TRUSTEES FOR ALASKA

A Nonprofit Public Interest Law Firm Providing Counsel to Protect and Sustain Alaska's Environment

1026 W. 4th Ave., Ste. 201 ♦ Anchorage, AK 99501 ♦ (907) 276-4244 ♦ (907) 276-7110 Fax ♦ Email: ecolaw@trustees.org

June 1, 2010

Sent via U.S. Mail, facsimile and email:
Larry Hartig, Commissioner
Alaska Department of Environmental Conservation
410 Willoughby Ave., Ste 303
Juneau, AK 99811-1800
Fax – (907) 465-5070
Email - DEC.Commissioner@alaska.gov

RE: Request for an Adjudicatory Hearing on Decision of April 30, 2010, to issue Pesticides Permit #10-SOL-01.

Dear Commissioner Hartig,

This letter is a request for an adjudicatory hearing, pursuant to 18 AAC 15.200 *et seq.*, regarding the Alaska Department of Environmental Conservation's (ADEC) April 30, 2010 decision to issue pesticides permit #10-SOL-01. It is submitted on behalf of Alaska Community Action on Toxics, Alaska Center for the Environment, Alaska Survival, Cook Inletkeeper, Defenders of Wildlife, the Native Village of Eklutna, Prince William Soundkeeper, Resurrection Bay Conservation Alliance, and Tom Kluberton, owner and operator of the Fireweed Station Inn. Collectively these groups, tribe and individual are referred to as "ACAT". Because of the important fish, wildlife and water resources at stake, and the significant health impacts that may occur as a result of operations under the permit, ACAT respectfully requests a stay of the decision pending completion of all proceedings requested by this letter, which is discussed below.

Alaska Community Action on Toxics is a statewide non-profit public interest environmental health research and advocacy organization dedicated to protecting environmental health and achieving environmental justice. It works to stop the production, proliferation, and release of toxic chemicals that may harm human health or the environment. Alaska Center for the Environment is a non-profit environmental education and advocacy organization with over 6,000 Alaskan members, whose mission is to enhance Alaskans' quality of life by protecting wild places, fostering sustainable communities, and promoting recreational opportunities. Alaska Survival is an Alaska non-profit corporation with members from throughout the state working to address the adverse impacts of pesticide and herbicide use on humans, fish and wildlife, and the Alaska environment, and to stop the unnecessary use of these harmful chemicals. Cook

Inletkeeper is a member-supported non-profit organization that works to protect clean water and healthy salmon in the Cook Inlet region. Defenders of Wildlife is one of the country's leaders in science-based, results-oriented wildlife conservation, and is committed to saving imperiled wildlife. The Native Village of Eklutna was formed in 1960 and seeks to strengthen its Tribal Nation by exercising its inherent powers to protect the past, present and future of the tribal membership. Prince William Soundkeeper is a grassroots non-profit organization working to protect water quality in Prince William Sound and the life it sustains. Resurrection Bay Conservation Alliance, based in Seward, Alaska, seeks to advance the environmental integrity of its community by addressing watershed issues like air and water pollution, protection and restoration of habitat, reducing bear and human conflicts, pursuing new energy sources and weighing in on development proposals. Each of these parties submitted comments in opposition to the ADEC's April 30, 2010, decision to issue permit #10-SOL-01, will be adversely affected by operations under the permit, and request that the ADEC reverse its April 30, 2010 decision and rescind permit #10-SOL-01.

Background and Decision Appealed.

Alaskans overwhelmingly oppose the use of herbicides as a means for controlling vegetation along the Alaska Railroad Corporation (ARR)'s railroad right-of-way and Seward Rail Yard. *See* ACE Comments at 2; ACAT Comments at 2-3. This consistent, strong opposition to the use of herbicides by the ARR prompted then-Governor Jay Hammond to ban the use of herbicides by state agencies in 1978. *See* ACAT Comments at 2-3. Since a lawsuit in 1983, Alaska Native Villages, municipalities, borough governments, concerned individuals, local businesses, and a whole host of affected organizations have successfully opposed the spraying of herbicides and other harmful chemicals by the ARR for decades. *Id.* In 2006, when the ARR last applied for a permit to apply herbicides, strong public opposition prevented the ADEC from issuing the permit. ACE Comments at 2. During the most recent public comment period that ended on September 15, 2009, the ADEC received no less than 106 comments in opposition to the proposed permit while only 17 comments were submitted in support of the spraying. For the past roughly 30 years, every time the state has faced a decision of whether to allow herbicide spraying along the ARR right-of-way, the State has declined to issue a permit and recognized the broad public health and environmental concerns at stake and the fact that herbicide spraying, no matter how carefully it is done, inevitably will result in contamination of state waters and cause significant human health impacts and harm to important fish, wildlife and water resources.

The Decision Violates Various Alaska Statutes, Regulations and the Alaska Constitution.

The ADEC's decision of April 30, 2010, violates various provisions of the Alaska Constitution, state laws and state regulations. As such, the ADEC must reverse its decision and rescind pesticides permit #10-SOL-01.

