

BEFORE THE ALASKA COMMISSIONER OF ENVIRONMENTAL CONSERVATION

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,)

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 GRANTING IN PART AND DENYING IN PART REQUEST FOR STAY

I. Introduction

Requestors have asked that the pesticide permit authorizing the Alaska Railroad Corporation to spray an herbicide along the railroad right of way be stayed pending final decision on their request for an adjudicatory hearing. They assert that the railroad's permit application was incomplete and, as a result, that they were denied a meaningful opportunity to comment during the public process. They contend that without a complete application to consider they were, in effect, precluded from fully raising their concerns about the health, safety and environmental effects of using chemical means to control weeds in the railroad right of way and the Division of Environmental Health issued the permit without being fully informed about the risks of the railroad's proposal.

The division and the railroad have opposed the stay request. Both argued that the permit, which includes conditions meant to minimize the risk of the herbicide migrating out of the treatment area, is protective of public health, safety and the environment, and that the requestors are not likely to prevail on the merits of the adjudicatory hearing request. The railroad also asserted that it will be harmed if it cannot proceed to spray under the permit during this

summer's growing season because effective weed control within the railbed has been elusive and is needed to protect workers and passengers, and to minimize the risk that a federal railroad regulatory agency will impose penalties or other sanctions, such as operational restrictions, on the railroad.

Based on the limited record and briefing available for this expedited review of the stay request, the requestors have shown a likelihood of success on the merits of their assertion that the application was incomplete with respect to the identification of seven groundwater wells. They have not shown, however, that the balance between the potential harms to them, to the railroad and to the public health, safety, and the environment tips in favor of a complete stay of the permit. Instead, a narrowly tailored stay designed to ensure greater protection against possible migration of the herbicide to the seven wells, if they are in fact located in close proximity to the area in which the herbicide is to be applied, provides the most appropriate interim remedy. That remedy, which is set out in detail below, is hereby granted. In all other respects, the requestors' stay request is denied.

II. Facts

The railroad is required by federal law to control vegetation along its right of way.¹ The railroad has been successful controlling the wayside brush using non-chemical methods, but those methods have not been effective in and around the track structures (rails and ties) along some areas of the right of way.² This lack of effective control in and around the structures presents safety and maintenance problems by impeding visual inspections and accelerating deterioration of track structures.³ Photographs from an August 2008 inspection of the track illustrate the extent of the intrusion into the railbed the vegetation makes in some areas, as well as the way the vegetation along the rails can obscure hazards such as large, rounded rocks and sheer drop offs.⁴

¹ April 30, 2010 Alaska Railroad Corporation Permit Application for Herbicide Application on Railroad Right-of-Way Decision Document ("Decision Document") at p. 2 (stating the same and citing 49 C.F.R. § 213.37 as the source of the requirement).

² *Id.*

³ *Id.* (explaining visibility of the ties, rail and fasteners is necessary for inspections and that vegetation holds moisture leading to ties rotting).

⁴ *See, e.g.*, RR Exh. B at pp. 14-17 (showing vegetation in the railbed at milepost 43.50 so dense that the ties and ballast rock are largely obscured); at p. 3 (showing sheer drop off at milepost 50.60); and at p. 12 (showing rounded rock partly obscured by vegetation along the rail at milepost 45.20-45.30). The 22 pages of photographs from the 2008 inspection, which were submitted via email with the railroad's opposition to the stay request in two parts purporting to be exhibit B, include some pages marked at the top with other alphabetic exhibit numbers, some already designated for other exhibits submitted by the railroad. The 22 pages have been remarked as "Exhibit RR-B"

In May 2009, the railroad applied to the division for a permit to apply AquaMaster Herbicide (a weed control pesticide) and Agri-Dex (a surfactant and spray oil) to 41 sections of the eight-foot-wide railbed, and to 30 acres in the Seward yard and passenger area.⁵ The 41 sections encompass about 30 miles of track (including mainline, sidings and branches), but it is not a continuous 30-mile length; rather, it consists of sections ranging from 0.1 to 3.8 miles spread over an approximately 83-mile stretch of track, interspersed with non-treatment-area gaps of a few tenths of a mile to more than eight miles.⁶ Of the 41 sections to receive treatment with the herbicide, three are two miles or longer, and six others exceed one mile, but the rest are less than one mile long, with many being just a few tenths of a mile.⁷ Total acreage affected is 58.80 acres, including the 30 acres at the Seward yard.⁸

