 Decision, Ex 3 to ACAT's Petition for Review, at 4.

Because these constitutional rights are at stake, this Court must review these issues *de novo* and owe no deference to the underlying decisions in this case. The violation of these constitutional rights, as discussed, constitute irreparable harm which warrants a continuance of the stay.

**C. The ARR is Adequately Protected, and Granting this Emergency Motion will not Significantly Harm the ARR.**

As discussed in ACAT's briefing before the superior court and in its original request for a stay and adjudicatory hearing, readily available alternative means of vegetation control have proven effective.<sup>103</sup> In 2006, while utilizing mechanical and manual methods without the use of herbicides, the ARR boasted about its safety record and that "2005 marked an all-time low in terms of employee accidents and train derailments, and our train accident rate is half the national average."<sup>104</sup> Cleaning and changing of ballast at regular intervals (required infrequently—e.g., every 10 years) has proven to be effective by the ARR's own admission at reducing and eliminating weed problems.

Other railroads in Canada and Europe, and even research within the U.S., continue to develop non-toxic alternatives to herbicides that could serve adequately the ARR's needs without endangering public health or important natural resources, and without causing undue additional costs to the ARR.<sup>105</sup> A 2003 report commissioned by the U.S. Department of Transportation and the Federal Transit Administration concluded that

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<sup>103</sup> See ACAT Emergency Motion, Ex. 12 to ACAT's Petition for Review, at 29-38; ACAT Request, Ex. 6 to ACAT's Petition for Review, at 13-15.

<sup>104</sup> ARR, *Community Ties* 2 (2nd Quarter, 2006) available at <http://www.akrr.com/pdf/Comm%20Ties%202nd%20Quarter%202006.pdf>.

<sup>105</sup> See ACAT Request, Ex. 6 to ACAT's Petition for Review, at 13-15; ACAT Emergency Motion, Ex. 12 to ACAT's Petition for Review, at 31-34.

prototype non-chemical weed control equipment “was highly effective at killing treated vegetation, easy to operate, and adaptable to a variety of application platforms.”<sup>106</sup> The steering committee for this project determined that wet infrared was the “single most appropriate technology.”<sup>107</sup> The report states:

The wet infrared technology offers advantages not found with any other thermal weed control systems. It is highly effective, and efficient with respect to propane and water use. The combined use of pre-watering and three forms of intense heat for weed control (turbulent hot air, infrared energy, and direct flame), with simultaneous and selective application of water for fire prevention, all in a single treatment pass, is a unique technology. The prototype weed control equipment was highly effective at killing treated vegetation, easy to operate, and adaptable to a variety of application platforms. As environmental, water quality, and human health concerns continue to add constraints on routine use of pesticides, other forms of vegetation management must be developed.<sup>108</sup>

The report also noted that the equipment was very durable and rugged:

[Railroad] personnel adapted the ballast regulator as an effective platform for carrying and using Sunburst’s weed control equipment. The regulator was stable and rugged; carrying the 3 thermal units with ease while the telescoping arms provided more than adequate strength, flexibility, and reach for manipulating the four-foot units for treatments along the side of the ballast. Development of the lorry car to carry propane and water supplies and equipment was an excellent innovation that worked well, although additional propane tank capacity would be needed when treating an extensive length of track.<sup>109</sup>

The Canadian Pacific Railway implemented hot water technology as a “primary management tool on a portion of its track in the Pacific Northwest.”<sup>110</sup> The technology,

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<sup>106</sup> U.S. Dept. of Transportation, *Non-Chemical Methods of Vegetation Management on Railroad Right of Ways 3* (2003) [attached as Exhibit 28].

<sup>107</sup> *Id.* at 23.

<sup>108</sup> *Id.* at 8.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 7.



tested across North America, was successful and effective in vegetation control.<sup>111</sup> Other alternatives to the use of herbicides tested and used in Canada and Europe include mechanical removal, steam, competing and replacement vegetation, timely mowing, thermal infrared, vacuum cutters, geotextile applications, and use of soybean-based fuels to support infrared treatment. In Germany, infrared methods that cover the ballast and shoulders up to 17 feet on either side of the railway centerline have proven to be the most successful and cost effective of the non-chemical alternatives.<sup>112</sup> In Sweden, the railroad uses a combination of preventative and non-chemical measures on 750 miles of track where chemical weed control may not be used. Mechanical measures including cutting, girdling, mowing and grazing animals provide effective means to eradicate unwanted vegetation along rights-of-way.<sup>113</sup>

In contrast, attempts by the ARR to evaluate and implement alternative technologies have been poorly designed and executed. The ARR's officials attempt to justify herbicide use citing safety concerns, but as shown through the successful use of non-chemical vegetation management by the ARR and in other countries, non-toxic alternatives to herbicides can effectively and economically manage vegetation along railroad right-of-ways without risking excessive harm to railroad workers, the public or the environment.