A fundamental right under the U.S. and Alaska Constitutions is due process of law. The Due Process Clause of the Alaska Constitution provides that "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. Alaska Const. art. 1, § 7. "[P]rocedural due process under the state constitution requires 'notice and opportunity for hearing appropriate to the nature of the case.'" *Carvalho v. Carvalho,* 838 P.2d 259, 262 (Alaska 1992) (quoting *Aguchak v. Montgomery Ward Co.,* 520 P.2d 1352, 1356 (Alaska 1974)). At the core of due process is an "opportunity to be heard and the right to adequately represent one's interests." *State, Dep't of Natural Res. v. Greenpeace, Inc.,* 96 P.3d 1056, 1063-64 (Alaska 2004) (quoting *Matanuska Maid, Inc. v. State,* 620 P.2d 182, 192-93 (Alaska 1980)). Alaskan courts recognize meaningful access to the judicial system as a fundamental right under the Alaskan Constitution. *See Public Employee Retirement System v. Gallant* 153 P.3d 346, 350 (Alaska 2006) (recognizing the right of "litigating" as a fundamental right); *Peter v. Progressive Corp.*, 986 P.2d 865, 872 (Alaska 1999); *see also Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375, 1379 (Alaska 1988); *Bush v. Reid*, 516 P.2d 1215, 1219-21 (Alaska 1973). Because, as discussed below, the ARR's application for its pesticide permit was 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, soil and vegetation types that may be affected—required for meaningful public involvement in the decision-making process, the ADEC's April 30, 2010, decision to issue pesticides permit #10-SOL-01 violates the due process rights of ACAT, and their individual members. Neither the ARR nor the ADEC provided sufficient information with which members of the public could properly consider the potential risks and costs of herbicidal spraying along the ARR right-of-way. Because the ADEC did not provide meaningful opportunities for public involvement and violated ACAT's due process rights, the ADEC must reverse its April 30, 2010, decision and rescind pesticides permit #10-SOL-01.

In addition to due process rights under the U.S. and Alaska Constitutions, the ADEC's April 30, 2010, decision and pesticides permit #10-SOL-01 violate various provisions of Article VIII of the Alaska Constitution. Section 3 provides that "fish, wildlife, and waters are reserved to the people for common use." Alaska Const. art. VIII, § 3. Section 4 provides that "[f]ree access to the navigable or public waters of the State . . . shall not be denied any citizen." Alaska Const. art. VIII, § 14. Under the ADEC's April 30, 2010, decision and pesticides permit #10-SOL-01, the ARR will be allowed to spray herbicides throughout its right-of-way in a manner that inevitably will cause contamination of nearby waters. As the ADEC itself previously observed, "any spray method, no matter how precaution, would likely result in the proposed herbicides reaching waters of the state." 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" (Feb. 2007) [hereinafter ADEC 2007 Decision]. Because of the toxic effects of the chemicals approved for use under pesticides permit #10-SOL-01, the ADEC's decision of April 30, 2010, effectively excludes ACAT and members of the public from access to, and common use of, waters within and near to, the permitted treatment area. This exclusion is a violation of ACAT,

and their individual members', constitutionally-guaranteed rights under Article VIII. *See* Alaska Const. art. VIII, §§ 3 and 14.

Beyond the constitutional rights implicated by the ADEC's April 30, 2010, decision, the decision violates various provisions of state laws and regulations. It is the State of Alaska's policy "to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well-being." AS 46.03.010(a). As a means of satisfying this purpose, the Legislature authorized the ADEC to develop regulations for the control of pesticides. *See* AS 46.03.020(10)(F) and 46.03.320. The purpose of the pesticide control regulations is "to protect human health, safety, and welfare, animals, and the environment." 18 AAC 90.010(a). To effectuate this purpose, regulations provide that a person may not "use . . . a pesticide . . . without the required certification or permit" or "in a faulty, careless, or negligent manner." *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 of the department"). As such, the ARR must obtain a permit to spray herbicides along its right of way. *See id.* Before obtaining a permit, the ARR was required to submit a permit application to the ADEC that met certain requirements. *See* 18 AAC 90.515. Additionally, regulations provide that a person may not "submit a false, misleading, fraudulent, or incomplete record, report, or application" under the pesticide control regulations. *Id.* at 90.020(7).

The application submitted by the ARR for its permit is insufficient on several grounds and, therefore, should have been denied as incomplete. The application routinely fails to provide the most basic information that is required before the ADEC can make an informed decision regarding the issuance of a permit permit. The application, even when it does attempt to comply with the applicable requirements, routinely provides incomplete or inaccurate information, or information that is so vague it serves no useful purpose to inform the public or decision-makers of the herbicides to be applied, where they will be applied, and the potential impacts of their application. Because the application contains misleading and incomplete information, contravenes state policy, and provides an insufficient basis for informed decision-making, the ADEC's April 30, 2010, decision must be reversed and pesticides permit #10-SOL-01 must be rescinded.

