

**EMERGENCY**

**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,	)	Superior Court No.: 3AN-10-08781CI
Petitioners (Appellants),	)	
	)	Supreme Court No.: S-
vs.	)	
	)	
LARRY HARTIG, COMMISSIONER,	)	
ALASKA DEPARTMENT OF	)	
ENVIRONMENTAL CONSERVATION,	)	
AND ALASKA RAILROAD	)	
CORPORATION	)	
Respondents (Appellees).	)	

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**EMERGENCY PETITION FOR REVIEW**

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State of Alaska on this 13th day  
of July, 2010.

Clerk of the Appellate Courts  
By: \_\_\_\_\_  
Deputy Clerk

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Pursuant to Alaska Rule of Appellate Procedure (RAP) 402, 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 Petition for Review of the July 12, 2010, decision<sup>1</sup> of the superior court, Judge William Morse presiding, denying a preliminary injunction to halt herbicide spraying by the Alaska Railroad Corporation (ARR) under pesticides permit # 10-SOL-10, issued by the Alaska Department of Environmental Conservation (ADEC). Because additional time was needed to review the superior court's records, ACAT intends to submit an emergency motion for preliminary injunction first thing in the morning on July 14, 2010.

**I. Statement of Facts [RAP 403(b)(1)(A)].**

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. Since 1983, Alaskans have successfully opposed toxic spraying by the ARR. 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>2</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>3</sup> Spraying as allowed

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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 Denying Motion for Preliminary Injunction*, OAH No. 3AN-10-08781CI (July 13, 2010) [attached as Exhibit 22].

<sup>2</sup> *See generally*, ARR, *Pesticide Permit Application* (May 22, 2009) [hereinafter ARR 2009 Application] [attached as Exhibit 1].

<sup>3</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].

under this permit will contaminate nearby surface- and groundwaters, cause significant human health impacts, and harm fish, wildlife and nearby edible plants.<sup>4</sup>

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>5</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 for failing to grant an automatic stay pending ACAT's exhaustion of its administrative remedies;<sup>6</sup> (2) the DNR's April 30, 2010, decision violated ACAT's constitutionally guaranteed rights to common use and access to navigable water;<sup>7</sup> (3) the ARR's 2009 application was legally deficient because it failed to include certain required information;<sup>8</sup> and (4) that the DNR's April 30, 2010, decision was arbitrary considering the risks to human health and the environment that would occur from spraying.<sup>9</sup>

The ADEC issued public notice of the request for stay and the Commissioner accepted public comment and responsive memorandum from the ADEC and the ARR.

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<sup>4</sup> See 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]; 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 Porter Literature Review] [attached as Exhibit 4]; Declarations of Warren Porter 22-27 [attached as Exhibit 5].

<sup>5</sup> See generally, 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].

<sup>6</sup> See *id.* at 3 and 16-18.

<sup>7</sup> *Id.* at 3-4.

<sup>8</sup> See *id.* at 4-9.

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

The comment period for the stay ended on June 24, 2010, with the vast majority of the comments supporting ACAT's request and opposing spraying along the right-of-way.<sup>10</sup> The ADEC and ARR submitted their responsive memoranda on June 18, 2010.<sup>11</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>12</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 some of its assertions.<sup>13</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>14</sup> that the permitted chemicals “could contain likely human carcinogens,”<sup>15</sup> and that most public comments had “understandable”<sup>16</sup> “concerns about the health, safety, economic and environmental consequences of pesticide use,”<sup>17</sup> nonetheless, the Commissioner denied the stay along the vast majority of the permit area.<sup>18</sup>

On July 2, 2010, ACAT filed a notice of appeal of the stay decision to superior

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<sup>10</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].

<sup>11</sup> See ARR, *Opposition to Request for Stay of Permit No. 10-SOL-01* (June 18, 2010) [attached as Exhibit 8]; ADEC, *Response to Request for Stay* (June 18, 2010) [attached as Exhibit 9].

<sup>12</sup> See Letter from Matt Kelzenberg, Manager of Environmental Operations, ARR, to Karin Hendrickson, ADEC (June 28, 2010) [attached as Exhibit 10].

<sup>13</sup> Commissioner's June 30, 2010, Decision, Ex. 7 at 2.