Using alternative means of removing vegetation will ultimately benefit the ARR. The use of glyphosate to manage vegetation can lead to the development of glyphosate-

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 20.

<sup>113</sup> See Lamming, Lani, *Successfully Controlling Noxious Weeds with Goats*, 21 *Pesticides and You* 19, 20-22 (2001).

resistant weeds.<sup>114</sup> The British Columbia government recommends the use of ecological vegetation management rather than the use of herbicides due to this resistance issue. The government's Integrated Pest Management Program notes that:

[R]epeated herbicide applications to keep sites bare, such as around electrical substations, along a fence lines or railroad tracks, will encourage the growth of weeds. The herbicides create a disturbance, both in the vegetation, and, depending on the herbicide, in the soil—which then encourages weed invasion. This disturbance is not limited to the area of application, but may be felt in the vegetation for some distance away . . . . Minimizing herbicide use can reduce weed growth and result in cost effective vegetation management systems.<sup>115</sup>

Herbicide applications are likely to result in higher costs over the long-term, as plants develop resistance to herbicide applications.<sup>116</sup> The use of herbicides will perpetuate

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<sup>114</sup> See Givens, W. A., et al., *A Grower Survey of Herbicide Use Patterns in Glyphosate-Resistant Cropping Systems*, 23 *Weed Technology* 156, 156-61 (2009); VanGessel, M. J., *Glyphosate-resistant Horseweed from Delaware*, 49 *Weed Science* 703, 703-05 (2001); Koger, C. H., et al., *Glyphosate-Resistant Horseweed (Conyza canadensis) in Mississippi*, 18 *Weed Technology* 820, 820-25 (2004); Koger, C. H. and Reddy, K. N., *Role of Absorption and Translocation in the Mechanism of Glyphosate Resistance in Horseweed (Conyza canadensis)*, 53 *Weed Science* 84, 84-89 (2005); Hembree, K. and Shrestha, A., *Glyphosate-Resistant Horseweed In California* (University of California, Davis 2005); Shrestha, A., Hembree, K. J. and Va, N., *Growth Stage Influences Level of Resistance in Glyphosate-resistant Horseweed*, 61 *California Agriculture* 67 (2007); Simarmata, M., Bughrara, S. and Penner, D., *Inheritance of Glyphosate Resistance in Rigid Ryegrass (Lolium rigidum) from California*, 53 *Weed Science* 615, 615-19 (2005); Simarmata, M., Kaufmann, J. E. and Penner, D., *Potential Basis of Glyphosate Resistance in California Rigid Ryegrass (Lolium rigidum)*, 51 *Weed Science* 678, 678-82 (2003); Powles, S. B., *Evolved Glyphosate-resistant Weeds Around the World: Lessons to be Learnt*, 64 *Pest Manag Sci.* 360, 360-65 (2008); Culpepper, A. S., *Glyphosate-Induced Weed Shifts*, 20 *Weed Technology* 277, 277–81 (2006); see also ACAT Request, Ex. 6 to ACAT's Petition for Review, at 9-13.

<sup>115</sup> Ministry of Environment, British Columbia, Integrated Pest Management, B.C. Pest Monitor – Former Newsletter of IPM in British Columbia, available at [http://www.env.gov.bc.ca/epd/ipmp/publications/pest\\_monitor/vol5\\_1.htm](http://www.env.gov.bc.ca/epd/ipmp/publications/pest_monitor/vol5_1.htm); see ACAT Request, Ex. 6 to ACAT's Petition for Review, at 15.

<sup>116</sup> See *id.*

resistance of the vegetation to treatment and will not be effective in vegetation management in the future.<sup>117</sup>

The ARR has stated that it expects to have to spend about \$750,000 “to fight persistent vegetative overgrowth” in 2010 “if it is not allowed to apply herbicides[,]” but it has provided no information to show that it might spend less if it is allowed to spray herbicides.<sup>118</sup> Any potential harm to the ARR is speculative, and could have been avoided but for the ARR’s tenacity in obtaining permits to apply toxic chemicals that have been prohibited for decades at the expense of public health and safety.

