BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION

ALASKA COMMUNITY ACTION ON TOXICS, and ALASKA SURVIVAL, Requestors, v. ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF ENVIRONMENTAL HEALTH, Respondent.	)	OAH No. 10-0278-DEC Alaska Railroad Pesticide Permit (Permit No. 10-SOL-01)

DECISION

I. INTRODUCTION

The Division of Environmental Health (Division) issued a pesticide permit to the Alaska Railroad Corporation (ARRC) granting permission to spray herbicides on certain portions of ARRC track and other property.[1] Several organizations and individuals contested that decision and requested a hearing as to whether the decision was appropriate. The Commissioner for the Alaska Department of Environmental Conservation determined that two of the requestors had standing to request the hearing. Those requestors are Alaska Community Action on Toxics and Alaska Survival, and are referred to collectively as ACAT. Pursuant to 18 AAC 15.220, the Commissioner granted an adjudicatory hearing as to some of the issues raised by ACAT involving factual disputes, and granted a hearing on the record as to other issues of law or policy.[2] A preliminary ruling on the hearing on the record was issued on February 16, 2011. ACAT then moved to dismiss its request for the adjudicatory hearing. After briefing by the parties, that request was granted. Accordingly, there are no remaining issues for hearing, and the matter is ripe for a final decision.

As discussed below, the Division properly exercised its discretion to consider the pesticide application to be complete. In addition, ACAT was not deprived of any constitutional

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[1] The Department of Environmental Conservation has the authority to regulate the use of pesticides. AS 46.03.320 – 330. The term "pesticide" includes herbicides, which are substances intended to "prevent, destroy, repel, or mitigate vegetation." 18 AAC 90.990(24) & (37).

[2] *See* 18 AAC 15.220(b)(1)(B) and 18 AAC 15.220(b)(3).

rights. Accordingly, there is no basis to reverse the Division's decision and revoke ARRC's permit.

II. FACTS

On April 30, 2010, the Division issued a permit allowing the herbicide application along the railroad right of way.[3] The basis for granting the permit was explained in a Decision Document of the same date.[4] The permit allowed the use of AquaMaster Herbicide with the active ingredient glyphosate which would be mixed with a non-ionic surfactant, Agri-Dex.[5] The permit allowed the spraying of this mixture along the 8 foot width of the rail bed at certain specified locations between the Seward Yard and Mile Post 90 of the Alaska Railroad.[6]

III. DISCUSSION

A. Issues for Hearing

The Commissioner granted a hearing on the existing agency record as to three issues:

- Whether the Division reasonably exercised its discretion in determining that the application was complete;
- Whether ARRC was required to list all public and private water systems within 200 feet of the treatment area; and
- Whether valid statutes or regulations were applied in an unconstitutional manner.[7]

Concerning the third of these issues, the Commissioner stated:

> ACAT also asserts that its constitutional rights were violated because the Division made a decision based on an inadequate application. Generally, constitutional challenges to statutes or regulations are beyond the scope of executive branch jurisdiction. If, however, ACAT is asserting that the Division applied a proper regulation or statute in an unconstitutional manner, that issue might be within the Commissioner's power to decide. ACAT may raise this issue as part of a hearing on the record.[8]

ACAT has the burden of proof on all issues in this hearing.[9]

B. Neither ACAT nor its Members Were Deprived of Due Process

Both the Alaska and the United States Constitutions prohibit government taking of life, liberty, or property without due process of law.[10] The first due process claim raised by ACAT is

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3 Record at 25 – 28.
4 Record at 1 – 24.
5 Record at 5.
6 Record at 5 – 6.
7 Order Regarding Request for Hearing, pages 7 – 8.
8 Order Regarding Request for Hearing, pages 6 – 7 (internal citation omitted).
9 18 AAC 15.270(d).
10 Alaska Const. Art. 1, §7, U.S. Const. Amend V.

that it did not have a meaningful opportunity to participate in the permitting process because the Division did not insist on an application from ARRC that included all of the information required for a pesticide permit.

ACAT's asserts a general property interest in land, water, wildlife, and fish.[11] Assuming such interests exist, ACAT is entitled to notice and an opportunity to be heard before any deprivation occurs. The notice must be sufficient to inform a person of the possible deprivation and the opportunity to oppose that action.[12] Even if the notice is inadequate, however, there is no due process violation if the individual contesting the action "actually appears and presents his claims."[13]

ACAT argues that the application omitted crucial information and that without this information "it was impossible for ACAT and its members to be aware of, or consider, the potential risks and costs of herbicide spraying along the right-of-way."[14] The record in this case, however, shows that members of the public were aware of the potential risks and costs of herbicide spraying, and were able to present their objections to the ARRC's proposal. Alaska Community Action on Toxics submitted comments concerning its position that vegetation along the rail bed could be managed without herbicide use.[15] It also submitted information about the possible environmental effects of herbicide use.[16] Finally, it was able to present information about the possible harm to water bodies from the herbicide.[17] Similarly, Alaska Survival was also able to present information about other methods of vegetation control, the effect of herbicide on water bodies, and the dangers of herbicide use.[18] Both organizations were able to do this without having more information about the specific water bodies, wells, and vegetation that might be affected.

Numerous other individuals and organizations also provided comments. ACAT, its members, and many others were in fact aware of the potential risks and costs of herbicide spraying, and presented their arguments to the Division. Most importantly, there is nothing in the record or in ACAT's briefing to suggest that anyone was limited in their ability to adequately

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11 ACAT Opening Brief, page 3. It also mentions, without substantive discussion, life and liberty interests.