The division determined that the railroad's application was complete as of June 26, 2009, after additional documentation had been provided.⁹ Three public hearings were held in August and public comments were accepted through September 15, 2009.¹⁰ The division received and responded to numerous written comments, most raising concerns about the potential health, safety, economic or environment effects of the railroad's planned use of pesticide.¹¹

On April 30, 2010, the division issued a permit to the railroad, authorizing application of the AquaMaster Herbicide "along selected portions of the railroad between Seward and Bird, Alaska."¹² The permit took effect June 9, 2010.¹³ It expires two years after the effective date.¹⁴ The permit requires the railroad to apply the herbicide in accordance with 18 AAC 90 and, in addition, imposes 14 specific conditions.¹⁵ A condition addressing protection of water bodies provides as follows:

Prevent application of pesticides to any surface water body as defined by AS 46.03.900(37), including any temporary water bodies, or to the area

and numbered pages 1-22, and are referred to in this order using the Exhibit RR-B reference to avoid confusion with other exhibits.

⁵ *Id.* at pp. 2-3.

⁶ *See* Decision Document at table spanning pp. 2-3 (showing starting and ending mile posts, and area affected for each section, beginning at mile post 6.6 and ending at mile post 89).

⁷ *Id.* ("Miles" column).

⁸ *Id.* at p. 3.

⁹ *Id.* at pp. 4 & 5.

¹⁰ *Id.* at p. 5.

¹¹ *See generally* April 30, 2010 Responsiveness Summary.

¹² April 30, 2010 Permit to Apply Pesticides ("Permit") at p. 1.

¹³ *Id.* at p. 1, para. A (providing for the permit to take effect 40 days after the April 30 issuance).

¹⁴ *Id.* at pp. 1 & 3.

¹⁵ *Id.* at pp. 1-3.

within 100 feet of any surface water body. Comply with all measures described in the permit application to prevent such application, including

- Identify and mark all locations to be sprayed prior to application;
- Operate a pilot car to identify and mark buffer zones of at least 100 feet from any surface water body;
- Pilot car should be in constant communication with application vehicle; and
- Use a hand operated backpack sprayer in areas that would be difficult [to] reach using the method approved in the application.^[16]

The permit also contains conditions forbidding the railroad to apply the herbicide during heavy rain or during periods when the measured wind speed is greater than ten miles per hour.¹⁷

“AquaMaster is a post-emergent, systemic herbicide used for control of weeds, woody brush, and trees.”¹⁸ The active ingredient in AquaMaster is glyphosate.¹⁹ Plants absorb AquaMaster through their foliage.²⁰ Glyphosate kills the target plants.²¹ The surfactant Agri-Dex is not used to kill the plants but rather to “improve pesticide application and efficacy by modifying the wetting and deposition characteristics of the spray solution.”²²

The division’s analysis concluded that the railroad’s proposal to apply the AquaMaster using the Agri-Dex “would result in no unreasonable adverse effect” largely because of glyphosate’s relatively limited toxicity, Agri-Dex’s much lower levels of toxicity than other surfactants recommended for use with glyphosate, and the fate and transport of the mixture in a cold environment.²³ The division’s analysis relied on the following specific facts and conclusions.

- The Environmental Protection Agency (EPA) has undertaken a thorough review of AquaMaster for pesticide registration purposes, and could cancel the registration if “new evidence documenting unreasonable risk to human health and the environment” emerged, and EPA’s registration analyses are “considered to be sufficient to protect human health and the environment from unreasonable adverse effects.”²⁴

¹⁶ *Id.* at pp. 1-2, condition 5.

¹⁷ *Id.* at p. 2, conditions 7 & 8.

¹⁸ Decision Document at p. 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at p. 3.

²² *Id.*

²³ *Id.* at p. 18.

²⁴ *Id.* at pp. 6-7 (describing EPA registration review process).