The ARR could have mitigated the need to apply pesticides to immediately clear track vegetation. The ARR argues that it must apply herbicides to the right-of-way in the immediate future to abate on-going violations from the Federal Railroad Administration (FRA) and summer track closures. According to the ARR, the FRA warned the railroad in April, 2009. The ARR began the application process seeking its pesticide permit in 2009, referencing potential economic losses due to track closures in the 2009 summer season. The 2009 summer season referenced in the application passed without the ARR receiving a pesticide permit and without spraying along the ARR right-of-way and, instead of exploring herbicide alternatives, the ARR choose to wait throughout the 2009 summer season and into 2010 for the ADEC to issue a pesticides permit in response to the ARR’s “emergency.” Whatever harm the ARR may suffer, in the form of FRA violations and economic losses due to track closures (which the ARR has failed to

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<sup>117</sup> *See id.*

<sup>118</sup> ADEC Response to Request for Stay, Ex. 9 to ACAT’s Petition for Review, at 5.

document),<sup>119</sup> could have been avoided if the ARR had addressed the vegetation problems in a timely manner. Instead of relying on herbicides, the ARR should have undertaken alternative methods of vegetation control to address concerns of the FRA and mitigate the potential for future harm from vegetation growth.

Not a single document in the record indicates that spraying will save the ARR significant financial resources over other methods or that not spraying will impinge upon ARR's interests.<sup>120</sup> The superior court also found that the harms to the ARR were "overstated" and that any economic or safety issues were difficult to calculate or quantify.<sup>121</sup>

**D. No Bond is Required Because the ARR is Adequately Protected.**

To show adequate protection for the opposing party, ordinarily a party that seeks a stay must file a bond.<sup>122</sup> No bond is required here, however, since neither the ARR nor the ADEC will not suffer serious injury if the Court grants this emergency motion and prevents spraying along the right-of-way. Even if the ARR can demonstrate that it would be harmed by using alternative means of vegetation control instead of applying herbicides, no bond, or at most a nominal bond, should be required. In *Jourdan v. Nationsbank Mortgage Corp.*, the court applied the public interest litigant test, excusing the bond requirement when: (1) the case effectuates strong public policies; (2) success by the Plaintiff will benefit numerous people; (3) only a private party can be expected to bring the suit; or (4) the public interest litigant has no economic incentive to file the

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<sup>119</sup> See Commissioner's June 30, 2010, Decision, Ex. 7 to ACAT's Petition for Review, at 10-11.

<sup>120</sup> Commissioner's June 30, 2010, Decision, Ex. 7 to ACAT's Petition for Review, at 5.

<sup>121</sup> See Statements by Judge William Morse (July 12, 2010).

<sup>122</sup> See Alaska RAP 603(a)(2)(A).

suit.<sup>123</sup> Similarly, the court may excuse a bond requirement when requiring security would effectively deny access to judicial review.<sup>124</sup>

ACAT easily satisfies the public interest litigant test. First, it seeks this emergency motion for a continuance of the stay to prevent dangerous herbicide spraying that will pollute valuable public resources and adversely affect public health. Second, if ACAT prevails, the public at large will benefit from enjoying water, walking paths, recreation areas and subsistence and sport resources near the ARR right-of-way that are free of dangerous herbicides. Third, only a private party like ACAT can be expected to bring a suit challenging the state's decision to issue a pesticides permit to the ARR. Finally, as a non-profit membership organization dedicated to protecting the health of Alaskans from toxic chemicals, ACAT has no economic incentive to raise the issues that are the subject of this case. ACAT depends on member donations for funding, and if forced to pay the bond requirement, ACAT would be unable to litigate and therefore denied judicial review on this issue. ACAT is therefore entitled to an exemption from the bond requirement in the event that this Court grants a continuance of the stay.

**E. ACAT has Satisfied the Balance of Hardships Test Because it Raised Serious and Substantial Questions.**

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<sup>123</sup> 42 P.3d 1072 (Alaska 2002); *accord Anchorage Daily News v. Anchorage Sch. Dist.*, 803 P.2d 402 (Alaska 1990) (determining that a party meeting the standards of the public interest litigant test may be excused from the bond requirement).