12 *State, Dept of Natural Resources v. Greenpeace, Inc.*, 96 P.3d 1056, 1064 (Alaska 2004).

13 *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192 – 193 (Alaska 1980). *See also, Laidlaw Transit, Inc. v. Anchorage School District*, 118 P.3d 1018, 1028 (Alaska 2005) ("More important, the record establishes that the three-day notice actually given sufficed to enable Laidlaw to submit a cogent and well-prepared response.")

14 ACAT Opening Brief, pages 5 – 6.

15 Record at 1254 – 1256.

16 Record at 1256 – 1263.

17 Record at 1265 – 1267.

18 Record at 1074 – 1076; 1127 – 1158.

represent their interests by the asserted lack of specificity concerning the water bodies, wells, and vegetation.[19] Even if the notice was defective in some way, there was no due process violation because ACAT and its members were actually able to present their objections before the Division made its decision.

In addition, the notice was adequate. An adequate notice is one that informs an individual that a deprivation may occur and provides an opportunity to present objections.[20] A copy of the proposed notice was included in ARRC's application.[21] It is this document, and not the application, that must be examined to determine whether people were given adequate notice for due process purposes. The notice states that the herbicide will be sprayed on the rail bed along a 90 mile corridor and in ARRC's rail yards.[22] To the extent any person believed his or her property rights might be affected by herbicide spraying near any vegetation or bodies of water along that 90 mile corridor, he or she was told how to submit a comment or request a public hearing.[23] Such a person was on notice of the need to comment if he or she was concerned about any vegetation or any water bodies near that 90 mile corridor or near the rail yards.

Finally, ACAT has also not shown that it or its members were actually deprived of any protected property interests. If they were not deprived of any protected interest, then they were not entitled to constitutional due process.[24]

ACAT never clearly identifies the manner in which spraying of this herbicide will actually deprive someone of a protected property interest. Arguably, people may feel forced to avoid areas that have been sprayed with the herbicide, but ACAT members have no right to be on the railroad right of way in the first place. ARRC property was transferred to Alaska by the federal government.[25] This transfer included either title to or the exclusive right to use the railroad right of way extending 100 feet on either side of the centerline of the track. Under

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[19] One person did comment that a survey of the types of plants in the target area would be helpful because she believes the herbicide won't be effective against woody plants, and is unnecessary for other plants. Record at 1203 – 1205. This argument is aimed more at the decision to target all vegetation, and the commenter was able to make that argument without having a plant survey. In addition, nothing in the record establishes that this person is a member of either Alaska Community Action on Toxics or Alaska Survival, the parties who requested a hearing in this matter.

[20] *Greenpeace*, 96 P.3d at 1064.

[21] The notice was published in the Anchorage Daily News, the Seward Phoenix Log, and the Turnagain Times. Record at 7.

[22] ARRC Exhibit A, page 97.

[23] *Id.*

[24] *Nichols v. Eckert*, 504 P.2d 1359, 1362 (Alaska 1973) (Due process clause only applies if there is a deprivation of an individual interest).

[25] 45 U.S.C.A. §1201 *et seq.*

Alaska law, the ARRC has the authority to manage and control the land transferred to the state by the federal government.[26] The treatment area is eight feet wide along the centerline of the rail bed. Because the right of way extends 100 feet on either side of the centerline, no ACAT member has a protectable right to be within 96 feet of the area sprayed with herbicide.[27] ACAT members do have the right to be as close as 96 feet from the treatment area, but ACAT has not shown how treatment of the eight foot wide rail bed interferes with this right.

ACAT's brief has also not shown how the decision to issue the permit interferes with any property interest in water, wildlife, and fish. As discussed above, ACAT members do not have the right to access water, wildlife, and fish within the right of way. Of course, water, wildlife, and fish can transit the right of way to areas that are accessible by ACAT members. However, ACAT's brief does not explain how issuance of the permit interferes with any property interest that its members may have in this water, wildlife, or fish. Absent a deprivation of some protected interest, there can be no due process violation regardless of the process followed.

ACAT's second due process claim is concerned with adequate notice of when herbicide spraying would occur during the permit period.

> [B]ecause there is no requirement that the ARR provide notice to the public or otherwise post the spray area when spraying occurs, ACAT is deprived of its due process rights. It is impossible for ACAT or other members of the public to know when and where spraying will occur, and to make the informed decision to avoid hazards posed by contaminants in the spray area.[28]

ACAT suggests that because people may not be aware that an area has been sprayed with the herbicide, they may come into contact with the treatment area which may result in the loss of life or liberty.[29]

ACAT has not explained in its briefing how this warning is constitutionally required. ACAT acknowledges that this is not a traditional notice and opportunity for a hearing claim. Instead, this claim asserts the right to notice concerning a potential hazard created by the herbicide spraying. ACAT has not shown that this notice is constitutionally required.

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[26] AS 42.40.250(10) & (19); AS 42.40.350(a).

[27] It is likely true that people trespass on ARRC property, but ACAT has not shown how any interference with a person's ability to trespass on ARRC property could be a constitutional violation.

[28] ACAT's Opening Brief at 6.

[29] ACAT's Opening Brief at 7.