- The railroad’s proposed methods of applying the herbicide, using a boom truck with nozzles close to the ground and a low-volume backpack sprayer, minimize the amount of drift likely to occur, as does the condition requiring that no spraying occur if the wind speed is above ten miles per hour.²⁵
- Because glyphosate works by inhibiting an enzyme pathway for protein production found only in plants, “the effects of glyphosate herbicides on organisms other than plants” is limited.²⁶
- Though glyphosate dissolves easily in water, it adsorbs strongly to soil particles and thus is not particularly mobile.²⁷
- Glyphosate and its primary breakdown product have relatively short half-lives and thus are not persistent in soil.²⁸
- “[O]ral and dermal absorption of glyphosate are low.”²⁹
- In two human health risk assessments on glyphosate, the EPA and U.S. Forest Service have found the worst-case cancer risk to be, respectively, four in 100 million and 0.8 in one million, both well below the threshold of concern.³⁰
- “[G]lyphosate itself is relatively non-toxic to fish, algae, aquatic invertebrates, and aquatic macrophytes[,]” but commercial formulations of glyphosate and certain surfactants can be “toxic to fish, aquatic invertebrates, and amphibians at low levels” due to the surfactants.³¹
- “EPA approves AquaMaster for use in aquatic conditions” but, as approved in the permit for application by the railroad (including the 100-foot buffer around water bodies and no spraying in heavy rain conditions), AquaMaster “is not expected to be a source of water contamination through leaching to groundwater, or by runoff or drift to surface water.”³²
- “Agri-Dex is approved for aquatic use by Washington State.”³³

²⁵ *Id.* at p. 7.

²⁶ *Id.* at p. 8.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at p. 10.

³⁰ *Id.* at pp. 11-12.

³¹ *Id.* at p. 12.

³² *Id.* at p. 10.

³³ *Id.*

- Agri-Dex could contain likely human carcinogens (though “information on the exact types it may contain is not available”), but it can be assumed the concentrations are low based on the much lower toxicity relative to similar products.³⁴

A recent (post-permit-decision) review of scientific literature by a professor of zoology and environmental toxicology concludes that glyphosate “can cause substantial biological and ecological harm to wildlife, humans and the environment” under some exposure situations.³⁵ The professor who conducted that review observes that “kidney damage and reproductive effects” can result from lifetime exposure to glyphosate at levels above the drinking water maximum contaminant level.³⁶ He also reports that the EPA requires glyphosate products applied directly to aquatic environments to be labeled as toxic to fish.³⁷

A physician working with a toxicology and environmental health program counters that “glyphosate does not pose an unreasonable risk to people, wildlife, or the environment.”³⁸ He concludes that “glyphosate has very low acute toxicity and is not mutagenic, teratogenic, carcinogenic, or a reproductive toxicant.”³⁹ He explains that

it is not persistent in the environment, is readily degraded by microbes with an average half-life of approximately 2 months in soil and 2-10 weeks in water, and has shown no significant toxicity to birds, mammals, or fish.^[40]

He also observes that Agri-Dex, the surfactant the railroad proposes to use with the AquaMaster, has been classified at “the lowest toxicity rating which can be given to a substance”—i.e., as “practically non-toxic” to fish and vertebrates.⁴¹

The recent literature review by the professor and counter opinion by the physician were submitted as part of the adjudicatory hearing and stay request process. Requestors filed their request document on June 1, 2010, asking for a hearing and asserting that the division’s decision

³⁴ *Id.* at p. 12.

³⁵ *See generally* May 19, 2010 Literature Review on Biological Effects of Roundup Herbicide and Evaluation of Materials Safety Data Sheet and Use Instructions for Aquamaster by Warren Porter, Professor of Zoology and Environmental Toxicology, University of Wyoming (Requestors’ Exh. 9 to June 1, 2010 adjudicatory hearing request) (discussing literature review suggesting increased incidents of certain cancers among farmers and herbicide applicators).

³⁶ *Id.* at pp. 2-3.

³⁷ *Id.* (noting 0.7 parts per million as the drinking water maximum contaminant level for glyphosate).