<sup>124</sup> *E.g., People ex rel. Van de Kamp v. Tahoe Regional Planning*, 766 F.2d 1319, 1325-26 (9th Cir. 1985) (finding a non-profit environmental group excused from bond requirement). Some courts have exercised their equitable discretion to dispense with the bond requirement when requiring security would effectively deny access to judicial review for non-profit groups. *See, e.g., Muckelshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1518 (W.D. Wash. 1988) (requiring nominal bond or no bond when Tribes do not have the financial ability to post a substantial bond and that requiring one would effectively deny them access to judicial review).

The ADEC's decision to issue pesticides permit # 10-SOL-01 based on an incomplete, misleading and legally deficient application resulted in the permit being issued without proper notice to the public or interested municipalities or local governments in violation of ACAT's due process rights under the Alaska and U.S. Constitutions. By the Commissioner's failure to grant a stay of spraying under the permit, such that ACAT is exposed to the risk of immediate and irreparable harms while forced to challenge the substance of the permit through administrative channels, ACAT's fundamental rights to due process and access to the courts are further violated. Because spraying under the permit, which does not require any public notice or posting of the spray area, will effectively prevent ACAT and the public from its common use of fish, wildlife and waters, and access to navigable waters, the ADEC also have violated ACAT's rights under Article VIII §§ 3 and 14 of the Alaska Constitution.

ACAT also has outlined various legal deficiencies in the permit application,<sup>125</sup>—deficiencies that go to the heart of protecting public health, water and fish, which is the mission of the ADEC—and the Commissioner acknowledged that ACAT has “shown a likelihood of success on the merits” on at least some of its claims.<sup>126</sup> The superior court also acknowledged some likelihood of success.<sup>127</sup>

*1. Success on Claim of Violation of Due Process of Law.*

ACAT is likely to successfully establish that the State violated ACAT's due process rights, a fundamental right under the U.S. and Alaska Constitutions.<sup>128</sup> Because

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<sup>125</sup> See ACAT Request, Ex. 6 to ACAT's Petition for Review, at 2-18.

<sup>126</sup> Commissioner's June 30, 2010, Decision, Ex. 7 to ACAT's Petition for Review, at 2.

<sup>127</sup> See Statements by Judge William Morse (July 12, 2010).

<sup>128</sup> Alaska Const. art. 1, § 7.

the ARR's application for its pesticides permit was misleading, incomplete and did not include all required information—such as what water bodies or groundwater wells exist within or near the permit area, the dates and times of herbicide application, and soil and vegetation types that may be affected—the public, including affected cities and municipalities that are opposed to the ARR spraying, did not receive adequate notice of the proposed permit.<sup>129</sup> Those deficiencies are discussed in section A, above, and E.3. below. Without that information, ACAT was not adequately informed about the decision and could not properly consider the potential risks and costs of herbicide spraying along the ARR right-of-way.<sup>130</sup> Because the ADEC failed to issue an immediate stay of its April 30, 2010, decision and substantially denied ACAT's request for a stay, the ADEC violated ACAT's due process rights under the Alaska and U.S. Constitutions. Because there is no requirement that the ARR provide notice to the public or otherwise post the spray area when spraying occurs, ACAT also is deprived of its due process rights because it will not be informed of the hazards and is unable to make the informed decision to avoid the contaminated areas.

2. *Success on Claim of Violation of Article VIII of the Alaska Constitution.*

Article VIII, §§ 3 and 14 of the Alaska Constitution provides for common use and free access to navigable or public waters.<sup>131</sup> The permit allows the ARR to spray herbicides without public notice throughout its right-of-way in a manner that will

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<sup>129</sup> See ACAT Request, Ex. 6 to ACAT's Petition for Review, at 2-3, 16-18; ACAT Emergency Motion, Ex. 12 to ACAT's Petition for Review, at 14-18 and 40-49.

<sup>130</sup> See ACAT Emergency Motion, Ex. 12 to ACAT's Petition for Review, at 40-41; ACAT Request, Ex. 6 to ACAT's Petition for Review, at 2-3.