C. Neither ACAT's nor its Members' Rights to Common Use and Access were Denied

ACAT's final constitutional claim is that granting this permit violates ACAT's rights under Article VIII of the Alaska Constitution. Section 3 of Article VIII states that fish, wildlife, and waters of the state are reserved for common use. Section 14 provides for free access to navigable or public waters. ACAT argues that, because of the toxic nature of the herbicide, issuance of the permit effectively excludes its members from use of any water or other resources in or near the permit area.[30]

Alaska regulations allow the Division to grant permits for the spraying of pesticides on public land.[31] Under ACAT's argument, spraying any pesticide on public land would deny its members access to that land, along with any water, plants, and wildlife on that land, for at least some period of time. If that restriction is unconstitutional, it is because of a problem with the regulations themselves rather than the application of those regulations to this particular permit request. Whether the regulations are invalid because they allow application of pesticides in violation of Article VIII of the Alaska Constitution is beyond the scope of this hearing, and is a question that can only be answered by the judicial branch.

D. Whether the Division Abused its Discretion in Accepting the Application

1. The Agency's Discretion

The information to be included in every application for a pesticide permit is set out in 18 AAC 90.515. The Division decides whether to issue or deny a permit based on the information in the application, the public record, and any comments from local, state, and federal agencies.[32] The applicable regulation goes on to say:

> The department will, in its discretion, deny a permit if
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> (1) the applicant fails to supply information or evidence required by this chapter.[33]

Contrary to ACAT's assertion, the Division is specifically granted the discretion to issue a permit even if the application does not provide all of the information required by 18 AAC 90.515. Therefore, the questions for this hearing are first, whether required information was omitted and, if so, whether the Division abused its discretion in considering the application to be complete despite any missing information.

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30 ACAT Opening Brief at 8.
31 18 AAC 90.500 – 900.
32 18 AAC 90.525(a).
33 18 AAC 90.525(b) (emphasis added).

2. Potentially Affected Surface Waters

The first deficiency asserted by ACAT is that the application does not identify all the bodies of water within 200 feet of the treatment area as required by regulation.[34] ACAT argues that the Division abused its discretion in granting this permit without identification of all potentially affected surface water.

The apparent purpose of including a list of potentially affected surface water is to protect that water from contamination. The area to be sprayed, however, stretches along approximately 90 miles of track[35] with numerous bodies of water, both small and large, many of which are seasonal. After reviewing the application, the Division asked the ARRC to make several revisions, including:

> We recommend deleting the list of water features from the application. It would be very difficult to ensure that such a list is complete and accurate. The proposed method of identifying water features on the ground is a more through approach.[36]

The ARRC proposed a 100 foot buffer zone around any surface water.[37] Rather than show on a map where each body of water was located, water features would be identified on the ground. "Water bodies within 200 ft. of the tracks will be identified in person on site and appropriate buffer zones marked/measured before herbicide application."[38] In spraying the herbicide, the ARRC would operate a pilot car in front of the application vehicle.[39] The pilot car would remain in constant radio communication with the application vehicle and provide notification of each buffer zone in time to stop applying the herbicide.[40] To assist in that process,

> The areas where the herbicide will be applied will be marked using white and blue marking spray paint. The railroad tie that marks the south end of each application area will be painted blue and three consecutive ties on the north end of the application zone will be painted white. . . . The application vehicle will proceed from the south end moving north through each of the application zones.[41]

The Division determined that this method of pre-marking the 100 foot buffer, along with the use of a pilot car during spraying, would adequately prevent the herbicide from impacting surface water.[42] The Division could reasonably conclude that this method would provide *more*

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34 18 AAC 90.515(8)(D).
35 Record at 762.
36 Record at 983.
37 Record at 764.
38 Record at 772.
39 *Id.*
40 *Id.*
41 *Id.*
42 Record at 33.

protection for surface water than requiring a list of potentially affected water bodies. It was therefore within the Division's discretion to grant the permit despite not having a list of potentially affected water bodies.[43]

ACAT notes that the permit was approved despite concerns raised by the Division of Water and the Department of Fish and Game.[44] The Division of Water provided extensive comments. It stated, in part:

> While the transportation of pesticides was possible in many or all of the spray zones, the railroad representatives attempted to reassure that they chose a pesticide with the least toxicity and least persistence in water. More reassuring however, was the description of using an eyeballed approach for each section, noting if there was water within, and marking off spray areas with blue and white ties. This preparation of the track, along with the use of an observational pilot car in front of the spray truck will help, or is even necessary, to account for seasonal and annual changes that may occur and that the railroad has no control over (Picture 5 for example), as well as any mistakes made in the planning (Picture 6).[45]

The Division of Water did note that there were some spray areas with the potential to transport pesticides to water, but went on to say "water quality will be better protected by careful marking of spray areas, careful application, and adherence to spill prevention measures, rather than rigid conformity to set spray zones."[46] In the summary section of its comments, the Division of Water noted that the likelihood of herbicide being transported to a drinking water source is small.[47] The Division of Water acknowledged several potential water quality violations, including the potential for an excess concentration of glyphosate, but the comments conclude: "While none of these things were observed, the railroad may want to be mindful of such water quality violations potentially occurring.[48] A fair reading of all of the Division of Water's comments is that the Division of Water supported the method of identifying bodies of water used in this permit instead of using a static list identifying every body of water, and that it had no objection to issuing the permit.

The Department of Fish and Game also had some concerns. Fish and Game's comments suggested that the permit not be issued until after a University of Alaska Fairbanks study,

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[43] Because of the 100 foot buffer zones, and because the Division had reason to believe gylphosate will not travel far from the treatment area, the Division could also reasonably conclude that there are no potentially affected water bodies.

[44] ACAT's Opening Brief at 11.

[45] Record at 311.

[46] Record at 312.

[47] Record at 313.

