IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT PALMER

ALASKA COMMUNITY ACTION ON TOXICS, ALASKA SURVIVAL, and COOK INLETKEEPER,

Appellants,

v.

LAWRENCE HARTIG, COMMISSIONER OF THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION (in his official capacity) and ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF ENVIRONMENTAL HEALTH; AND ALASKA RAILROAD CORPORATION,

Appellees.

Case No. 3PA-11-01604CI

DECISION ON APPEAL

This case is an administrative appeal from a final decision by the Commissioner of the Alaska Department of Environmental Conservation (DEC) upholding Alaska Railroad Corporation Pesticide Permit #10-SOL-01 (Permit). Based on the reasons discussed below, the decision upholding the Permit is AFFIRMED.

I. PROCEDURAL HISTORY AND FACTUAL SUMMARY

In 2009 the Alaska Railroad Corporation (ARRC) sought to use pesticide to control vegetative growth along its railroad. On May 22, 2009, ARRC submitted a pesticide permit application to the DEC.[1] ARRC proposed to apply herbicide to portions of a 90 mile section of railroad between Seward and Indian.[2] The application provided for the use of herbicide to 41 sections of the railbed, confined to the 8-foot width of the railbed, and to 30 acres in the Seward

[1] Exc. 457-562.
[2] Exc. 462.

rail yard.[3] The proposed total acreage to be affected was 58.8 acres.[4] The herbicide proposed for use had been approved by the Environmental Protection Agency for use on railroad right of ways and was approved for use on water.[5] ARRC proposed a 100 foot buffer zone from spraying around water bodies along the railroad right of way.[6] The application proposed June 2010 as the date for the application of herbicide.[7]

ARRC published notice regarding the Permit application in daily and weekly newspapers serving the Anchorage, Seward and Turnagain Arm communities.[8] A series of three public hearings were held August 10-12, 2009, in Whittier, Seward and Anchorage.[9] Alaska Community Action on Toxics (ACAT), Cook Inletkeeper and Alaska Survival provided comments during this process.[10] ACAT testified at one of the public hearings.[11]

The DEC issued a decision document and a document responding to the public comments on April 30, 2010.[12] ACAT, Alaska Survival, Cook Inletkeeper and other entities collectively filed a request on June 1, 2010, for an adjudicatory hearing regarding the DEC's decision to issue the Permit.[13] ACAT also requested a stay of ARRC's application of herbicides pursuant to the Permit.[14]

Commissioner Larry Hartig (Commissioner) granted in part ACAT's request for a stay.[15] The Commissioner granted a stay for a small section of the railroad near Seward where possible migration of the herbicide could occur but otherwise declined to stay the issuance of the permit.[16]

On July 2, 2010, ACAT filed an administrative appeal challenging the DEC's issuance of the Permit and the Commissioner's granting in part and denying in part the request for a stay. The Superior Court denied ACAT's motion for a temporary restraining order and preliminary

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[3] Exc. 641-642.
[4] Exc. 508.
[5] Exc. 550.
[6] Exc. 464.
[7] Exc. 471.
[8] Exc. 643.
[9] Exc. 644.
[10] Exc. 322, 354.
[11] Exc. 313.
[12] Exc. 637-660; Exc. 563-613.
[13] Exc. 665-687.
[14] Exc. 683.
[15] Exc. 686-699.
[16] Exc. 699.

injunction.[17] ACAT appealed the Superior Court's decision to the Alaska Supreme Court which denied the petition for review on July 23, 2010.[18]

Deputy Commissioner Dan Easton (Deputy Commissioner), on August 6, 2010, granted in part ACAT's request for hearing.[19] The Deputy Commissioner denied Cook Inletkeeper standing to request a hearing, finding that Cook Inletkeeper had "not met the minimal burden of explaining how their interests would be affected by the decision."[20] Cook Inletkeeper, along with several other organizations, sought reconsideration of the order denying it standing and in the alternative sought to intervene. The Administrative Law Judge (ALJ) denied reconsideration and also denied Cook Inletkeeper's Motion to Intervene.[21] The ALJ determined that Cook Inletkeeper's interests were adequately represented by the other parties.[22]