Specifically, an initial problem with the permit is that an application is that it must identify "the targeted pests to be controlled by the pesticide." *Id.* at 90.515(2). In its application, the ARR generally lists "vegetation/invasive weeds" but fails to identify what specific pests or weeds it plans to target. *See* ARR 2009 Application at 10. By failing to identify the target pests, the ARR circumvents the intent of the ADEC regulations and makes it impossible for the ADEC or the public to make an informed decision regarding whether the problems caused by the pests and/or weeds outweigh the well-documented risks and potential impacts to human health and the environment from the ARR's application of herbicide chemicals. Because the ARR fails to identify the

target pests, its application is incomplete in violation of the ADEC's regulations and the ADEC's April 30, 2010 decision must be reversed.

Second, the application is required to describe the "vegetation in the treatment area" and the "soil type, including drainage characteristics." 18 AAC 90.515(8)(C) and (E). 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." *See* ARR 2009 Application at 4. However, the ARR provides no detailed 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." *See* ARR 2009 Application at 4. However, 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 are undoubtedly designed to provide efficient runoff, they as a consequence encourage the dispersal of any herbicides that may be applied. 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. Each of 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 issue a pesticide permit to the ARR.

Third, and perhaps most importantly, the application 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." 15 AAC 90.515(8)(D) and (F). "[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. . . ." *Id.* at 90.990(53). "[W]aters" is defined broadly to include:

> lakes, 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). However, numerous water bodies intersect, or exist within 200 feet of, the treatment area that are not identified or otherwise included in the application. Because the application fails to identify the potentially affected water bodies, they could therefore not be considered by the ADEC and there was no meaningful opportunity for public participation in the decision-making process.

While the ARR checked "yes" in its application when asked if there are surface waters present within 200 feet of the treatment area, the ARR merely provided Google images without any identification of potentially affected waters. *See* ARR 2009 Application at 5. The aerial photographs included with the application do not satisfy the regulatory requirement and, as the September 4, 2009, letter from Ms. Karin Hendrickson to Mr. John Strasenburgh demonstrates, the ADEC evaluated the ARR's permit application as if it was for an area that did "not contain any known surface water bodies." *See* Letter from Karin Hendrickson, Pesticides Permits, ADEC, to John Strasenburgh (Sept. 4, 2009) (responding to Mr. Strasenburgh's public records request seeking all documents pertaining to waters near the permit area) [attached as Exhibit 1]. Amazingly, 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." ADEC Responsiveness Summary at 3. Despite the lack of information contained in the ARR's application identifying any potentially affected water bodies, the lack of information on file with the ADEC regarding water bodies within the permit area and the ADEC's claim that it travelled the entire permit area, water bodies identified in an application filed by the ARR in 2006 in which the ARR sought a similar permit to the one at issue here documents streams within the current permit area that were not identified in this permit application. *See* Alaska Railroad, *2006 Application, Water Features Spreadsheet* [attached as Exhibit 2]. One of the more obvious surface water bodies within the permit area and improperly omitted from the 2009 ARR application is Henry Creek, located at mile 41.6 and clearly within the permitted mile 40.7 to mile 41.8 spray area. *See* USGS Topographic Map of Henry Creek [attached as Exhibit 3]. Another water body of note is Victor Creek, sometimes referred to as "Vickery Creek," 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 Figure 4-08 [attached as Exhibit 4]. The ARR also fails to identify a lake at mile 27.52 to mile 27.64 that is 129 feet from the track. *See* ARR 2009 Application Figure 5-06 [attached as Exhibit 5]. In addition to these more obvious omissions, numerous other waters exist throughout the permit treatment area and are omitted from the current ARR application. *See* Alaska Railroad, *2006 Application, Water Features Spreadsheet*; Alaska Railroad, *2006 Application, Bridges and Culverts* [attached as Exhibit 6]; John Strasenburgh, *Comments and Exhibits in Opposition to Granting the ARR Permit* (Sept. 12, 2009) (identifying several additional waters not identified in ARR's 2009 Application) [attached as Exhibit 7]. Because the ARR's application fails to properly identify all waters that may be affected by the use of herbicides, its application is incomplete and violates the ADEC's regulations and the ADEC's April 30, 2010, decision to issue a permit, based on an inaccurate and incomplete application, is improper and must be reversed.

In addition to the various natural surface waters discussed in this document but not identified by the ARR in its current application and not considered by the ADEC in its April 30, 2010, decision, private wells exist within 200 feet of the permit area that the ARR failed to include in its 2009 permit application. *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 8]. In addition to the other omissions and faults of the ARR's Application discussed here, failing to identify potentially affected water wells violates the ADEC's regulations and could result in groundwater contamination that will be costly to remediate and untold human health impacts.

While aerial photographs such as those submitted by the ARR in its most recent application are helpful for many tasks, they are insufficient for satisfying the regulatory requirements for a complete application absent additional data and documentation. When reviewing the ARR's 2006 Application, which included much of the data referenced in the above paragraphs, the ADEC denied the permit "[d]ue to the discrepancy in data submitted to DEC and the large number of water bodies located throughout the rail line, and any spray method, no matter how precautious, would likely result in the proposed herbicides reaching waters of the state." ADEC 2007 Decision. The same waters and water contamination issues that led the ADEC denying the 2006 application still exist today and, as like in 2007 when the 2006 application was denied, there is no way to protect the important fish, wildlife and water resources along the right-of-way from the harmful effects of herbicide spraying even when spraying is done in the most environmentally responsible manner possible utilizing the best technologies and practices. Because the factual bases of the ADEC's decision to deny the 2006 Application still ring true today, any contrary decision by the ADEC—such as the April 30, 2010, decision to issue permits here—is an abuse of discretion in violation of state law. *See* AS 44.62.570. As such, the ADEC must revoke pesticides permit #10-SOL-01.