<sup>131</sup> Alaska Const. art. VIII, §§ 3 and 14.

contaminate nearby waters.<sup>132</sup> As the ADEC observed while denying a prior permit application, “any spray method, no matter how precautions, would likely result in the proposed herbicides reaching waters of the state.”<sup>133</sup> Spraying will exclude ACAT and the public from access to, and common use of, waters near the permitted treatment area.<sup>134</sup>

3. *Success on Claim that the ADEC’s Decision Violates Provisions of State Laws and Regulations.*

ACAT will likely succeed in its claim that the ADEC abused its discretion because the ARR application violates both state laws and regulations and the ADEC made no efforts to resolve contradictions between the 2009 Application and the 2006 Application for the same application area. The ADEC is authorized to regulate pesticides<sup>135</sup> in order to “protect human health, safety, and welfare, animals, and the environment.”<sup>136</sup> The ADEC’s regulations provide that a person may not “use . . . a pesticide . . . without the required certification or permit” or “in a faulty, careless, or negligent manner.”<sup>137</sup> As such, the ARR must obtain a permit to spray herbicides along its right of way.

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<sup>132</sup> See generally, Pesticides Permit #10-SOL-01, Ex. 2 to ACAT’s Petition for Review, (requiring no public notice or signage of the spray area).

<sup>133</sup> ADEC 2007 Decision, Ex 3 to ACAT’s Petition for Review, at 4.

<sup>134</sup> See ACAT Emergency Motion, Ex. 12 to ACAT’s Petition for Review, at 41-42; ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 3-4.

<sup>135</sup> See AS 46.03.020(10(F) and 46.03.320.

<sup>136</sup> 18 AAC 90.010(a).

<sup>137</sup> *Id.* at 90.020(3)-(4); see AS 46.03.320(c), 46.03.330(a) and 46.03.730 (providing that no person may “spray or apply, or cause to be sprayed or applied [pesticides] in a manner that may cause damage to or endanger the health, welfare, or property of another person, or in a manner that is likely to pollute the air, soil, or water of the state without prior authorization from the department.”).



Before obtaining a permit, the ARR was required to submit a permit application to the ADEC that contained specific information.<sup>138</sup> The regulations provide a prohibition against a person “submit[ting] a false, misleading, fraudulent, or incomplete record, report, or application.”<sup>139</sup> The application the ARR submitted for its permit is legally deficient and issuing a permit based on the application is prohibited because the application is vague, incomplete, misleading and inaccurate, thereby contravening state policy and fulfilling no useful purpose in informing the affected public or the ADEC’s decision to issue the permit. Simply amending the permit or providing post-application permit conditions in an attempt to compensate for information that was missing or incomplete in the application and only became known after the permit was issued violates regulatory requirements.<sup>140</sup> Because the ARR’s Application was misleading and incomplete, it violated the ADEC’s regulations.

An application for a pesticide permit must identify “the targeted pests to be controlled by the pesticide.”<sup>141</sup> In its application, the ARR generally lists “vegetation/invasive weeds” but fails to identify any specific pests or weeds it plans to target.<sup>142</sup> By failing to identify the target pests, the ARR circumvents the intent of the ADEC regulations and render the requirement to identify the target pests meaningless. It also makes it difficult or impossible to determine whether the proposed herbicide is an effective one for the use. The ARR’s omission makes it impossible for the ADEC or the public to make an informed decision regarding whether the problems caused by the pests

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<sup>138</sup> See 18 AAC 90.515.

<sup>139</sup> *Id.* at 90.020(7).

<sup>140</sup> *See id.*

<sup>141</sup> *Id.* at 90.515(2).

<sup>142</sup> See ARR 2009 Application, Ex. 1 to ACAT’s Petition for Review, at 10.

and/or weeds outweigh the well-documented risks and potential impacts to human health and water, fish, wildlife, soil and edible plants from herbicide spraying. Because the ARR's application fails to identify the target pests, it is legally incomplete in violation of the ADEC's regulations.<sup>143</sup>