<sup>14</sup> See *id.* at 8.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 14.

court and an emergency motion for a preliminary injunction.<sup>19</sup> Citing the irreparable harms that immediately will occur once spraying begins, the non-chemical means readily available to the ARR for vegetation management, and 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>20</sup> On July 6, 2010, the ARR filed its response to ACAT's emergency motion and a motion to dismiss.<sup>21</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>22</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 ACAT's emergency motion for a preliminary injunction. However, based on the recognition that once spraying occurs ACAT would have no remedy if it ultimately prevails on the merits of its claim, Judge Morse extended a second temporary stay of the permit through midnight on July 15, 2010, giving ACAT an opportunity to file this emergency petition for review.

## **II. Statement of the Question [RAP 403(b)(1)(B)].**

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<sup>19</sup> See ACAT, *Notice of Appeal*, Case No.: 3AN-10-08781CI (July 2, 2010) [attached as Exhibit 11]; 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].

<sup>20</sup> ACAT Emergency Motion, Ex. 12, at 13-51.

<sup>21</sup> ARR, *Motion to Dismiss and Memorandum of Support*, Case No.: 3AN-10-08781CI (July 6, 2010) [attached as Exhibit 13].

<sup>22</sup> ADEC, *Opposition to Emergency Motion*, Case No.: 3AN-10-08781CI (July 7, 2010) [attached as Exhibit 14]; ACAT, *Opposition to Motion to Dismiss*, Case No.: 3AN-10-08781CI (July 7, 2010) [attached as Exhibit 15].

Did the superior court err in its application of the balance of hardships test when ACAT provided evidence of irreparable harm and the ARR and State did not, resulting in an improper denial of ACAT's emergency motion for a preliminary injunction?

**III. Statement of the Trial Date [RAP 403(b)(1)(C)].**

No trial date is scheduled. However, ACAT's Request for Adjudicatory Hearing to the Commissioner has been referred to the Office of Administrative Hearings, which must make a decision on whether it will grant ACAT's request by August 5, 2010.

**IV. Discussion of why this Court Should Grant Review [RAP 403(b)(1)(D)].**

This Court should grant review because, if it does not, spraying by the ARR will cause immediate and irreparable harm to human health; cause the contamination of nearby waters, soil, edible plants, and fish and wildlife; and no other remedy would be available to ACAT if it ultimately prevails on the merits of its challenge to the permit.

This petition for review satisfies the requirement of Alaska RAP 402(b).<sup>23</sup> The ARR may begin herbicide spraying under its permit on July 16, 2010. If this Court postpones review until after spraying commences, there will be no further remedy available to ACAT. It will be impossible to undo the herbicide spraying and the resulting harm to human health and state waters, lands, and fish and wildlife near the spray area. This petition for review also involves an important question of Constitutional law, and the public's interest in human health and various public resources risk contamination if review is denied and spraying is allowed. Numerous waters and public resources exist within or near the spray area.<sup>24</sup> ACAT and the general public hunt, fish, pick berries, and

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<sup>23</sup> See Alaska RAP 402(b)(1)-(2) and (4).

<sup>24</sup> While ACAT has identified several groundwater wells near the permit area and several surface water bodies, ACAT has only been able to review a small portion of the total permit area. If a more thorough review of the permit area was conducted and ACAT was able to submit factual evidence at the adjudicatory hearing it has requested, ACAT is

otherwise use the public waters and lands near the treatment area.<sup>25</sup>

An immediate decision by this Court is in the public's interest and, absent review here, ACAT cannot obtain review elsewhere. As evidenced by the overwhelming majority of the public comments received by the ADEC, the public is nearly unanimously opposed to the ARR spraying and the impacts to public health and contamination of public resources that would follow.<sup>26</sup> The public's interest in health, water, land, and fish and wildlife, as well as this Court being the last remedy available to ACAT, makes review of this petition appropriate.

**V. The Superior Court's Decision was Erroneous Because ACAT has Satisfied its Burden Under the Balance of Hardships Test [RAP 403(b)(1)(E)].**

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>27</sup> This standard is essentially the same as that of a temporary restraining order or preliminary injunction.<sup>28</sup>

The showing required to obtain an emergency preliminary injunction depends on the nature of the threatened injury. If the petitioner faces the danger of irreparable

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confident that significantly more waters would prove present within or immediately near the spray area. See ACAT Request, Ex. 6, at 5-7; John Strassenburgh, *Comments and Exhibits in Opposition to Granting the ARR Permit* (Sept. 12, 2009) [hereinafter Strassenburgh Comments] [attached as Exhibit 16]; see also Alaska Railroad, *2006 Application, Water Features Spreadsheet and Bridges and Culverts* [hereinafter Water Features Spreadsheet] [attached as Exhibit 21] (evidencing numerous waters along the ARR right-of-way that are not documents in the ARR 2009 Application).