The ARR's failure to identify and document waters present within and near the treatment area is problematic on another front. The Clean Water Act provides that "the discharge of any pollutant . . . shall be unlawful" unless authorized by a Clean Water Act § 402 National Pollution Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1311(a). "Discharge of a pollutant" means any "addition of a pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Because the chemicals proposed for use by the ARR are "pollutants" under the Clean Water Act and the equipment proposed for use by the ARR is a "point source," the ARR will need to obtain a permit under § 402 of the Clean Water Act if any of its chemicals are added to "navigable waters" as defined by the Clean Water Act. *See* 33 U.S.C. § 1362(6), (7) and (14); 40 C.F.R. § 122.2. As discussed herein, numerous waters intersect or are near the treatment area necessitating a Clean Water Act § 402 permit before spraying may commence. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F. 3d 526 (9th Cir. 2001); *see also* ADEC Responsiveness Summary at 7-8.

Fourth, the application must include "the proposed date and time of each pesticide application." 18 AAC 90.515(9). Despite this explicit requirement for the "date and time" the ARR merely provides "June 2010" in its application. ARR 2009 Application at 10. Listing "June 2010" creates several problems. It plainly fails to satisfy the requirements of the ADEC regulations because it includes no specific date and not even a general time. As a result, there is no notice to the public of when the applications will occur so that people may take measures to protect themselves from herbicide exposure. Additionally, because the permit cannot become effective for 40 days following the

decision to issue a permit, the permit, even if approved, does not become active until well into June. But the main problem is that the permit expires two years after it becomes effective. If the herbicide application may only occur in June 2010, the permit should expire upon the conclusion of the application. It is therefore arbitrary and clearly excessive that the permit would last 23 months after the latest month specified in the ARR's application, or the permit itself, for chemical treatment. *See* ADEC pesticides permit #10-SOL-01.

Fifth, the application must include "special precautions planned to protect human health, safety, and welfare, animals, and the environment." 18 AAC 90.515(12). In its application and supporting documents, the ARR indicates that it will use low-pressure application, pilot cars with constant radio communication with the individuals operating the spraying equipment, and attempt to provide a 100-foot buffer zone. *See* ARR 2009 Application at Attachment 7. Additionally, the ARR plans to rely on ADEC monitoring. However, the ARR provides no substantive special precautions for the protection of human health, safety, and welfare. Important fish, wildlife, water and other environmental resources inevitably will be affected. As the ADEC concluded in its review of the ARR's 2006 application, because of the large number of waters within and near the treatment area, "any spray method, no matter how precaution, would likely result in the proposed herbicides reaching waters of the state." ADEC 2007 Decision. Because the chemicals proposed for use by the ARR pose such great health and environmental risks, and, as the ADEC recognized in 2007, herbicides cannot be applied to the permit area without contamination of waters, the ARR's application is incomplete and violates the ADEC's regulations, and the ADEC must reverse its April 30, 2010, decision.

Lastly, the application must include "information that demonstrates to the department's satisfaction that the pesticide to be applied does not cause an unreasonable adverse effect." 18 AAC 90.515(16). As the ADEC recognized in 2007 when it was evaluating an earlier application by the ARR for a similar permit, there likely is no way to prevent herbicides from reaching important waters and risking serious human health impacts and harm to important fish and wildlife. The ADEC then observed that it is impossible to avoid risk of unreasonable adverse effects if the ARR is allowed to spray herbicides along its right-of-way. *See* ADEC 2007 Decision. Because the underlying facts surrounding the current application by the ARR remain the same as in the past when the State and political leaders uniformly decided not to permit the spraying of herbicide by the ARR, any decision by the ADEC that arbitrarily deviates from past decisions of the State without providing an adequate rationale grounded in verifiable facts is an abuse of discretion and reversible by the courts. *See* AS 44.62.570. Nothing has changed to support the conclusion by the ADEC that the ARR can safely apply herbicides along its right-of-way. In fact, if anything has changed, it is our understanding of the severe potential negative impacts of glyphosate and Agridex, as discussed next. While the on-the-ground facts remain the same, our understanding of the significant health and environmental costs of the chemicals to be applied by the ARR has only improved with time and reaffirms prior concerns about adverse human health and environmental impacts. As discussed in the following section, these chemicals threaten long-term

severe impacts that, as recognized by the ADEC in 2007, amount to an unreasonable adverse effect.