³⁸ June 17, 2010 Opinion Letter from David J. Hewitt, M.D., M.P.H., Center for Toxicology and Environmental Health, LLC (RR-A) at p. 1.

³⁹ *Id.*

⁴⁰ *Id.* at p. 2

⁴¹ *Id.*

to issue the permit violates statutes, regulations and the Alaska constitution.⁴² They included a request for a stay of the permit's effectiveness for the duration of the hearing process and asked for expedited consideration of the stay request.⁴³

By order dated June 11, 2010, time was shortened for the division's and railroad's responses to the stay request and it was determined that the record for consideration of the stay request consists of the stay-related filings of the requestors, division and railroad, if timely filed; the permit and its transmittal letter, the decision document, and responsiveness summary addressing public comments; and "any responsive memoranda and supporting documents filed by potential intervenors" (e.g., people who had commented during the public process and thus were entitled to receive notice of the adjudicatory hearing and stay request) if received by the June 24th deadline or before circumstances required the commissioner to rule on the stay if that happened before the deadline.⁴⁴

As with the initial public comment process on the permit application, many responses to the notice of the hearing and stay request were filed by the June 24 deadline, most raising concerns about the health, safety, economic and environmental consequences of pesticide use in the railroad right of way similar to those raised in the comments on the permit application. Though the responses reflected passionately held beliefs about pesticide use, very few conveyed concrete facts or verification of opinions that can be relied on in evaluating the stay request.⁴⁵

In contrast to most of the responses, one stood out by providing support and backup documents raising questions about whether the railroad's application had complied with a requirement to include in the treatment area description potentially affected surface water bodies and public or private water systems within 200 feet of the treatment area.⁴⁶ The same or similar documents from the earlier public comment period had been made an exhibit to the requestors' June 1 adjudicatory hearing and stay request document.⁴⁷ Notably, these documents purport to

⁴² June 1, 2010 Letter ("Hearing Request") from Austin Williams, Trustees for Alaska (counsel for requestors) to Commissioner Hartig at pp. 1-9.

⁴³ *Id.* at p. 19.

⁴⁴ June 11, 2010 Order Regarding Stay Request at p. 4, para. (6). The department gave notice of the adjudicatory hearing and stay request on June 4, setting June 24 as the deadline for responses.

⁴⁵ *See, e.g.*, June 17, 2010 Email from Holck to Mendivil (purporting to be from an epidemiologist, who might be presumed to have specialized knowledge of science subjects helpful to forming an opinion on pesticide use, but who did not detail the evidence or cite any references to support his view that "scientific evidence is becoming more and more damning of glyphosate due to its increasingly likely association with adverse human and ecological health").

⁴⁶ June 20, 2010 Letter from Strassenburgh and attachments thereto.

⁴⁷ *Compare id. with* Requestors' Exh. 7.

identify many groundwater wells, water features (e.g., lakes, streams) and structures typically associated with surface water management (e.g., culverts) that the commentor and the requestors assert are within 200 feet of the area the railroad proposes to treat with the herbicide but, requestors contend, were not adequately identified in the application. The commentor's documents purport to have taken some of the comparative information on milepost locations from the railroad's 2006 application for pesticide use in the right of way.

A comparison of the milepost numbers on the commentor's documents and the railroad's list of the specific areas in which it plans to spray the AquaMaster reveals some overlap. The comparison shows that the commentor has listed wells, water features or water-related structures as with 200 feet of the right of way at mileposts occurring within one of the sections on the railroad's spray area list. For instance, the commentor's "exhibit A" lists a stream at mileposts 7.38-7.55, while the railroad proposes to spray between mileposts 6.6 and 7.6. Similarly, the commentor's "exhibit B" lists a culvert at milepost 88.76, while the railroad proposes to spray between mileposts 88.6 to 89.0.

The commentor provided a list ostensibly reflecting wells within 200 feet of the right of way—e.g., it shows a well just 120 feet from the right of way at milepost 6.7, while the railroad proposes to spray between mileposts 6.6 and 7.6. In total, this list suggest that seven groundwater wells supplying water to property owners are within 200 feet of right of way sections on the spray area list, six in the 6.6-7.6 milepost section and a seventh at milepost 20. Whether these wells are in fact within 200 feet of the eight-foot-wide spray corridor spanning the centerline of the track or simply within 200 feet of the wider right of way has not been established through the limited record on which the stay decision is based.