<sup>25</sup> ACAT Request, Ex. 6, at 1-4;

<sup>26</sup> See ACAT Emergency Motion, Ex. 12, at 8-10; ACAT Request, Ex. 6, at 2; Commissioner's June 30, 2010, Decision, Ex. 7, at 7 and 9.

<sup>27</sup> Alaska RAP 504.

<sup>28</sup> See Alaska R. Civ. P. 65(b).



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 plaintiff must only raise serious and substantial questions going to the merits of the case that are not frivolous or obviously without merit.<sup>29</sup> If, however, the appellants' threatened harm is less than irreparable and the opposing party cannot be adequately protected, then the court requires a clear showing of probable success on the merits.<sup>30</sup>

a. ACAT Risks of Immediate and Irreparable Harm.

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>31</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 the severity—as opposed to the reparability—of potential harm to ACAT was minimal. However, because the ADEC's factual conclusions were arbitrary because they were not based on adequate information and are not supported by substantial evidence, they do not deserve deference.

The ADEC, despite the ample evidence before it to the contrary, concluded that glyphosate and Agridex do not pose serious risks to human health. The ADEC argued

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<sup>29</sup> *Alaska Pub. Utils. Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549, 554 (Alaska 1975).

<sup>30</sup> *City of Kenai v. Friends of Recreation Center, Inc.*, 129 P. 3d 452, 546 (Alaska 2009).

<sup>31</sup> See Statements by Judge Williams Morse (July 8 and 12, 2010).

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. The overwhelming 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>32</sup> The ADEC even concedes that the permitted chemicals “could contain likely human carcinogens”<sup>33</sup> and included numerous restrictions in the permit that evidence a very real risk that the chemicals can adversely impact human health.<sup>34</sup> While the ADEC admits that it is not privy to the actual ingredients in Agridex, which is approved for use by the permit, and cannot therefore be informed about the chemical’s risks.<sup>35</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>36</sup> yet the ADEC incongruously concludes that the chemicals are safe for the public, 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>37</sup>

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<sup>32</sup> Porter Literature Review, Ex. 4, at 3-4 (internal citations omitted); *see* ACAT Request, Ex. 6, at 9-13; Declarations of Warren Porter, Ex. 5, at 22-27.

<sup>33</sup> Commissioner’s June 30, 2010, Decision, Ex. 7, at 6.

<sup>34</sup> Pesticides Permit #10-SOL-01, Ex. 2, at 1-3.

<sup>35</sup> *See* ADEC, *Responsiveness Summary* 38–39 (Apr. 30, 2010) [hereinafter ADEC Responsiveness Summary] [attached as Exhibit 17] (stating that it does not know the ingredients in Agridex).

<sup>36</sup> *See* Pesticides Permit #10-SOL-01, Ex. 2, at 1-2.

<sup>37</sup> *See generally* Pesticides Permit #10-SOL-01, Ex. 2 (providing no public notice or signage of the spray area).

The ADEC also 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>38</sup> The EPA requires glyphosate to be labeled as “toxic to fish,”<sup>39</sup> and, as the ADEC similarly 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>40</sup>

The ADEC’s arbitrary conclusion that the chemicals pose no risk is not supported by substantial evidence nor the ADEC’s own conflicting actions, and does not deserve deference from this Court. Even if some weight is given to the ADEC’s factual conclusions, the ADEC’s conclusions only go to the severity of the potential physical injury to ACAT, and do not address any constitutional violations or whether ACAT’s injury is irreparable. Thus, this Court should give no deference to the ADEC’s findings regarding ACAT’s injuries or to the superior court in applying that deference.

b. The ARR is Adequately Protected.

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>41</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

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<sup>38</sup> See ACAT Emergency Motion, Ex. 12, at 42-47; ACAT Request, Ex. 6, at 5-7; Strassenburgh Comments, Ex. 16, at 1-2, 16-18.

<sup>39</sup> Porter Literature Review, Ex. 4, at 3.

<sup>40</sup> ADEC 2007 Decision, Ex. 3, at 4.

<sup>41</sup> See ACAT Emergency Motion, Ex. 12, at 29-38; ACAT Request, Ex. 6, at 13-15.

derailments, and our train accident rate is half the national average.”<sup>42</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.<sup>43</sup> 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>44</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>45</sup>

c. ACAT is Likely to Succeed on the Merits.