[48] Record at 313.

currently in progress, was completed. Fish and Game also suggested that the treatment area be limited to five feet on either side of the rail bed centerline.[49] These concerns are not related to the question of whether the Division should have required a complete list of all potentially affected bodies of water.[50]

3. Potentially Affected Wells

ACAT has also stated: "Beyond the surface waters omitted from consideration in violation of the ADEC's regulations, the ARR's application omits numerous private wells located within 200 feet of the permit area."[51] Neither the Division nor ARRC dispute that there are private wells within 200 feet of the permit area.

ARRC argues that it did provide the list of wells within 200 feet of the treatment area because the Division of Public Drinking Water Protection was able to create a list of public water sources that are near the railroad.[52] The fact that another agency was able to compare the application to its database and determine wells in the vicinity of the treatment area is not the same as including that information in the application. In addition, the Division of Public Drinking Water Protection only provided a list of public water sources.[53] Its list does not include any private wells.[54]

The ARRC also argues that there are no potentially affected public or private water systems within 200 feet of the treatment area because glyphosate has limited mobility in the soil, so spraying it on the track bed will not impact any public or private well.[55] The regulation at issue, however, says the application must include

> 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.[56]

This regulation asks for a list of *potentially affected* surface water or marine water, and also asks for a list of each public or private water system, regardless of whether it is potentially affected.

Both the Division and the ARRC also argue that this issue is moot because they have now agreed to permanently comply with the temporary stay issued by the Commissioner. That stay

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49 Record at 345. The permit limits the application to only four feet on either side.

50 ACAT also asserts that ARRC is required to get a §402 National Pollution Discharge Elimination System Permit. ARRC disputes this. Whether the railroad needs this additional permit is beyond the scope of this hearing.

51 ACAT's Brief at 14.

52 ARRC's brief at 21.

53 Record at 327.

54 *See* ACAT Exhibit 8 (list of private wells within 200 feet of the AARC right of way).

55 ARRC's brief at 20.

56 18 AAC 90.515(8)(D).

prohibited any herbicide spraying within 200 feet of seven specified wells. The issue is not moot, however, because the stay was limited to those specified wells, and the information from which those wells were identified was created in 2006.[57] That list was about three years old when the application was submitted, and there may now be other private wells within 200 feet of the spray area. In addition, that list does not address the public water sources identified in the record.[58]

Because the required list of public and private water systems was not included in the application, this decision must address whether the Division abused its discretion in considering the application to be complete. The Division determined that it did not need this list of water systems. In response to comments about possible groundwater effects, the Division stated:

> [T]he UAF study documented a maximum groundwater concentration of 30 ug/L glyphosate. The majority of samples were below detection limits. Given these and other results, DEC does not believe that groundwater will be adversely affected through use of this permit.[59]

Given the Division's conclusion that groundwater will not be adversely affected, there was no need to require a list of public and private water systems. Thus, it was within the Division's discretion to determine that the application was complete.[60]

4. Identification of Targeted Pests

ACAT next asserts that the application should have been rejected because it failed to list the targeted pests as required by 18 AAC 90.515(2). The permit stated that the targeted pests consisted of "Vegetation/Invasive weeds."[61] The purpose of this permit is to remove all vegetation from the railroad tracks.[62] Thus, listing "vegetation" is an accurate and complete description of the targeted pests. In addition, a different section of the application lists the vegetation in the treatment area:

> Invasive weeds and vegetation.
>
Queen Anne's Lace	Foxtail	Willow	Spotted Knapweed
Cow Parsnip	Dandelion	Alder	Orange Hawkweed
Equisetum	Tansy	Salsify	Sweet Clover

[57] ACAT Exhibit 8, page 1.
[58] Record at 327.
[59] ARRC Exbhit B, page 22.
[60] The issue in this decision is whether the Division abused its discretion in considering the application to be complete. Whether the herbicide does in fact pose an unreasonable risk of adverse effects was a question reserved for the adjudicatory hearing. Because the adjudicatory hearing was voluntarily dismissed, there is no factual finding on that question.
[61] ARRC Exhibit A, page 15.
[62] ARRC Exhibit B, page 13.

And other broadleaves and grasses.[63]

The permit did list the targeted pests as required. In the alternative, it would not be an abuse of discretion to grant the permit even if this description is considered to be an inadequate identification of the targeted pests. The Division knew that the purpose of the permit was to eradicate all vegetation in the treatment area, and the Division further knew the type of vegetation likely to be found in the treatment area. The Division could reasonably conclude there was no need for a more detailed description of the vegetation being eradicated since the target is *all* vegetation.

5. Identification of Vegetation and Soil Type

ACAT complains that the application did not adequately describe the vegetation in the treatment area. It states that ARRC did not "provide vegetation maps, plant surveys or other data to document the vegetation present in the treatment area."[64] As discussed above, the application did list the vegetation found in the treatment area. It did not, however, describe the distribution of those plants throughout the treatment area, or their relative frequency. ACAT does not explain why the Division should have required that additional information or how it might have been useful to anyone during the public comment period. Again, the purpose of this permit was to eradicate all vegetation. The application adequately identified that vegetation. In the alternative, the Division acted within its discretion to approve this application even if it is technically incomplete because a more detailed description of the vegetation would not have assisted it in evaluating the application and would not have assisted the public in submitting comments.

ARRC's description of the soil and drainage is "Rock ballast on top of packed soil. Water drains through the rock to the soil, down the shoulder to the ditches."[65] ACAT asserts that this is not adequate to meet the regulatory requirement, but does not explain why. Absent some explanation of why a more detailed description of the soil and drainage was important for the Division's decision or the public's opportunity to comment, ACAT has not met its burden of proving that the application is incomplete.