By including the commentors' documents with their request, the requestors have raised fact questions concerning what the application disclosed about proximity of groundwater wells and water features to the treatment area. Those fact questions in turn appear to give rise to a serious regulatory interpretation issue regarding whether the railroad adequately identified surface water bodies and private water systems in its application.

III. Discussion

Under the pesticide control regulations, a person may not use a pesticide “in a manner that might endanger human health, safety, or welfare, animals, or the environment” and may not use a pesticide at all without a permit, if one is required.⁴⁸ “Pesticide” includes herbicides.⁴⁹ An herbicide is “a substance or mixture of substances intended to prevent, destroy, repel, or mitigate vegetation[.]”⁵⁰ In accordance with the division’s April 30, 2010 decision, the railroad obtained a two-year permit to apply AquaMaster, an herbicide, to sections of the right of way between Seward and Bird.⁵¹

The division’s decision was not automatically stayed by the filing of requestors’ adjudicatory hearing request.⁵² However, the commissioner, acting as the neutral decisionmaker under the adjudicatory hearing regulations, has the authority to stay the decision to issue the permit.⁵³ In deciding whether to grant a stay request, the commissioner considers three criteria:

- (1) the relative harm to the person requesting the stay, the permit applicant, and public health, safety, and the environment, if a stay were granted or denied;
- (2) the resources that would be committed during the pendency of proceedings under this chapter if a stay were granted or denied; and
- (3) the likelihood that the person requesting the stay will prevail in the proceedings on the merits.^[54]

A. *Relative Harms*

The requestors have not shown that the potential harms associated with applying AquaMaster to eight-foot-wide sections of the railroad right of way outweigh the harms that could flow from forbidding the railroad to use the herbicide to control vegetation in the railbed. The requestors’ concerns about the actual and perceived risks of using chemical means to control weeds are understandable. It is reasonable to be concerned that harm might result from applying an herbicide, whether from actual health, safety or environmental effects or from socioeconomic effects due to public perception.

⁴⁸ 18 AAC 90.020(1)&(3).

⁴⁹ 18 AAC 90.990(37).

⁵⁰ 18 AAC 90.990(24).

⁵¹ Permit at pp. 1 & 3.

⁵² See 18 AAC 15.210(a) (explaining that a “decision is not automatically stayed during the pendency of a proceeding under” 18 AAC chapter 15, which includes consideration of an adjudicatory hearing request).

⁵³ 18 AAC 15.210(a).

The requestors, however, have not shown that their understandable concerns are supported by the weight of scientific evidence about the effects of the AquaMaster herbicide and the Agri-Dex surfactant the railroad plans to use, particularly in light of the restrictions placed on the already limited plan of treatment proposed by the railroad. The low toxicity of the key ingredient, glyphosate, coupled with its limited mobility and short persistence in soils, taken together with permit's conditions prohibiting spraying when wind speed is higher than ten miles per hour or heavy rain is falling, and imposing 100-foot buffers from surface waters, make it unlikely that people or any plant or animal species other than the targeted weeds will be adversely affected by exposure to the herbicide.

On the other hand, if the railroad is forbidden to use the herbicide to control weeds in the railbed, safety risks to railroad workers and passengers, as well as the threat of economic harms from federal fines and operational restrictions, will remain because the non-chemical means of weed control have not proven effective in the railbed. These harms are concrete and potentially imminent, especially the threat of safety-driven, federally-imposed operating restrictions.

In sum, though the requestors' understandable preference for non-chemical means of weed control and concerns about the use of herbicides are not taken lightly, the requestors have not shown that the harms they fear are relatively greater or more likely to occur than the safety and economic harms threatening the railroad, its workers and passengers.