ACAT alleges that the ADEC violated various Alaska statutes, regulations and provisions of the Alaska and U.S. Constitutions by issuing the ARR’s permit based on an incomplete, misleading and legally deficient permit application. ACAT has outlined various legal deficiencies in the permit application,<sup>46</sup> and the Commissioner acknowledged that ACAT has “shown a likelihood of success on the merits” on at least some of its claims.<sup>47</sup> The superior court also acknowledged some likelihood of success.<sup>48</sup>

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>49</sup> Because

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<sup>42</sup> Alaska Railroad Corporation, Community Ties 2 (2nd Quarter, 2006) *available at* <http://www.akrr.com/pdf/Comm%20Ties%202nd%20Quarter%202006.pdf>.

<sup>43</sup> See ACAT Request, Ex. 6, at 13-15; ACAT Emergency Motion, Ex. 12, at 31-34.

<sup>44</sup> Commissioner’s June 30, 2010, Decision, Ex. 7, at 5.

<sup>45</sup> See Statements by Judge Williams Morse (July 12, 2010).

<sup>46</sup> See ACAT Request, Ex. 6, at 2-18.

<sup>47</sup> Commissioner’s June 30, 2010, Decision, Ex. 7, at 2.

<sup>48</sup> See Statements by Judge Williams Morse (July 12, 2010).

<sup>49</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>50</sup> 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>51</sup>

Article VIII, §§ 3 and 14 of the Alaska Constitution provides for common use and free access to navigable or public waters.<sup>52</sup> The permit allows the ARR to spray herbicides without public notice throughout its right-of-way in a manner that will contaminate nearby waters.<sup>53</sup> As the ADEC observed while denying a prior permit application, “any spray method, no matter how precautionous, would likely result in the proposed herbicides reaching waters of the state.”<sup>54</sup> Spraying will exclude ACAT and the public from access to, and common use of, waters near the permitted treatment area.<sup>55</sup>

ACAT also will likely succeed in its claim that the ADEC abused its discretion since 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

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<sup>50</sup> See ACAT Request, Ex. 6, at 2-3, 16-18; ACAT Emergency Motion, Ex. 12, at 14-18, 40-49.

<sup>51</sup> See ACAT Emergency Motion, Ex. 12, at 40-41; ACAT Request, Ex. 6, at 2-3.

<sup>52</sup> Alaska Const. art. VIII, §§ 3 and 14.

<sup>53</sup> See *generally* Pesticides Permit #10-SOL-01, Ex. 2 (providing no public notice or signage of the spray area).

<sup>54</sup> ADEC 2007 Decision, Ex. 3, at 4.

<sup>55</sup> See ACAT Emergency Motion, Ex. 12, at 41-42; ACAT Request, Ex. 6, at 3-4.

pesticides<sup>56</sup> in order to “protect human health, safety, and welfare, animals, and the environment.”<sup>57</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>58</sup> Before obtaining a permit, the ARR was required to submit a permit application to the ADEC that contained specific information.<sup>59</sup> The regulations provide a prohibition against a person “submit[ting] a false, misleading, fraudulent, or incomplete record, report, or application.”<sup>60</sup> Simply amending a 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 the regulatory requirements.<sup>61</sup> Because the ARR’s Application was misleading and incomplete, it violated the ADEC’s regulations.

The application was misleading and incomplete because it failed to contain required information, such as what water bodies<sup>62</sup> or groundwater wells exist within or near the permit area, the dates and times of herbicide application, and soil and vegetation

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<sup>56</sup> See AS 46.03.020(10(F) and 46.03.320.

<sup>57</sup> 18 AAC 90.010(a).

<sup>58</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.”).

<sup>59</sup> See 18 AAC 90.515.

<sup>60</sup> *Id.* at 90.020(7).