The ADEC must deny a permit if it determines that (1) the "applicant fails to supply information" (2) "the special precautions [for the protection of human health, safety, and welfare, animals, and the environment] are inadequate"; (3) "the applicant . . . has failed to abide by a condition of a previous permit"; (4) "a proposed action is unlawful"; or (5) there will be "an unreasonable adverse effect." *Id.* at 90.525(b). An "unreasonable adverse effect" is defined as "an unreasonable risk to humans, animals, or the environment, taking into account the economics, social, and environmental costs and benefits of the use of the pesticide, as determined by the department." *Id.* at 90.990(54). As discussed in the preceding paragraphs and throughout this document, the ARR's application is incomplete and violates the ADEC's regulations. The application is missing requisite information regarding potentially affected waters, targeted pests, existing vegetation and soil types, the time and date of chemical application, special precautions, and how the ARR will avoid causing unreasonable adverse impacts to human health and important fish, wildlife and water resources. Because the ARR's application fails to comply with the ADEC's regulations, and herbicide spraying in the treatment area will cause unreasonable adverse effects on human health and the environment, the ADEC's decision of April 30, 2010 must be reversed and the permit must be rescinded.

The Decision Constitutes Arbitrary Decisionmaking Given the Significant Adverse Impacts to Human Health and Important Fish, Wildlife and Water Resources.

As discussed in the various comments submitted by ACAT and throughout the scientific literature, glyphosate and Agridex, chemicals permitted under ADEC's April 30, 2010, decision, cause severe adverse impacts to human health and important natural resources. Under pesticides permit #10-SOL-01, application of harmful chemicals will contaminate waters, harm valuable fish and wildlife communities, pollute important berry-picking sites and fishing and hunting grounds, pollute popular bicycle and walking areas, and threaten residential wells and water sources.

As a recent independent study shows, Aquamaster and its associated solvents and surfactants cause various severe health impacts that have not received adequate evaluation by the U.S. Environmental Protection Agency (EPA) or the ADEC. Chemicals approved for use under pesticides permit #10-SOL-01 can cause numerous problems:

> . . . including but not limited to effects on reproduction, embryonic development, endocrine, immune and neurological function as well as cancer risks. Many of these 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 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 which again are not part of the registration process.

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) (internal citations omitted) [attached as Exhibit 9].

While the EPA classified glyphosate as a Group E carcinogen in 1991, recent scientific research on the effects of glyphosate shows that it can cause severe health problems. *See generally id.* at 1-3 (surveying the available literature on health impacts from glyphosate). Individuals exposed to glyphosate have an increased risk of non-Hodgkin Lymphoma. *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. Glyphosate is associated with multiple myeloma. *See* De Roos, A. J. D., et al., *Cancer Incidence among Glyphosate-Exposed Pesticide Applicators in the Agricultural Health Study*, 113 Envt'l 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. Glyphosate causes increased risks of birth defects, late abortion, and endocrine disruption. *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).

Various solvents and surfactants permitted under the ADEC's April 30, 2010, decision can further exacerbate the problems associated with glyphosate. *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). In addition to considering the impacts from glyphosate itself, the ADEC must consider the potential impacts from specific solvents and surfactants that may be used by the ARR during its operations under the permit. Without adequate regulation of these additional chemicals and consideration of the additional potential impacts, the ADEC's April 30, 2010, decision is uninformed, improper and must be reversed. As the ADEC seems to concede, it is not privy to the actual ingredients in Agridex and, therefore, cannot make an informed decision regarding its use. *See* ADEC Responsiveness Summary at 38-39 (stating that it does not know the ingredients in Agridex and has chosen to rely on Washington State analysis). These adjuvants have been shown to kill human cells and cause other adverse impacts to embryonic, placental and umbilical cord cells at extremely low concentrations. *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). Polyethoxylated tallowamine (POEA), despite commonly being characterized as "inert," accounts for more than 86% of glyphosate toxicity. *See* Tsui, M. and Chu, L., *Aquatic Roxicity of Glyphosate-based Formulations: Comparison Between Different Organisms and the Effects of Environmental Factors*, 52 Chemosphere 1189, 1189-97 (2003). 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. *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).

In addition to the above health impacts to humans, glyphosate has numerous adverse environmental impacts to important fish, wildlife and water resources such as those found along the permit area. 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 breakdown. *See* EPA, Office of Prevention, Pesticides and Toxic Substances, *Glyphosate Summary Document Reregistration Review: Initial Docket* 10 (2009). Contamination of surface water, over both the long- and short-term can lead to many of the human health impacts discussed above, 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. *See id.*

Aquatic environs are especially vulnerable to the effects of glyphosate and, as other research has shown, the impacts of surfactants must be considered when evaluating the possible consequences to the natural environment from the use of glyphosate. *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 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 siliquoidea (Unionidae), 26 Environ Toxicol Chem 2094, 2094–100 (2007). Glyphosate also 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. *See* EPA, Office of Prevention, Pesticides and Toxic Substances, *Glyphosate Summary Document Reregistration Review: Initial Docket* 10 (2009); 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).

In addition to all the human health and environmental concerns discussed throughout the this request and comments submitted by ACAT to the ADEC in opposition to its April 30, 2010, decision, the use of glyphosate to manage vegetation can lead to the development of glyphosate-resistant weeds. *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).