The application also is required to describe the "vegetation in the treatment area" and the "soil type, including drainage characteristics."<sup>144</sup> In describing the vegetation type, the ARR merely provides a list of twelve plants species, lists "invasive weeds and vegetation" and states that there are "other broadleaves and grasses."<sup>145</sup> However, the ARR provides no vegetation maps, plant surveys or other data to document the vegetation present in the treatment area. Similarly, in describing the soil type and drainage characteristics of the site, the ARR summarily states in its application that the site is "rock ballast on top of packed soil. Water drains through the rock to the soil, down the shoulder to the ditches."<sup>146</sup> Stating that the soil is "packed" does not satisfy the requirement to identify the soil type, and stating that "water drains" does not satisfy the requirement to identify the drainage characteristics. While railroad tracks undoubtedly are designed to provide efficient runoff and consequently encourage the dispersal of any applied herbicides, the ARR fails to provide any data on the soil composition beneath the rock ballast, the permeability of the soil, or the connectivity of the soil and nearby surface- and groundwater resources. These issues must be addressed before the ARR's permit application is complete, the public has a meaningful opportunity for notice and comment, and the ADEC can make an informed decision regarding whether to issue a

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<sup>143</sup> See 18 AAC 90.020(7).

<sup>144</sup> *Id.* at 90.515(8)(C) and (E).

<sup>145</sup> See ARR 2009 Application, Ex. 1 to ACAT's Petition for Review, at 4.

<sup>146</sup> *Id.*

pesticide permit to the ARR. Granting the permit absent this required information violates of the ADEC's regulations.<sup>147</sup>

The ARR's application also is required to describe "each potentially affected surface water or marine water body within 200 feet of the treatment area, or each public or private water system within 200 feet of the treatment area" and provide the "average annual precipitation."<sup>148</sup> "[S]urface water" is defined as "(A) a fresh water lake or pond with surface outlet . . . ; (B) a fresh water spring with a surface outlet . . . ; and (C) a fresh water stream. . . ." <sup>149</sup> "[W]aters" is defined broadly to include:

[L]akes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, straits, passages, canals, the Pacific Ocean, Gulf of Alaska, Bering Sea, and Arctic Ocean, in the territorial limits of the state, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially in or bordering the state or under the jurisdiction of the state.<sup>150</sup>

However, numerous waters intersect, or exist within 200 feet of, the spray area that the ARR's application neither identifies nor describes.

The ARR failed to identify and describe any of the waters in the permit area and, instead, merely provided poorly labeled or scaled aerial photographs.<sup>151</sup> The ADEC evaluated the application as if the area did "not contain any known surface water

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<sup>147</sup> See 18 AAC 90.020(7).

<sup>148</sup> 15 AAC 90.515(8)(D) and (F).

<sup>149</sup> *Id.* at 90.990(53).

<sup>150</sup> AS 46.03.900(37); 18 AAC 90.990(55).

<sup>151</sup> See ACAT Request, Ex. 6 to ACAT's Petition for Review, at 5-7; Strassenburgh Comments, Ex. 16 to ACAT's Petition for Review; ARR 2009 Application, at Figure 4-08 [attached as Exhibit 29].

bodies”<sup>152</sup> and the ADEC claims that its staff “traveled the entire railway between Seward and Indian, and confirmed that no water bodies were present in the proposed spray areas.”<sup>153</sup> The record does not support this claim, since the Commissioner has acknowledged that surface- and groundwater bodies exist within the permit area.<sup>154</sup>

While ACAT has reviewed only a small portion of the permit area and documented only the largest or most obvious surface- and groundwaters that were not identified in the ARR’s application, a full survey of the potentially affected waters such as should have occurred prior to acceptance of the permit application would show a wealth of surface- and groundwaters within the permit area.<sup>155</sup> A few of the most obvious waters improperly omitted from the ARR’s Application include Henry Creek,<sup>156</sup> Victor Creek,<sup>157</sup> a lake at mile 27.52 to mile 27.64, and various other smaller waters.<sup>158</sup>

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<sup>152</sup> See Letter from Karin Hendrickson, Pesticides Permits, ADEC, to John Strassenburgh (Sept. 4, 2009) (responding to Mr. Strassenburgh’s public records request seeking all documents pertaining to waters near the permit area) [attached as Exhibit 19 to ACAT’s Petition for Review]; ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 6.

<sup>153</sup> ADEC Responsiveness Summary, Ex. 17 to ACAT’s Petition for Review, at 3.

<sup>154</sup> Commissioner’s June 30, 2010, Decision, Ex. 7 to ACAT’s Petition for Review, at 2 and 8.

<sup>155</sup> ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 5-7; ACAT Emergency Motion, Ex. 12 to ACAT’s Petition for Review, at 42-49.

<sup>156</sup> Located at mile 41.6 and clearly within the permitted mile 20.7 to mile 41.8 spray area. See USGS Topographic Map of Henry Creek [attached as Exhibit 27].