In addition, even if it is incomplete, ACAT has not met its burden of proving that it was an abuse of discretion to grant the permit. The Division was aware of the interim findings from a study by the University of Alaska Fairbanks. The study looked at glyphosate applied to railroad

63 ARRC Exhibit A, page 7.
64 ACAT's Brief, page 16.
65 ARRC Exhibit A, page 7.

bed materials. It found that "under typical Kenai Peninsula weather glyphosate applied to the soil is not downwardly mobile, is metabolized by soil microorganisms, and dissipates within approximately two weeks."[66] This study also indicates that glyphosate is "relatively non-mobile in soil."[67] Based on this information, the Division could reasonably exercise its discretion to consider the application complete even if more detailed descriptions of the soil and drainage would normally be required.

6. Identification of Date and Time of Spraying

ACAT's next argument is that the application fails to include the date and time of each herbicide application. The application simply states that the herbicide will be applied in June of 2010. The permit granted to ARRC allows spraying for a two year period beginning in June of 2010.[68] ACAT states that because the permit application does not specify the time and date of spraying, it is impossible for "individuals concerned about the harmful effects of spaying to avoid exposure."[69] ACAT also states that the "decision to issue a two-year permit instead of a shorter-length permit limited to the month specified in the ARR's application is arbitrary."[70]

There are at least two separate issues here. Whether the Division abused its discretion in considering the application to be complete is a separate issue from whether the permit actually granted was proper. The issue for this hearing on the record is whether "the Division reasonably exercised its discretion in determining that the application was complete."[71]

The permit application describes how the herbicide would be sprayed in a manner that would limit any drift to areas beyond the treatment area. The permit was also limited to areas not open for public access. In addition, the permit requires advance notice to the Division of the specific date and time of spraying.[72] The Division could reasonably conclude that it did not need any additional information about the time and date of the spraying other than "June 2010."

The permit does allow herbicide spraying well beyond the month requested by the ARRC in its application. This does not mean that the application was incomplete, but it does raise the question of whether the Division abused its discretion in granting something that was not requested. While not within the grounds for which a hearing on the record was granted, this issue will be briefly addressed.

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66 Record at 12.
67 *Id.*
68 ARRC Exhibit E, page 1.
69 ACAT's Brief at 18.
70 ACAT's Brief at 17.
71 Order of Deputy Commissioner, August 6, 2010.
72 ARRC Exhibit 3, page 2.

Normally, a pesticide permit would be good through December 31 of the year in which the permit is granted.[73] It is within the Division's authority to grant a permit that lasts beyond the specific dates listed in the application, and the normal termination date of any permit is the end of the calendar year unless the Division takes an affirmative action to change that date. The Division was not required to take that action. Some permits, including this one, are dependent on weather conditions and it would not make sense to re-open the entire application process if spraying was prevented on the specified treatment day – or month – because of rain or wind. 18 AAC 90.530(a) also specifies that a permit is not valid for more than two years from its effective date. The permit at issue here meets that limitation.

7. Failure to Include Special Precautions

The last issue raised by ACAT is that the application did not include sufficient special precautions to protect the health, safety, and welfare of people, or the protection of animals and the environment. ACAT then states:

> These issues are factually based and will be addressed in detail by ACAT at the adjudicatory hearing in April, 2011.[74]

Because the adjudicatory hearing was dismissed, these issues are not ruled on in this decision.

IV. CONCLUSION

ACAT has not met its burden of proving that the Division abused its discretion in determining that the ARRC's application was complete. ACAT has established that ARRC was required to include a list of all public and private water systems within 200 feet. It has also established that this list was not included in the application. Even without this information, however, the Division did not abuse its discretion in determining that the application was complete. Finally, ACAT has not met its burden of proving any constitutional violations.

The Division's decision to grant pesticide permit number 10-SOL-01 is upheld.

DATED this 22nd day of April, 2011.

By: *Signed*
Jeffrey A. Friedman
Administrative Law Judge

[73] 18 AAC 90.530(a).
[74] ACAT's Brief at 18.

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of the Department of Environmental Conservation and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 27th day of April, 2011.

By: *Signed*
Signature
Larry Hartig
Name
Commissioner
Title

[This document has been modified to conform to the technical standards for publication.]

SEE ATTACHMENTS BELOW

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION

ALASKA COMMUNITY ACTION ON TOXICS, and ALASKA SURVIVAL, Requestors, v. ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF ENVIRONMENTAL HEALTH, Respondent.	)	OAH No. 10-0278-DEC Alaska Railroad Pesticide Permit (Permit No. 10-SOL-01)

ORDER DENYING MOTION TO SET ASIDE ADMINISTRATIVE RECORD COSTS

I. INTRODUCTION

Pursuant to 18 AAC 15.237, a party who appeals an agency decision is responsible for paying the cost of preparing the administrative record, unless the agency waives that cost. Alaska Community Action on Toxics and Alaska Survival (collectively ACAT) have requested an order setting aside their obligation to pay the costs of gathering and certifying the administrative record. In addition ACAT requests an accounting of the time spent preparing the record. The Division of Environmental Health (Division) has opposed that motion. For the reasons stated below, ACAT's motion is denied.

II. PROCEDURAL HISTORY

The Division certified the record in this matter on October 14, 2010.[75] At the same time, the Division notified ACAT of the cost of preparing the record.[76] Included with this notice was a description of the employee time spent gathering and certifying the record.[77] This description includes each employee's name, the number of hours spent by that employee, and an hourly rate specific to that employee. The total charge for this was $5,443.95. Of this total, $4,958.55 was for personnel time and $485.40 was for copying costs at 10 cents per page.