The Deputy Commissioner granted a hearing on the record pursuant to 18 AAC 15.220(c) as to: (A) Whether the DEC reasonably exercised its discretion in determining that an application was complete; (B) Whether ARRC was required to list all public and private water systems within 200 feet of the treatment area; and (C) Whether valid statutes or regulations were applied in an unconstitutional manner.[23] The Deputy Commissioner also granted an adjudicatory hearing pursuant to 18 AAC 15.220(b)(1) as to: (A) Whether the application of the herbicide in proximity to any wells will result in an unreasonable adverse effect to individuals or the environment; and (B) Whether application of the herbicide in compliance with the permit would pose a risk of adverse effect to individuals or the environment, and whether any such effect would be unreasonable.[24]

The ALJ upheld the issuance of the Permit in the Decision on Hearing on the Agency Record on February 16, 2011.[25] The ALJ determined that the DEC did not abuse its discretion in

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[17] Exc. 700-706.
[18] Exc. 707.
[19] Exc. 709-716.
[20] Exc. 711.
[21] Exc. 428-432.
[22] Exc. 431.
[23] Exc. 715-716.
[24] Exc. 716.
[25] Exc. 717-730.

determining that ARRC's Permit application was complete.[26] The ALJ also determined that there were no constitutional violations.[27]

Following the ALJ's decision ACAT moved to voluntarily dismiss the adjudicatory hearing without prejudice, which the ALJ granted.[28] The ALJ held that ACAT was not precluded from raising those issues in response to any future permit but was precluded from raising these issues again in regard to Permit 10-SOL-01.[29]

The ALJ issued a final decision on April 22, 2011, upholding the issuance of the Permit on the same grounds as stated in the Decision on Hearing on the Agency Record.[30] On April 27, 2011, the Commissioner adopted the final decision as the final administrative determination in this matter.[31] ACAT, Alaska Survival and Cook Inletkeeper (collectively referred to as ACAT) filed an appeal in this court.

II. STANDARD OF REVIEW

The standard of review applied in this case is dependent on the nature of the DEC's actions. There are four possible standards of review to be applied in a superior court's review of an administrative decision: (1) substantial evidence test, (2) reasonable basis test, (3) substitution of judgment test, (4) and the reasonable and not arbitrary test.

> The "substantial evidence" test is used for questions of fact. The "reasonable basis" test is used for questions of law involving agency expertise. The "substitution of judgment" test is used for questions of law where no expertise is involved. The "reasonable and not arbitrary" test is used for review of administrative regulations.[32]

The court reviews an agency's interpretation of its own regulation under the reasonable basis standard, deferring to the agency unless the interpretation is "plainly erroneous and inconsistent with the regulation."[33] The reasonable basis test requires deference to be given to an administrative determination if it has a reasonable basis in law and fact.[34]

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[26] Exc. 729.
[27] *Id.*
[28] Exc. 731-733.
[29] Exc. 732.
[30] Exc. 734-748.
[31] Exc. 748.
[32] *State v. Public Safety Employee's Ass'n*, 93 P.3d 409, 413 (Alaska 2004).
[33] *Simpson v. State, Commercial Fisheries Entry Com'n*, 101 P.3d 605, 609 (Alaska 2004).
[34] *Storrs v. State Medical Bd.*, 664 P.2d 547, 554 (Alaska 1983).