<sup>157</sup> Located at mile 20.0 and clearly within the permitted mile 19.4 to mile 20.3 spray area according to the application and by reference in the permit, even though it appears outside the hand-drawn treatment area included with the application. See Figure 4-08, Ex. 25; ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 6.

<sup>158</sup> See Alaska Railroad, 2006 Application, Water Features Spreadsheet [hereinafter Water Features Spreadsheet] [attached as Exhibit 31]; Alaska Railroad, 2006 Application, Bridges and Culverts [hereinafter Bridges and Culverts] [attached as Exhibit 32]; Strassenburgh Comments, Ex. 16 to ACAT’s Petition for Review, at 1-2, 16-18 (identifying several additional waters not identified in ARR’s 2009 Application based, in

These do not include smaller bodies of water that exist all along the ARR route. Many of these waters were identified in the ARR's 2006 application,<sup>159</sup> but omitted in the ARR's 2009 application in violation of the ADEC's regulations.<sup>160</sup> Despite this readily available information and the obvious contradictions between the ARR's 2006 and 2009 applications, the ADEC never bothered to attempt to reconcile the differences in the two applications. The failure to identify and describe various potentially affected waters also precluded affected local governments from having correct information on the regions affected.

Beyond the surface waters omitted from consideration in violation of the ADEC's regulations, the ARR's application omits numerous private wells residing within 200 feet of the permit area, including one on Ms. Dorothy Locke's property at Mile 5.5 that is not included in the Commissioner's Order due to this error.<sup>161</sup> Failing to identify potentially affected waters violates the ADEC's regulations and could result in surface- and groundwater contamination that will be costly to remediate and potentially cause untold human health impacts. ACAT will likely succeed on its claim that the permit was issued in violation of the ADEC's own regulations,<sup>162</sup> constituting an abuse of discretion, because the application fails to identify the potentially affected water bodies, making proper consideration by the ADEC and opportunity for public participation impossible.

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part, on the Water Features Spreadsheet); ACAT Request, Ex. 6 to ACAT's Petition for Review, at 6.

<sup>159</sup> See *id.*

<sup>160</sup> See 18 AAC 90.020(7).

<sup>161</sup> See Letter and Wells Spreadsheet from Matt C. Kelzenberg, Environmental and Regulatory Officer, ARR, to Bob Buckwalter, Environmental Program Specialist, ADEC, (Oct. 4, 2006) [attached as Exhibit 33]; ACAT Request, Ex. 6 to ACAT's Petition for Review, at 6-7, 9 and 18; Locke Decl, Ex. 24, at 4, ¶ 13.

<sup>162</sup> See 18 AAC 90.020(7).

The application also fails to include the “proposed date and time of each pesticide application.”<sup>163</sup> Despite this explicit requirement, the ARR merely provides “June 2010” in its application. Yet, inexplicably, the ARR received a two-year permit that lasts 23 months after the month specified in the ARR’s application.<sup>164</sup> The ARR didn’t even give notice until the end of June to the ADEC that it would begin spraying on July 9, 2010, a month not even identified in the application. Because there is no provision requiring public notice or postings of the spray area to inform the public when spraying is to occur,<sup>165</sup> it is impossible for ACAT or other individuals concerned about the harmful effects of spraying to avoid exposure.

The application the ARR submitted for its permit is legally deficient because it is vague, incomplete, misleading and inaccurate.<sup>166</sup> ACAT has a strong likelihood of success on the merits because the ADEC issued the permit based on an application that failed to satisfy the regulatory requirements, failed to provide sufficient information to give ACAT and the public adequate, constitutionally required notice, and formed an insufficient basis for the ADEC to make an informed decision regarding permit issuance.

4. *Success on Claim that the State Acted Arbitrarily in Approving the Pesticides Permit.*

ACAT will likely succeed on its claim that the ADEC acted arbitrarily in failing to consider potential health and environmental harms and in failing to reconcile conflicting information in the ARR’s 2006 and 2009 applications. As described above, ACAT, the public, and the environment will suffer irreparable harm once the ARR applies herbicides

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<sup>163</sup> 18 AAC 90.515(9).

<sup>164</sup> See Pesticides Permit #10-SOL-01, Ex. 2 to ACAT’s Petition for Review, at 1.