B. Commitment of Resources

The requestors did not address the commitment of resources criterion in their stay request.⁵⁵ The division observed that the railroad's commitment of resources would be affected by a stay because the railroad has hired a contractor who is mobilizing to bring equipment to Alaska to spray this summer.⁵⁶ The railroad asserted that it expects to have to spend about three-quarters of a million dollars "to fight persistent vegetative overgrowth" in 2010 "if it is not allowed to apply herbicides[.]" but it was not able to quantify how much that expenditure might

⁵⁴ *Id.*

⁵⁵ June 1, 2010 Hearing Request at pp. 18-19.

⁵⁶ June 18, 2010 [Division's] Response to Request for Stay at p. 5. For purposes of reference in this order, the response filed on behalf of the division is referenced as shown here to eliminate any confusion that might be created by using the title appearing on the response—i.e., "Department of Environmental Conservation Response to Request for Stay." Since the request for hearing and stay are matters before the Commissioner of Environmental Conservation, any filings in this proceeding by a party advocate representing the agency in its permit issuance role are not on behalf of the department but rather are from the division.

be reduced if allowed to go forward with spraying this year.⁵⁷ It did not mention in its written opposition mobilization of the spraying contractor or provide cost information for that effort.

In sum, the parties collectively have provided insufficient information for the commitment of resources criterion to be given serious consideration in deciding whether to grant or deny the stay request.

C. Likelihood of Success on Merits

This criterion for deciding whether to grant a stay requires consideration of the likelihood (not certainty) of the requestors being successful on the merits of their challenge to the permit decision.⁵⁸ The requestors need not prove that they will prevail on all of the issues they raised. Under appropriate circumstances, a stay may be warranted if a likelihood of success on the merits is shown regarding just a single issue using the limited record applicable to a stay request, even if it is possible that a hearing using a more extensive record might lead to a different result.⁵⁹

The several issues on which requestors seek a hearing center around completeness of the railroad's application and the resulting information available to the public for purposes of comment and to the division for purposes of analysis and decisionmaking. The requestors question whether the railroad satisfied the application content requirements of 18 AAC 90.515, particularly the requirements for description of the treatment area. Under the regulation,

[t]he application must identify [among 18 items] (8) a description of the treatment area where the pesticide will be applied, including ... (D) each potentially affected surface water ... body within 200 feet of the treatment area, or each public or private water system within 200 feet of the treatment area

The requestors question whether the maps and other information submitted by the railroad satisfied this requirement.

⁵⁷ June 18, 2010 Opposition to Request for Stay of Permit No. 10-SOL-01 at p. 11.

⁵⁸ See 18 AAC 15.210(a)(3).

⁵⁹ In deciding whether to grant the stay request, consideration of the requestors' likelihood of success on the merits is necessarily based on the limited record and briefing available at this early stage. This order assumes, without deciding, that requestors will be afforded a hearing opportunity on one or more of the issues identified in their adjudicatory hearing request and evaluates likelihood of success on the merits based on the limited record and briefing. This order does not bind the commissioner or the administrative law judge assigned to assist the commissioner with consideration of the adjudicatory hearing request, and to conduct any hearing allowed, to grant a hearing on any issues or to reach the same conclusion on the merits.

Using the commentor's detailed work comparing milepost locations of proposed spraying with locations of wells, water features and structures ostensibly taken from a previous railroad pesticide permit application, the requestors have raised an issue about whether the application was adequate to inform the public and the division about potentially affected waters and wells within the zone the regulation contemplates will be considered.

Certainly, there may be a legal dispute about what level of detail or what type of documents the regulation requires when it commands that the application "identify ... a description of the treatment area...." There may also be a factual dispute about whether what the railroad submitted satisfies that requirement. It may even be that the railroad's targeted proposal to treat just the railbed by spraying only in the eight-foot-wide area straddling the centerline takes some or all of the wells identified in the comments outside the 200-foot proximity to the treatment area. Such legal and factual disputes, however, need not be resolved to meet the test for a stay.

Surface waters are protected by a combination of the herbicide's characteristics, the railroad's proposal for limited treatment and the permit's conditions. Specifically, the facts that AquaMaster and Agri-Dex are approved for use in aquatic conditions, glyphosate is not very mobile or persistent, the treatment area is not large, and the permit requires measures to minimize potential drift and migration, as well as use of the pilot car to establish 100-foot buffers, indicate that surface waters in the treatment area more likely than not will be protected, even if requestors might ultimately prove that the permit application did not identify surface waters in a manner that made it easy for the public to share local knowledge and concerns about those waters. The same is not necessarily true as to groundwater, however.