[75] Attachment 1. All "attachments" referenced here are the documents identified as attachments in the Division's Opposition.
[76] Attachment 2, page 1.
[77] Attachment 2, page 2.

ACAT requested a waiver of this cost pursuant to 18 AAC 15.237(c).[78] The Division requested financial documents from ACAT to assist it in evaluating the waiver request.[79] In turn, ACAT requested information from the Division about the cost of preparing the record in prior administrative appeals.[80] This request was treated as a Public Records Act request.[81]

Both Alaska Community Action on Toxics and Alaska Survival provided information about their ability to pay costs.[82] The Division issued its decision which denied the waiver request but did reduce the amount charged to a total of $2,821.28, or $1,410.64 for each party.[83]

III. DISCUSSION

ACAT asserts that the total costs requested are excessive, violate its due process rights, and violate applicable regulations.[84] ACAT's primary argument is that the agency record already exists at the time the appeal is filed, so the only staff time required would be the time needed to pull the record out of a file (either electronic or physical) and make a copy.[85] In response, the Division points out that its process was not that simple. Five individuals in three different offices worked on the permit in question.[86] They each had to review 9 months worth of e-mails to identify documents relied on in ruling on the permit application. It was then necessary to remove duplicate copies before creating a single, master file of the agency record.[87]

In its Reply Memorandum ACAT claims that it is improper to pull together documents from various sources after the fact. ACAT states:

> The administrative record is not something that is generated and created at the time an appeal is filed. Nor is an administrative record an after-the-fact perusal of documents in the agency and consultant files to determine which documents may have been part of an individual staff member's files for the proceeding. The agency record is the collection of documents **that were actually relied upon by the decision-maker** to form the basis of the agency decision. Kristen J. Ryan, the Environmental Health Director, made the decision to issue Pesticides Permit #10-SOL-01 on April 30, 2009. Ms. Ryan presumably had the record documents she relied upon before her in a cogent, readily identifiable place before making the decision. Even if the permit had never been challenged, the administrative record should have been in one accurately defined location (either electronic or hard

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78 Attachment 5. ACAT had previously filed a motion seeking waiver of the costs. That motion was denied without prejudice to allow ACAT to file its request with the Division.
79 Attachment 6.
80 Attachment 7.
81 Attachment 8.
82 Attachment 13.
83 Attachment 14.
84 ACAT Motion, section II.
85 *See* ACAT's Motion, page 7.
86 Division's Opposition, page 9.
87 Division's Opposition, page 10.

> copy) rather than scattered in five individual agency employee's and consultants' emails and documents in three different cities.[88]

ACAT's argument incorrectly assumes that only those documents personally relied on by Ms. Ryan can be included in the agency record. The applicable regulation supplies a list of documents that must be part of the record which includes "other materials that **the department** considered or relied upon in making the department's decision."[89] Presumably Ms. Ryan consulted with her staff about the decision, and any documents considered or relied upon by staff members in forming their advice to Ms. Ryan would properly be part of the record. These would be documents considered or relied upon by the department even if Ms. Ryan did not personally review those documents. To rule otherwise would mean that the department could drastically limit the agency record by having subordinates review information related to the application and then give oral advice to the final decisionmaker. While this would reduce the initial cost to a party requesting a hearing, it would also improperly limit a requestor's access to the records that formed the basis for the agency's decision.

Given that the Division did not keep a single master file related to the permit application, it is not surprising that a substantial amount of time and effort was required to create that master file after the appeal was filed. Even so, the total amount does appear large, and in a different case, it might be necessary to explore in more detail the time spent gathering the record. Here, however, the Division determined on its own that the total charge should be reduced. It noted:

> 18 AAC 15.237(c) allows the Division to recover all of these costs; however, in this specific instance, because it was the first time that the Division utilized an outside contractor in the review process and the Division may not have been as streamlined in its collection efforts from the various individuals involved in the review as it would be for future efforts, I am exercising my discretion and reducing the fee by the amount commensurate with that part of the process.[90]

The Division reduced the amount charged for personnel time by over 50%. After this reduction, the total charge for gathering and certifying the record, including copy costs, was $2,821.28. This amount is not excessive given the complexity of the issues related to this pesticide permit.

ACAT claims that even the reduced amount is excessive as compared to the amounts charged by other divisions within the Department of Environmental Conservation, and by other Departments, for record gathering and certification in other matters. Without more information about the other files, however, it is not possible to directly compare the different costs of

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88 ACAT Reply Memorandum at 2(emphasis in original).
89 18 AAC 15.237(a) (emphasis added).
90 Attachment 14.

gathering and certifying the records. A very large file might all be kept in one central location. A smaller file might be divided into different sub-parts and require additional time to gather.

ACAT's next argument raises a due process challenge. ACAT asserts that it is held hostage to whatever amount the Division chooses to charge for gathering and certifying the agency record and that this is an impermissible deterrent to challenging the pesticide permit.[91] 18 AAC 15.237 is a validly adopted regulation. Both the undersigned ALJ and the Commissioner must follow this regulation unless a court rules otherwise. While there are some situations where the ALJ or Commissioner can consider a constitutional challenge to a regulation,[92] ACAT has not shown that this is one of those situations.[93]

ACAT properly takes issue with one assertion in the Division's opposition. The Division suggests that if fewer or different issues had been raised in ACAT's challenge, the agency record might have been less extensive.[94] Pursuant to 18 AAC 15.237, the extent of the agency record does not vary based on the issues for which a hearing is granted. Once a hearing is granted by the Commissioner, the agency record consists of all the documents described in 18 AAC 15.237 regardless of whether each document is pertinent to the specific issues for hearing.[95] While the Division is wrong to assert that it could have reduced the size of the agency record if different issues were raised for hearing, there is no claim here that the Division improperly withheld documents from the record. Any error in the Division's analysis on this question is irrelevant to ACAT's challenge to the record costs.