<sup>61</sup> See *id.*

<sup>62</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.” AS 46.03.900(37); 18 AAC 90.990(55).

types that may be affected.<sup>63</sup> The most egregious omissions involved not identifying surface-and groundwaters within or near the permit area.<sup>64</sup> The ARR failed to identify any of the waters in the permit area and, instead, merely provided poorly labeled or scaled aerial photographs.<sup>65</sup> The ADEC evaluated the application as if the area did “not contain any known surface water bodies”<sup>66</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>67</sup> The record does not support this claim, since the Commissioner has acknowledged that water bodies exist within the permit area.<sup>68</sup>

While ACAT has reviewed only a small portion of the permit area and documented numerous larger surface- and groundwaters that were not identified in the ARR’s application, a full review such as should have occurred prior to permit issuance, or could occur if ACAT’s request for an adjudicatory hearing is granted, would show even more waters within the permit area.<sup>69</sup> A few of the waters improperly omitted from

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<sup>63</sup> *Id.* at 90.515; *See* ARR 2009 Application, Ex. 1, at 4 and 10.

<sup>64</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.” AS 46.03.900(37); 18 AAC 90.990(55).

<sup>65</sup> *See* ACAT Request, Ex. 6, at 5-7; Strassenburgh Comments, Ex. 16; ARR 2009 Application, Ex. 1, at Figure 4-08 [attached as Exhibit 18].

<sup>66</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]; ACAT Request, Ex. 6, at 6.

<sup>67</sup> ADEC Responsiveness Summary, Ex. 17, at 3.

<sup>68</sup> Commissioner’s June 30, 2010, Decision, Ex. 7, at 2 and 8.

<sup>69</sup> ACAT Request, Ex. 6, at 5-7; ACAT Emergency Motion, Ex. 12, at 42-49.

the ARR's Application include Henry Creek,<sup>70</sup> Victor Creek,<sup>71</sup> a lake at mile 27.52 to mile 27.64, and various other smaller waters.<sup>72</sup> 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, but omitted in its 2009 application. The ADEC never bothered to attempt to reconcile these differences in these two applications. The failure to identify water bodies also precluded affected local government from having correct information on the regions affected.

The application also fails to include the "proposed date and time of each pesticide application."<sup>73</sup> The ARR merely provides "June 2010" in its application, yet inexplicably received a two-year permit that lasts 23 months after the month specified in the ARR's application.<sup>74</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. There is no provision for public notice or postings of the area to inform the public when spraying is to occur.<sup>75</sup>

## **VI. Statement of the Precise Relief Sought [RAP 403(b)(1)(F)].**

Because ACAT's constitutional rights have been violated, ACAT requests that the

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<sup>70</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 20]; ACAT Request, Ex. 6, at 6.

<sup>71</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* ARR 2009 Application, Ex. 1, at Figure 4-08 [attached as Exhibit 18]; ACAT Request, Ex. 6, at 6.

<sup>72</sup> *See* Water Features Spreadsheet, Ex. 21; Strassenburgh Comments, Ex. 16, at 1-2, 16-18 (identifying several additional waters not identified in ARR's 2009 Application); ACAT Request, Ex. 6, at 6.

<sup>73</sup> 18 AAC 90.515(9).

<sup>74</sup> *See* Pesticides Permit #10-SOL-01, Ex. 2, at 1.

<sup>75</sup> *See id.*



Court grant this emergency petition for review and continue the superior court's injunction against herbicide spraying under the permit until ACAT's Request for Adjudicatory Hearing is resolved and the Office of Administrative Hearings has issued a final decision that is appealable to the superior court. Additionally, because additional time is needed to review the court log notes and order, which were not immediately available, ACAT intends to submit an emergency motion for preliminary injunction first thing in the morning on July 14, 2010.

**VII. Statement of the Date by Which a Decision is Needed [RAP 403(b)(1)(G)].**

ACAT respectfully requests a decision by 4:00 p.m. on July 15, 2010. Judge Morse has temporarily enjoined spraying through midnight on July 15, 2010 and, without action by this Court, the ARR plans to commence spraying on July 16, 2010. Once spraying occurs, ACAT will be without remedy should it ultimately prevail on the merits of its challenge to the permit.

**VIII. Notice of this Emergency Petition for Review was Provided.**

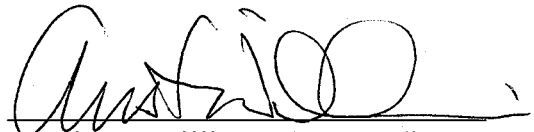
Counsel for ACAT has provided notice by telephone and personal service of this Emergency Petition for Review to all opposing counsel.

**IX. Conclusion.**

For the foregoing reasons, ACAT respectfully requests that this Emergency Petition for Review be granted and an injunction issued to stay the herbicide spraying under pesticide permit #10-SOL-01.

Respectfully submitted July 13, 2010.

TRUSTEES FOR ALASKA



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