Protection of a surface waterbody such as through the permit's 100-foot buffer and other conditions might reduce the risk of migration to a groundwater well directly influenced by the surface waterbody, but a groundwater well with unique characteristics, located in close proximity to the treatment area, might not be completely protected against exposure pathways by the limited mobility and persistence of glyphosate, and the drift and migration minimization conditions of the permit. Without localized knowledge of the unique characteristics of groundwater wells in close proximity to the treatment area that might be gained from comments on the permit application if it identified the wells, there is some risk important information could be overlooked in the decisionmaking process. Because the limited record available for

consideration of the stay request does not show that the seven wells noted by requestors were identified in the application, an appropriately tailored stay is warranted to address concerns about possible exposure routes to these seven wells.

None of the other application completeness issues the requestors have identified (e.g., lack of specific dates for planned treatment, better description of soil types, drainage, and targeted vegetation species) raise immediate concerns about pesticide exposure risks warranting an interim remedy staying the limited spraying planned, and thereby precluding the railroad from addressing safety concerns about vegetation in the railbed. The same can be said as to the requestors' constitutional arguments.

Moreover, the requestors' likelihood of success on the merits of their constitutional arguments appears slight. Their primary due process argument likely will not be reached by an adjudicator or court because it simply puts a constitutional overlay on the statutory and regulatory process arguments. If a hearing is granted on the process issues, they likely will be resolved on statutory and regulatory grounds; thus, as a matter of judicial restraint, the constitutional due process argument is unlikely to be joined. The requestors' other constitutional arguments are in the nature of a challenge to a permit decision having the effect of placing temporary land use restrictions on public property for the protection of public safety. The limited spraying planned under this permit poses no greater inhibition on the requestors' or the public's use of the land in and around the railroad right of way than would, for instance, a temporary road closure due to avalanche risk, a seasonal limitation on hunting or fishing to manage resources, or restricting access to a public building during dangerous construction activities.

For these reasons, though a complete stay is not warranted, a narrowly tailored one meant to better ensure that the seven wells are not put at risk by planned spraying is appropriate.

IV. Conclusion

Based on the limited record and briefing available for consideration of the stay request, the requestors have satisfied the test for obtaining a stay but only in a narrow sense. That is, they have raised a serious issue about whether the permit adequately protects seven groundwater wells that may or may not be in close proximity to areas where the railroad plans to spray.

IT IS ORDERED, therefore, that

(1) the railroad may proceed with the permit-authorized spraying, except that the railroad shall not spray or otherwise apply herbicide within 200 feet of groundwater wells reportedly located adjacent to the railroad right of way at the following mileposts

- 6.6,
- 6.7,
- 6.71,
- 7,
- 7.1,
- 7.3, and
- 20;

(2) the railroad may move to lift the stay as to any or all of the milepost locations in (1) above upon a showing satisfactory to the commissioner, after consideration of any opposition filed by the requestors in response to such motion, that no public or private water system exists within 200 feet of the treatment area at the milepost location.

DATED this 30th day of June, 2010.

By: Signed _____
Larry Hartig, Commissioner
Department of Environmental Conservation

Certificate of Distribution: The undersigned certifies that on June 30, 2010, this order was **emailed and sent by U.S. mail** to the following:

- (1) Austin Williams and Vicki Clark, Trustees for Alaska, counsel for requestors;
- (2) Phyllis Johnson, general counsel of the Alaska Railroad Corporation;
- (3) Susan Reeves and Brian Stibitz, Reeves Amodio LLC, co-counsel for the Alaska Railroad Corporation;
- (4) Jennifer Currie, Assistant Attorney General, counsel for the Division of Environmental Health.

Courtesy copies were **emailed** to Gary Mendivil, Department of Environmental Conservation, Commissioner's Office, and Cameron Leonard, Assistant Attorney General.

Neil Roberts
Office of Administrative Hearings

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