<sup>165</sup> See *id.*

<sup>166</sup> See 18 AAC 90.020(7).

to its right-of-way due to the toxic effects of glyphosate and Agridex. Recent studies show that glyphosate and its associated solvents and surfactants adversely affect reproduction, embryonic development, endocrine, immune, and neurological functions in exposed individuals.<sup>167</sup> Glyphosate adversely impacts fish, wildlife and surface- and groundwater resources, such as those found along the permit area.<sup>168</sup>

In reaching its April 30, 2010, decision to issue the permit, the ADEC failed to properly consider all the potential human health concerns and impacts to water, fish, wildlife, soil and edible plants that result from spraying glyphosate and Agridex. The ADEC even concedes that it is not privy to the actual ingredients in Agridex,<sup>169</sup> which is approved for use by the permit, and that the permitted chemicals “could contain likely human carcinogens”<sup>170</sup>

Because the application was incomplete, the public had no meaningful opportunity for notice of the issues or opportunity to provide factually informed comments for the ADEC to consider in making its decision. As the ADEC noted in 2007, “any spray method, no matter how precautionous, would likely result in the proposed herbicides

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<sup>167</sup> Porter Literature Review, Ex. 4 to ACAT’s Petition for Review, at 1-3; *see also* Hardell, L., and Eriksson, M., *A Case-Control Study of Non-Hodgkin Lymphoma and Exposure to Pesticides*, 85 *Cancer* 1353, 1353–60 (1999); Porter Decl., Ex. 5 to ACAT’s Petition for Review; ACAT Request, Ex. 7, at 9-13.

<sup>168</sup> *See* EPA, *supra* note 84, at 10; *see also* Folmar, L.C., Sanders, et al., *Toxicity of the Herbicide Glyphosate and Several of its Formulations to Fish and Aquatic Invertebrates*, 8 *Archives of Environmental Contamination and Toxicology* 269, 269-78 (1979); Givents, W.A., et al., *A Grower Survey of Herbicide Use Patterns in Glyphosate-Resistant Cropping Systems*, 23 *Weed Technology* 156, 156–61 (2009); ACAT Request, Ex. 6 to ACAT’s Petition for Review, at 9-13.

<sup>169</sup> *See* ADEC Responsiveness Summary, Ex. 17 to ACAT’s Petition for Review, at 38–39 (stating that it does not know the ingredients in Agridex).

<sup>170</sup> Commissioner’s June 30, 2010, Decision, Ex. 7 to ACAT’s Petition for Review, at 6.

reaching waters of the state.”<sup>171</sup> Yet, the ADEC granted the permit based upon a factually unsupported conclusion that the permit area does “not contain any known surface water bodies.”<sup>172</sup>

## V. CONCLUSION

ACAT will suffer immediate and irreparable harm if its emergency motion for a continuance of the stay is not granted and herbicide spraying is allowed along the right-of-way pending a decision on its request for an adjudicatory hearing. The ARR meanwhile will not suffer significant injury if ACAT’s emergency motion is granted because the ARR may employ a number of effective non-chemical alternatives for eliminating vegetation along the right-of-way. Since the balance of the hardships tips clearly in ACAT’s favor, ACAT need only demonstrate that they raise serious and substantial questions going to the merits of the case.

ACAT has raised serious and substantial questions going to the merits of its case, and, even if the heightened standard is applied, has established a clear likelihood of success on the merits of the claims set forth in this memorandum. Granting ACAT’s emergency motion will avoid immediate and irreparable harm to ACAT and its members, the public and natural resources in and near the permit area from harmful chemical exposures that will occur once the ARR begins spraying.

For the foregoing reasons, ACAT respectfully requests that the Court grant its emergency motion for a continuance of the stay of the herbicide spraying under pesticides permit #10-SOL-01.

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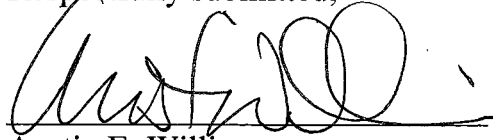
<sup>171</sup> ADEC 2007 Decision, Ex 3 to ACAT’s Petition for Review, at 4.

<sup>172</sup> See Letter from Karin Hendrickson, Ex. 19 to ACAT’s Petition for Review.



Dated: July 14, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Austin E. Williams", written over a horizontal line.

Austin E. Williams  
TRUSTEES FOR ALASKA  
Attorney for Plaintiffs