In coming to its April 30, 2010, decision, the ADEC failed to properly consider all the potential human health and environmental impacts that result from glyphosate and its accompanying chemical additives (adjuvants). Additionally, because the ARR's

application was incomplete, the public had no meaningful opportunity for notice of the issues and to provide factually informed comments to be taken into consideration by the ADEC. As the ADEC noted in 2007, "any spray method, no matter how precaution, would likely result in the proposed herbicides reaching waters of the state." ADEC 2007 Decision. Just as the State over the past 30 years universally has concluded every time it was asked to consider herbicide spraying along the ARR right-of-way, spraying inevitably will cause severe irreparable harm to public health and the environment. Because this harm is so great and cannot be avoided, the ADEC's April 30, 2010, decision is arbitrary and pesticides permit #10-SOL-01 must be rescinded.

The Decision is Arbitrary Given the Readily Available Alternatives.

Other railroads in Canada and Europe, and even research within the U.S., continue to develop non-toxic alternatives to herbicides that could adequately serve the ARR's needs without endangering public health or important natural resources and without causing undue additional cost to the ARR. The fact that the ARR has successfully utilized non-herbicide treatment of vegetation along its right-of-way since 1983 further supports the use of mechanical and other non-toxic methods of vegetation treatment that adequately manage vegetation without risking undue public health and environmental harm.

A 2003 report commissioned by the U.S. Department of Transportation and the Federal Transit Administration concluded that prototype non-chemical weed control equipment "was highly effective at killing treated vegetation, easy to operate, and adaptable to a variety of application platforms." U.S. Dept. of Transportation, *Non-Chemical Methods of Vegetation Management on Railroad Right of Ways* 3 (2003) [attached as Exhibit 10]. The steering committee for this project determined that wet infrared was the "single most appropriate technology." *Id.* at 23. The report states:

> The wet infared 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.

Id. at 8. 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.

Id. The report determined that the annual costs per mile for vegetation management "could . . . range from $70-500 per mile. Of that cost, 65-80% would be labor. If labor costs are internalized within the railroad maintenance budget, significant savings over external expenditures could be realized." *Id.*

As compared to vegetation management in other countries, the report also concluded that:

> [T]he European railroad industry appears to be much more committed to the concept of integrated vegetation management than the North American railroad industry. This most likely is a result of a combination of cultural perceptions, regulatory restrictions, and administrative differences related to public (European) vs. private (North America) ownership. The European experience has shown that the technology to implement integrated vegetation management programs is available and achievable given the proper incentives.

Id. at 51. The Canadian Pacific Railway implemented hot water technology as a "primary management tool on a portion of its track in the Pacific Northwest." *Id.* at 7. The technology, tested across North America, was successful and effective in vegetation control. 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, 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. *Id.* at 20. Mechanical measures including cutting, girdling, mowing and grazing animals provide effective means to eradicate unwanted vegetation along rights-of-way. 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. *Id.* at 21. 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 in other countries, non-toxic alternative 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.[1]

The British Columbia government recommends the use of ecological vegetation management rather than the use of herbicides. The government's Integrated Pest Management Program notes that:

> repeated 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.

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 (last visited May 30, 2010) [attached as Exhibit 11]. Herbicide applications are likely to result in higher costs over the long-term, as plants develop resistance to herbicide applications. *See id.* The use of herbicides will perpetuate resistance of the vegetation to treatment and will not be effective in vegetation management in the future. *See id.*

As demonstrated by successful non-chemical vegetation management in other countries and research in other parts of the U.S., new and proven methods and technologies that do not rely on synthetic herbicides, including new acetic acid-based products, improved infrared steam technology, cultural and biological control methods provide readily-available low- or no-impact alternatives for the ARR's vegetation management needs. Moreover, cleaning and changing of ballast at regular intervals (required infrequently—e.g. every 10 years) is proven to be effective (by the ARR's own admission) at reducing and eliminating weed problems. A clean ballast does not support plant growth. Finally, innovative methods using goat herds to graze unwanted vegetation have proven successful in public lands and rights-of-way vegetation management on small- to large-scale projects. *See* Lamming, Lani, *Successfully Controlling Noxious Weeds with Goats*, 21 Pesticides and You 19, 20-22 (2001) [attached as Exhibit 12].

Because of the many readily available, non-toxic alternatives to herbicidal treatment of right-of-way vegetation, the ADEC's decision of April 30, 2010, to issue pesticides permit #10-SOL-01 was arbitrary, improper and must be reversed.

---

[1] What is particularly troubling about the ARR's application for this permit and the ADEC's decision to issue it is that the ARR has found non-toxic alternative methods to clear vegetation for almost three decades. There has been no explanation or justification from the ARR or the ADEC about why such toxic herbicide application methods are now necessary given the significant threat to human health and the environment.

The Due Process Rights of ACAT and its Members Require that the ADEC Stay its Decision.

As discussed above, the Due Process Clause of the Alaska Constitution provides that "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. Alaska Const. art. 1, § 7. 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. *See* 18 AAC 15.300(c); *Stein v. Kelso*, 846 P.2d 123, 126 (Alaska 1993). Additionally, meaningful access to court cannot be guaranteed, as required by the Alaskan Constitution, if ACAT are required to exhaust the ADEC's administrative remedies, but are denied procedural due process throughout the ADEC proceeding. As the Alaskan Supreme Court recognizes, "there is a certain level of procedural fairness that must be accorded to an affected party." *Nichols v. Eckert*, 504 P.2d 1359, 1364 (Alaska 1973); *See Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970) (providing that the Alaska Constitution offers greater due process protections that the U.S. Constitution).