The "substantial evidence" test is used for questions of fact. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[35] The court need only determine whether such evidence exists, and does not choose between competing inferences.[36] The court does not evaluate the strength of the evidence, but merely notes its presence.[37]

III. ANALYSIS

A. Did the DEC abuse its discretion by determining that ARRC's Permit application was complete?

Under regulations promulgated by the DEC, a permit application for the spraying of pesticide must identify, among other things, "a description of the treatment area where the pesticide will be applied, including ... 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 "the proposed date and time of each pesticide application."[38] The DEC may also request additional information as necessary to evaluate the permit application.[39] The DEC "will, in its discretion, deny a permit if ... the applicant fails to supply information or evidence required" by the regulations.[40]

ACAT argues that the record does not support DEC's decision not to require information of the proposed spray areas' proximity to water and the time and location of spraying. Essentially, ACAT argues that the Permit application was not complete. The court reviews the DEC's interpretation of its own regulations, whether ARRC's Permit application met the applicable requirements, under the reasonable basis test.

1. List of Potentially Affected Surface Waters

As part of its application, ARRC proposed the use of a pilot car to ensure that spraying would not occur within 100 feet of any water body.[41] The pilot car, operated by an ARRC

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[35] *Keiner v. City of Anchorage*, 378 P.2d 406, 411 (Alaska 1963).
[36] *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).
[37] *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 179 n. 26 (Alaska 1986).
[38] 18 AAC 90.515 (8)(d), (9).
[39] 18 AAC 90.515(17).
[40] 18 AAC 90.525(b)(1).
[41] Exc. 511.

employee, would travel in front of the spray vehicle during the application of herbicide.[42] The pilot car would identify any upcoming buffer zone and would radio the spray vehicle of any upcoming buffer zones.[43] Additionally, the areas to be sprayed would be pre-marked.[44] The use of the pilot car was included in the Permit.[45]

After AARC submitted the application, the DEC requested additional information regarding how the pilot car would identify buffer zones near water bodies and a clear statement as to how a water body would be defined.[46] The DEC determined that while the aerial photos may be helpful, it would be more accurate to use the pilot car during the spraying.[47] The DEC determined that a static map would not accurately reflect all of the water bodies at the time of spraying.[48] The Commissioner agreed, finding that the DEC could reasonably conclude that the use of a pilot car "would provide *more protection* for surface water than requiring a list of potentially affected water bodies."[49]

The DEC had a reasonable basis in determining that the Permit application was complete with respect to the identification of water bodies along the proposed spray area. The apparent purpose of the regulation requiring a description of each potentially affected surface water body is for the protection and maintenance of water quality. Given the temporary nature of many of the water bodies along the proposed spray route, the DEC could reasonably determine that a static list of water bodies would not accurately reflect the surface water bodies along the route. Additionally, the Permit was given a two-year effective date and a list of surface waters during that period would change. The DEC could reasonably conclude that pre-marking the 100 foot buffer zone around the water bodies and using a pilot car to provide notification of each buffer zone was sufficient for the Permit application. The DEC could reasonably determine that this method would provide suitable protection for surface water along the spray route.

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Exc. 663-664.
[46] Exc. 305.
[47] Exc. 378.
[48] Exc. 378.
[49] Exc. 741 (emphasis same).

2. *List of Potentially Affected Water Systems*

In assessing the potential impacts of the herbicide to be used, the DEC relied upon a 2009 University of Alaska-Fairbanks (UAF) study on the persistence and mobility of herbicides along the ARRC railway. The UAF study demonstrated that "glyphosate applied to the soil is not downwardly mobile, is metabolized by soil microorganisms, and dissipates within approximately two weeks."[50] Finally, based on other research data, the DEC concluded that glyphosate, even in the cold temperatures, "will remain bound to soil and not move to aquatic systems or other locations where exposure could occur."[51]

Based on the available information to the DEC, it could reasonably conclude that groundwater would not be adversely affected. Data relied upon by DEC showed that glyphosate would not migrate downward and it would not move to aquatic systems, such as public and private water systems. Therefore, the DEC had a reasonable basis for not requiring a list of potentially affected water systems and determining that the application was complete.

3. *Identification of the Time and Date for Herbicide Application*

ARRC identified June 2010 as the date for the proposed pesticide use.[52] An exact time and date for spraying would be impracticable given the weather-dependent nature of the Permit. For example, spraying could only occur when the wind speed measured between 2-10MPH and could not occur during heavy rain.[53] The EPA approved a product label which provided these limitations.[54] Thus, the DEC could reasonably conclude that it did not need any more information other than "June 2010" because it would not possible to provide a specific date and time due to environmental factors.