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91 ACAT's Motion at 12.

92 *See In Re Holiday Alaska, Inc.*, OAH No. 08-0245-TOB (Alaska Dept of Commerce, Community, and Economic Development 2009) page 7.

93 ACAT also raised an equal protection argument in its reply brief. Because that issue was not raised in its original motion, it is not considered.

94 Division's Opposition at 8 and 11.

95 The parties could stipulate to a narrower scope if they agreed that some documents were not relevant.

IV. CONCLUSION

A party requesting a hearing is required to pay the cost of gathering and certifying the agency record. That cost properly includes the time spent bringing together documents from various sources and locations as long as all the documents are those described in 18 AAC 15.237. ACAT has not shown that any of the documents in the record were not properly included. Nor has it shown that the time spent or the amount charged for gathering the record was excessive. Accordingly, its motion to set aside the administrative record costs is DENIED.

DATED this 15th day of March, 2011.

By: *Signed*
Jeffrey A. Friedman
Administrative Law Judge

Certificate of Service: The Undersigned hereby certifies that on this 15th day of March, 2011, a true and correct copy of this document was mailed/faxed/e-mailed to the following:

(1) Vickie Clark, Trustees for Alaska, counsel for requestors;
(2) Andrew Behrend, Senior Attorney, Alaska Railroad Corporation;
(3) Susan E. Reeves and Brian J. Stibitz, counsel for ARRC;
(4) Jennifer Currie, AAG, counsel for the Division of Environmental Health.

Courtesy copies were e-mailed to Gary Mendivil, Department of Environmental Conservation, Commissioner's Office and Cameron Leonard, AAG.

By: *Signed*
Kim DeMoss/Linda Schwass

ATTACHMENT A

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION

ALASKA COMMUNITY ACTION ON TOXICS, and ALASKA SURVIVAL, Requestors, v. ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF ENVIRONMENTAL HEALTH, Respondent.	)	OAH No. 10-0278-DEC Alaska Railroad Pesticide Permit (Permit No. 10-SOL-01)

ORDER DENYING IN PART AND GRANTING IN PART RECONSIDERATION OF ORDER DENYING SET ASIDE OF ADMINISTRATIVE COSTS

I. INTRODUCTION

ACAT seeks reconsideration of the previous order denying its motion to set aside the cost of gathering and certifying the record. Reconsideration is denied except as to two issues.

II. BACKGROUND

18 AAC 15.237(c) sets out the parties' obligations regarding administrative record costs. This regulation obligates the party requesting the hearing to pay those costs. Where, as in this case, there is more than one requestor, the Division is obligated to apportion the costs equally among the requestors.[96] The agency is permitted to require advance payment of the costs, but when it does so it must provide an explanation of how the cost estimate was calculated.[97] In addition, 18 AAC 15.237(c) allows for the waiver of some or all of the administrative costs. Costs may be waived if "the requestor demonstrates, to the department's satisfaction, an inability to pay those costs."[98]

[96] The hearing officer may provide for a different allocation. In addition, if the requestors agree as to a more equitable division of costs among themselves, nothing prevents one requestor from providing additional funds to another requestor to accommodate that adjustment.

[97] *Copeland v. Ballard*, 210 P.3d 1197, 1204 (Alaska 2009).

[98] 18 AAC 15.237(c) (emphasis added).

The Division did not require advance payment. Instead, it prepared the record and then informed ACAT of the cost of doing so.[99] This included an explanation of how that actual cost was calculated.[100] ACAT requested a waiver of these costs.[101] The Division responded with a letter setting out the information it would like to review in order to determine whether it was satisfied that one or more of the requestors was unable to pay the costs.[102]

ACAT responded by stating that producing the requested documents would be burdensome and that the documents would paint an inaccurate picture of the organizations' financial health.[103] ACAT did not, at this time, provide documents which would, in its view, paint an accurate picture of the organizations' finances. Instead, it requested information from the Division about other proceedings in which administrative record costs were calculated, information about waiver requests in other cases, and the factors or criteria used by the Division in evaluating waiver requests.

The Division responded with an explanation of how it evaluates waiver requests. The Division explained that it determines the financial ability to pay by looking at the assets and liabilities of the organization.[104] As for the other information requested by ACAT, the Division indicated that it would treat this as a public records request and sought clarification as to the scope of that request.[105] The Division did provide documents in response to this request.[106]

III. DISCUSSION

A. Waiver of Costs

The first question is whether the Division acted arbitrarily or unfairly in either the initial calculation of the cost of gathering the record, or in its subsequent decision to reduce the amount charged to ACAT. There is no evidence that the Division's initial calculation was arbitrary or unfair. It calculated the actual cost of collecting the documents as it was required to do by regulation. That initial cost was large because the Division did not have a good process in place to create or maintain its agency record in cases of this sort.[107] That this process was inefficient,

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99 ACAT's Exhibit 2.

100 *Id.* at page 2.

101 Letter from ACAT dated November 5, 2010.

102 Letter from Division dated November 10, 2010.

103 Letter from ACAT dated November 11, 2010.

104 Letter from Division dated November 12, 2010.

105 *Id.* ACAT clarified its request for documents in a letter dated November 18, 2010.