In determining whether due process has been observed by an administrative agency, the court reviews the proceedings:

> [T]o assure that the trier of fact was an impartial tribunal, that no findings were made except on due notice and opportunity to be heard, that the procedure at the hearing was consistent with a fair trial, and that the procedure was conducted in such a way that there is an opportunity for a court to ascertain whether the applicable rules of law and procedure were observed.

Robles v. Providence Hospital, 988 P.2d 592 (Alaska 1999) (citing *In re Hanson*, 532 P.2d 303, 305 (Alaska 1975) (footnote omitted)). Due process in an administrative hearing includes the right to a neutral and unbiased decision-maker who presides over proceedings that are fair and that have the appearance of fairness. *Copeland v. Ballard* 210 P.3d 1197, 1201 (Alaska 2009), quoting *State v. Lundgren Pac. Constr. Co.,* 603 P.2d 889, 895-96 (Alaska 1979).

The substantive and procedural due process protections guaranteed by the Alaska Constitution require the ADEC to impose a stay of its April 30, 2010, decision 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. This is especially true in this situation where the herbicide application is scheduled to occur as soon as the permit becomes effective and will be complete before ACAT receives relief on it request for adjudicatory hearing. Because ACAT, and their individual members, all have interests in, and are concurrent users of, the important fish, wildlife and water resources that will be adversely affected by the ADEC's April 30, 2010, decision to issue permit #10-SOL-01, and will suffer other health and environmental damage from spraying under the permit, the ADEC must impose a stay of its decision pending the resolution of this

request for an adjudicatory hearing and a final decision by the ADEC that, if adverse, ACAT may appeal to the Alaska superior court.

The U.S. Supreme Court has addressed a similar issue to the one here involving the federal Administrative Procedure Act. *See Darby v. Cisneros*, 509 U.S. 137, 148 (1993). 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.

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). 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, 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.

Id. 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 U.S. and Alaska Constitutions, then the ADEC must stay its decision pending exhaustion of administrative remedies. This is because, without a stay, no later hearing or remedy at law can undue the arbitrary deprivation of ACAT's due process rights and the harm that would be caused by the arbitrary requirement that ACAT pursue administrative exhaustion without the ADEC granting a stay. *See State v. Greenpeace,* 96 P.3d at1064 -1065 (citing *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972)).

If the ADEC fails to issue a stay and requires ACAT to pursue administrative remedies prior to appeal to the Alaska superior court, the ARR will spray under its ADEC-issued permit thereby causing untold harm to important environmental resources and risk significant human health impacts, as discussed elsewhere in this request and in the comments ACAT submitted to the ADEC in opposition to the permit. The harm that will be caused should the ADEC fail to issue a stay will be irreparable and cannot subsequently be remedied through any administrative process or at law because the actions under the permit will be completed and irremediable. If the ARR is allowed to spray under permit #10-SOL-01 while the ADEC requires ACAT to pursue administrative exhaustion, the ADEC will violate the fundamental right of ACAT to due process guaranteed by the U.S. and Alaska Constitutions. For the foregoing reasons, the

ADEC must issue a stay of its April 30, 2010, decision pending exhaustion of administrative remedies prior to any appeal to the Alaska superior court.

ACAT Requests Additional Time to Supplement the Record.

ACAT request additional time to supplement the record of this request for an adjudicatory hearing. As discussed above and in the factual section below, there are numerous material facts in dispute. For example, while this request highlights some of the waters that most obviously were omitted from the ARR's application, many additional waters were omitted that are not included in this request because of time restraints. The potential area affected by pesticides permit #10-SOL-01 is exceptionally large, and portions of it are in remote locations. The documents and materials evidencing the material facts in dispute are voluminous. Additional time to supplement the record is necessary to ensure that the ADEC's decisions are well informed and act to effectuate the purpose of the pesticide control regulations—i.e., "to protect human health, safety, and welfare, animals, and the environment." 18 AAC 90.010(a).

Material Facts in Dispute.

In addition to the material facts identified in other portions of this document, ACAT assert the following material facts that are in dispute:

1. Numerous documented and currently undocumented surface waters intersect with, or are within 200 feet of, the permitted treatment area.
2. Numerous private groundwater wells exist within 200 feet of the permitted treatment area.
3. Other waters, including groundwater and private groundwater wells, are highly interconnected with waters in the permitted treatment area.
4. The use of chemicals by the ARR under the permit will, no matter how careful the ARR is, contaminate waters and private groundwater wells.
5. The permitted chemicals cause severe human health and environmental harm.
6. No matter how careful the ARR is while spraying, it will cause an unreasonable adverse impact to human health and the environment.

Because there are significant material facts in dispute, and several mixed factual and legal issues in dispute, if the ADEC does not immediately reverse its April 30, 2010, decision and rescind pesticides permit #10-SOL-01, it must issue a stay and hold an adjudicatory hearing to allow ACAT to conduct discovery, brief the various issues, advance expert opinion and factual witnesses, and pursue all other procedural opportunities available under the ADEC's regulations. The stay pending a final decision appealable to the Alaska superior court is required because the potential harm to ACAT, their individual members and the public is so great and the actions under the permit are imminent, irreparable and irremediable.