B. Did DEC's failure to require the identification of potentially affected water bodies violate ACAT's due process rights?

Under the Alaska Constitution, no person shall be deprived of life, liberty, or property, without due process of law.[55] Administrative proceedings must comply with due process.[56] At a

[50] Exc. 249.
[51] Exc. 249-250.
[52] Exc. 142.
[53] Exc. 236.
[54] Exc. 189.
[55] Alaska Const. art. I, § 7.
[56] *State, Dept. of Natural Resources v. Greenpeace, Inc.*, 96 P.3d 1056, 1064 (Alaska 2004).

minimum, due process includes notice and a fair opportunity to be heard.[57] "Notice must be reasonably calculated under all the circumstances to apprise the individual of the pendency of the deprivation and to afford an opportunity to present objections."[58] "Where notice is inadequate the opportunity to be heard can still be preserved and protected if a contestant actually appears and presents his claim."[59]

For a pesticide permit application, the DEC is required to "publish two consecutive notices of the application in a newspaper of general circulation in the area that would be affected by the operation."[60] The notice to be provided regarding a pesticide permit application must include: (1) information on the nature and the location of the proposed activity; (2) information on how the public can receive more information; and (3) a statement that a person may submit comments on the application by filing written comments with the DEC.[61]

ACAT argues that its due process rights were violated because the pesticide permit did not include specific and accurate information about the proposed action. ACAT argues that it has a broad property interest in the state lands and waters within and in proximity to the Alaska Railroad right of way. ACAT also argues that as a public interest litigant it is entitled to due process greater than the traditional notice and comment procedures.

ACAT has failed to cite any authority supporting its position that it is entitled to greater due process. Therefore the court will analyze ACAT's claim under the traditional due process framework. The court reviews this constitutional issue under the substitution of judgment test.

As an initial matter, the court need not reach the issues of whether ACAT has a general property interest in the resources of the state or whether ACAT suffered a deprivation of that property interest. The court finds that even if ACAT had such a property interest and the Permit constituted a deprivation of that interest, ACAT received due process prior to the deprivation.

ACAT received sufficient notice of the proposed Permit application. The DEC published notice of the Permit application in the Anchorage Daily News on July 16-17, 2009 (daily paper); July 16 and July 23, 2009, in the Seward Phoenix Log (weekly paper); and July 16 and August 6,

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[57] *Id.* at 1065.
[58] *Id.* at 1064.
[59] *Id.*
[60] 18 AAC 15.050(a).
[61] 18 AAC 15.050(b).

2009, in the Turnagain Times (bi-weekly paper).[62] The notice indicated that the herbicide AquaMaster with the active ingredient glyphosate was to be used to control vegetation for a 90-mile corridor on the south end of the mainline; along the mainline, branch, spur and siding track right-of-ways from Seward, north to Portage, Girdwood and Indian.[63] The notice also included information about the public hearings, how to submit comments and how to obtain more information.[64] The DEC also posted the notices online.[65] Therefore, the DEC provided sufficient notice regarding the proposed Permit application.

ACAT was given an opportunity to be heard. The DEC held a series of three public hearings were held August 10-12, 2009, in Whittier, Seward and Anchorage.[66] ACAT, Cook Inletkeeper and Alaska Survival provided comments during this process.[67] ACAT testified at one of the public hearings.[68] ACAT had an opportunity to be heard regarding the proposed Permit application.

Even if the notice regarding the Permit was inadequate, ACAT still had the opportunity to present comments and objections prior to the issuance of the Permit. ACAT's comments demonstrate that it had the opportunity to object to the use of herbicides and detail the potential harm to water bodies from the use of herbicide. In fact, included with its comments, ACAT provided DEC with GIS maps demonstrating how much of the corridor, 100 feet on either side of the railroad centerline, was intersecting with water bodies.[69] This demonstrates that ACAT had sufficient notice as to the potentially affected water bodies. ACAT's due process rights were not violated because it had the opportunity to present its objections to the use of herbicides near water bodies.