106 *See* ACAT's Motion to Set Aside Administrative Costs, page 5 and Exhibit 1 thereto.

107 As noted in the prior order, the size of this initial assessment was large enough that, in a different case, it might be necessary to determine whether the time spent gathering documents was excessive.

however, does not mean the calculation was arbitrary. The calculation was based on the actual time spent gathering and certifying the record.

What is not adequately explained is the method used by the Division to determine how it reduced the amount charged by roughly 50%. Because the Division was permitted to charge the full amount, even if its process was inefficient, the reduction in the amount charged benefits ACAT. As long as the amount charged is reasonable, ACAT's complaint that the amount of the reduction is arbitrary will not be considered.[108] In this case, the total amount charged to ACAT is less than $2,500 and is reasonable considering the size of the record, and the complexity of the issues involved.

The next question is whether the Division should have waived payment of the reduced amount. The Division's decision not to waive the cost of gathering the record was based on its view that the documents submitted by ACAT did not demonstrate an inability to pay those costs. That determination was not an abuse of discretion. The documents submitted by ACAT show that both organizations had sufficient financial resources to pay their share of the costs. While paying these costs might not have been their preferred allocation of these resources, that reflects a choice rather than the inability to pay. No evidence was presented that the bequest to Alaska Survival had conditions on it that prevented Alaska Survival from paying this amount.[109] No evidence was presented that Alaska Community Action on Toxics did not have sufficient unrestricted money within its budget to preclude it from paying this amount.

ACAT legitimately calls attention to the Division's suggestion that the scope of the record is determined by the nature of the issues raised for the hearing. If ACAT had requested a hearing on a narrow issue, and the record had been limited, ACAT could legitimately complain that the Division had not produced the full record. In this case, however, the Division did produce the entire record. The Division's incorrect view of what it might have been required to produce in a different case did not harm ACAT.

ACAT indicates that both organizations are non-profits and have no economic incentive to pursue this litigation. There is no public interest exception in the regulations. ACAT knew when it requested a hearing that it would be required to pay the cost of gathering the record. While it might claim surprise at costs approaching $5,000, it cannot be surprised to be expected to pay approximately $2,500.

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[108] To the extent there is a potential equal protection problem, that issue is addressed below.

[109] The evidence was that the bequest was intended to be spent over a longer period of time, but there was no evidence that spending 10% or 15% of that money for this purpose was prohibited.

There are two issues on which ACAT is granted reconsideration and an adjustment of the prior determination. Five hours of time for Rebecca Colvin at $34 per hour should be $170, and not the $323 charged to ACAT. ACAT is entitled to a reduction of $153. In addition, the Administrative Law Judge should have considered whether a different percentage allocation between the two requestors was appropriate. While either party has sufficient resources to pay one-half of the total cost, it is evident that Alaska Community Action on Toxics has more resources available, and a greater ability to replace any funds paid. ACAT has not suggested how the costs should be apportioned between the two organizations, but based on the limited financial information provided by the parties, it is appropriate to require Alaska Community Action on Toxics to pay 75% and to require Alaska Survival to pay 25%.

B. Constitutional Issues

ACAT first argues that treating its request for additional information as a public records request violated its equal protection rights. The Division provided documents in response to ACAT's request. Whether the Division treated the request as a discovery request or a public records request is irrelevant from ACAT's point of view because the documents were produced. If ACAT believed it was entitled to more records, it could have filed a motion to conduct discovery pursuant to 18 AAC 15.240(d), or a motion to compel assuming an implied stipulation by the parties to engage in limited discovery.[110]

Next ACAT asserts the Division treats litigants differently based on the issues raised in the hearing request. The applicable regulation requires the gathering and certification of the entire record regardless of the scope of the challenge to the permit. Because the entire record was gathered for this proceeding, ACAT was not harmed by the Division's possibly erroneous interpretation of its regulation.

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[110] The Supreme Court has suggested that denial of a Public Records Act request simply because the party requesting the records was in litigation *might* violate the equal protection clause. *Copeland*, 210 P.3d at 1203. That is a very different proposition than the suggestion that treating a request for documents as a Public Records Act request violates the equal protection clause, especially where the requested documents are produced.

III. ORDER

Upon consideration of ACAT's Motion for Reconsideration, IT IS HEREBY ORDERED:

1. ACAT's motion is DENIED in all respects except as follows:
2. The total amount of the cost of gathering and certifying the record is reduced by $153 to a total of $2,335.88;
3. Alaska Community Action on Toxics is obligated to pay 75% of that amount, or $1,751.91, and Alaska Survival is obligated to pay 25% of that amount, or $583.97.

DATED this 23rd day of March, 2011.

By: *Signed*
Jeffrey A. Friedman
Administrative Law Judge

Certificate of Service: The Undersigned hereby certifies that on this 23rd day of March, 2011, a true and correct copy of this document was mailed/faxed/e-mailed to the following:

(5) Vickie Clark, Trustees for Alaska, counsel for requestors;
(6) Andrew Behrend, Senior Attorney, Alaska Railroad Corporation;
(7) Susan E. Reeves and Brian J. Stibitz, counsel for ARRC;
(8) Jennifer Currie, AAG, counsel for the Division of Environmental Health.

Courtesy copies were e-mailed to Gary Mendivil, Department of Environmental Conservation, Commissioner's Office and Cameron Leonard, AAG.

By: *Signed*
Kim DeMoss/Linda Schwass

ATTACHMENT B