Remedy Requested

For the foregoing reasons, ACAT respectfully request that the ADEC issue an immediate stay of its April 30, 2010, decision, reverse its decision and rescind pesticides permit #10-SOL-01, and prohibit all future spraying of harmful chemicals along the ARR right-of-way. If the ADEC does not issue an immediate stay and immediately reverse its April 30, 2010, decision, ACAT request: (1) a five-day adjudicatory hearing on the material factual issues discussed above; (2) discovery; (3) briefing of the factual and legal issues; and (4) the opportunity to advance expert opinion and factual witnesses.

As discussed throughout this document, ACAT will be directly and adversely affected if the ADEC's decision of April 30, 2010, goes into effect and an adjudicatory hearing is not issued. The interests of ACAT in human health and the environment are the same interests that the U.S. and State Constitutions, federal water pollution control laws and regulations, state water pollution and pesticide laws and regulations, and ADEC administrative regulations were designed to protect. The ADEC's April, 30, 2010, decision and action under pesticides permit #10-SOL-01 directly threatens ACAT's interests in human health and wellbeing, and the environment.

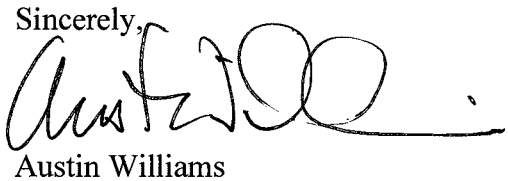
ACAT requests that the Commissioner issue a final decision on whether it will issue a stay by Friday, June 4, 2010. A final decision is required by that date because spraying is set to begin under the permit on June 9, 2010, and, once spraying commences, the harm to ACAT will be immediate and irremediable.

Contact Information

Please direct correspondence on this matter to Austin Williams at the address on the letterhead of this request or by telephone at 276-4244, ext. 114.

Thank you for your prompt attention to this matter.

Sincerely,



Austin Williams
Staff Attorney

Pamela Miller
Executive Director
Alaska Community Action on Toxics
505 West Northern Lights Boulevard, Suite 205
Anchorage, AK 99503
907) 222-7714
pkmiller@akaction.net

Toby Smith
Executive Director
Alaska Center for the Environment
807 G Street, Suite 100
Anchorage, AK 99501, USA
(907) 274-3621
toby@akcenter.org

Becky Long
Director
Alaska Survival
PO Box 320
Talkeetna, AK 99676
907-232-5638
longfellow1741@hotmail.com

Bob Shavelson
Executive Director
Cook Inletkeeper
P.O. Box 3269
3734 Ben Walters Lane
Homer, AK 99603
907.235.4068 ext 22
bob@inletkeeper.org

Karla Dutton
Alaska Program Director
Defenders of Wildlife
(907) 276-9453
karla.dutton@defenders.org

Marc Lamoreaux
Land & Environment Director
Native Village of Eklutna
26339 Eklutna Village Road
Chugiak, AK 99567
(907) 688-6020
nve.ledirector@eklutna-nsn.gov

Jennifer Gibbins
Prince William Soundkeeper
PO Box 1368
Cordova, AK 99574
907-424-5701
jennifer@pwskeeper.org

Russ Maddox
Board Member and Activism Director
Resurrection Bay Conservation Alliance
P.O. Box 1092
Seward, AK 99664
russmaddox@yahoo.com

Tom Kluberton
Owner and operator
Fireweed Station Inn
P.O.Box 200
15113 E. Sunshine Rd
Talkeetna, AK 99676
907-733-1457
tomk@mtaonline.net

cc via email: Senator Mark Begich

TABLE OF EXHIBITS

DESCRIPTION	EXH.
Letter from Karin Hendrickson, Pesticides Permits, ADEC, to John Strasenburgh (Sept. 4, 2009).	1
Alaska Railroad, *2006 Application, Water Features Spreadsheet.*	2
USGS Topographic Map of Henry Creek.	3
ARR 2009 Application Figure 4-08.	4
ARR 2009 Application Figure 5-06.	5
Alaska Railroad, *2006 Application, Water Features Spreadsheet*; Alaska Railroad, *2006 Application, Bridges and Culverts.*	6
John Strasenburgh, *Comments and Exhibits in Opposition to Granting the ARR Permit* (Sept. 12, 2009).	7
Letter and Wells Spreadsheet from Matt C. Kelzenberg, Environmental and Regulatory Officer, ARR, to Bob Buckwalter, Environmental Program Specialist, ADEC (Oct. 4, 2006).	8
Porter, Warren, *Literature Review on Biological Effects of Roundup Herbicide and Evaluation of Materials Safety Data Sheet and Use Instructions for Aquamaster* (2010).	9
U.S. Dept. of Transportation, *Non-Chemical Methods of Vegetation Management on Railroad Right of Ways* (2003).	10
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.	11
Lamming, Lani, *Successfully Controlling Noxious Weeds with Goats*, 21 Pesticides and You 19 (2001).	12

* All exhibits were only sent via U.S. Mail due to size constraints of email and facsimile.