C. Did the DEC improperly deny Cook Inletkeeper standing and intervenor status?

Cook Inletkeeper argues that it was improperly denied standing and intervention status. Cook Inletkeeper also argues that the Commissioner denied Cook Inletkeeper's right to petition

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[62] Exc. 643.
[63] Exc. 553.
[64] Exc. 553, 643.
[65] Exc. 643.
[66] Exc. 644.
[67] Exc. 322, 354.
[68] Exc. 313.
[69] Exc. 367.

under Article I, §6, and its due process rights under Article I, §7 and Article VIII, §10. Issues of standing, intervenor status and due process are questions of law not subject to agency expertise and therefore the court will apply its independent judgment in assessing these claims.

1. The Commissioner properly denied Cook Inletkeeper standing

Standing to challenge the issuance of a permit before the DEC is governed by its regulations. The Commissioner may grant a request for an adjudicatory hearing if:

> the request discloses that the requestor would be directly and adversely affected by the department's decision so as to justify an adjudicatory hearing; in determining whether a requestor is directly and adversely affected by the department's decision, the commissioner or designee will consider the nature of the interest asserted by the requestor, whether that interest is one that the applicable statutes and regulations were intended to protect, and the extent to which the department's decision directly and substantively impairs that interest.[70]

In the request for an adjudicatory hearing, the reference to Cook Inletkeeper's standing stated that "Cook Inletkeeper is a member-supported non-profit organization that works to protect clean water and health Salmon in the Cook Inlet region."[71] In denying standing for Cook Inletkeepers and others, the Commissioner held that Cook Inletkeeper "had not met the minimal burden of explaining how their interests would be affected by the decision."[72]

The Commissioner properly denied Cook Inletkeeper standing. The request for a hearing did not state how Cook Inletkeeper's interests would be directly and adversely affected by the issuance of the Permit. Rather, Cook Inletkeeper only identified its interests--clean water and healthy salmon--in the Permit application. The request did not disclose how Cook Inletkeeper would be directly and adversely affected by the DEC's decision, which is a requirement under the regulation to show standing.

Without an explanation by Cook Inletkeeper, it failed to meet the burden for standing. Cook Inletkeeper's after-the-fact justifications submitted in the Appellant's Opening Memorandum cannot retroactively justify its assertion of standing as that information was not included in the request for an adjudicatory hearing.

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[70] 18 AAC 15.220(b)(1)(A)
[71] Exc. 665-666.
[72] Exc. 711.

2. The Commissioner properly denied Cook Inletkeeper intervention

In order to intervene, a potential intervenor must meet the same standing requirements as stated above but the intervenor must also show that their interests are not adequately represented in the adjudication.[73] The regulation does not define what constitutes adequate representation. Under Civil Rule 24(a), which contains similar language,[74] the standard for inadequacy of representation is "proven by a showing of collusion, adversity of interest, possible nonfeasance, or incompetence."[75]

In the request to intervene, Cook Inletkeeper submitted additional information which satisfied the standing requirement. The issue then is whether Cook Inletkeeper would be adequately represented by the existing parties, ACAT and Alaska Survival.

Cook Inletkeeper's were adequately represented by ACAT and Alaska Survival because the groups' interests are not adverse. First, Cook Inletkeeper did not file individual comments during the comment period but joined with comments submitted by ACAT.[76] Second, Cook Inletkeeper joined with ACAT and Alaska Survival on the request for an adjudicatory hearing.[77] Cook Inletkeeper's willingness to participate in the submission of joint comments and the joint request for an adjudicatory hearing shows that Cook Inletkeeper's interests were not adverse to the other parties. Cook Inletkeeper failed to show that its interests would not be adequately represented by ACAT and Alaska Survival.

3. Constitutional Claims

Cook Inletkeeper makes constitutional claims regarding the right to petition and due process under two provisions of the Alaska Constitution. "Where a point is not given more than a cursory statement in the argument portion of a brief, the point will not be considered on appeal."[78] Cook Inletkeeper's claims regarding denial of the right to petition under Article I, § 6, and the public notice requirement under Article VIII, §10, will not be considered as Cook Inletkeeper did not adequately brief these issues; they were given a single sentence in the

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[73] 18 AAC 15.225(c).
[74] Intervention of right is not allowed if "the applicant's interest is adequately represented by existing parties." Civil Rule 24(a).
[75] *State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984).
[76] Exc. 749.
[77] Exc. 665.
[78] *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 (Alaska 1980).

Appellants' Opening Memorandum. Moreover, the court addresses the public notice requirement later in this order.

The court will address Cook Inletkeeper's claim of due process under Article I, §7. "No person shall be deprived of life, liberty, or property, without due process of law."[79] At a minimum, due process includes notice and a fair opportunity to be heard.[80]

As discussed previously, DEC provided adequate notice and an opportunity to be heard regarding the Permit application. DEC published the notice regarding the Permit in several newspapers and held three public meetings. Cook Inletkeeper participated with comments provided by ACAT and thus Cook Inletkeeper had the opportunity to be heard.

To the extent Cook Inletkeeper was permitted to participate in the appeal of the Permit, Cook Inletkeeper was required to meet the standing and intervenor requirements as set forth in the DEC's regulations. Moreover, Cook Inletkeeper has not cited any authority which provides it with the general right to appeal the issuance of the permit before the DEC. The DEC validly enacted regulations limiting the class of persons who may challenge an agency action. Cook Inletkeeper failed to show that it would be directly and adversely affected by the agency's decision and the Commissioner properly denied standing. Cook Inletkeeper's due process rights were not violated.

D. Did the DEC err by not requiring posted notice along spray areas prior to spraying?

ACAT argues that the Commissioner erred by not requiring posted, written notice prior to spraying under the Permit because the spraying occurs in public areas. ACAT argues that the railroad right-of-way constitutes a public place due to flag-stop and whistle-stop locations as well as the public's general use near the railroad. Although ACAT did not specifically raise the issue of the applicability of AS 42.03.320(c), the Commissioner did conclude that the public did not have the right to be on the railroad right of way in the first place.[81]

1. The railroad right of way under the Permit is not open to the public

The Commissioner's decision that the Permit is limited to areas not open to the public is reviewed under the substantial evidence test. The Alaska Railroad Transfer Act provided that

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[79] Alaska Const. art. I, § 7.
[80] *Greenpeace*, P.3d at 1065.
[81] Exc. 738.

the Alaska Railroad would be transferred to the State of Alaska.[82] The Alaska legislature created the ARRC and provided that the lands transferred under the Alaska Railroad Transfer Act would be conveyed to ARRC.[83] The ARRC obtained a right-of-way of 100 feet on each side of the tracks.[84]

Regarding flag-stops, there are no flag-stop services in the area where spraying was to occur. Since the issue of flag and whistle-stops was not raised below, the court looks to the record supplemented by ARRC. ARRC offers only limited flag-stop services for certain trains operating between Talkeetna and Hurricane.[85] The Permit only applied to sections between Indian and Seward.[86] Therefore, the issue of whether flag-stops constitute a "public place" need not be reached by the court as no flag-stops were within the area to be sprayed.

Finally, regarding the Spencer Glacier whistle-stop, this area is not subject to spraying. The Spencer Glacier whistle-stop location, at approximately MP 55-56,[87] was not subject to receiving spraying because no herbicides were to be applied from MP 54 – MP 64.4.[88] Thus, even if this whistle-stop location did constitute a "public place" under the statute, no public notice would be required.

2. AS 46.03.320 does not apply to the Permit

Whether the railroad right of way is a "public place" within the meaning of the public notice statute is a question of law and thus the substitution of judgment standard applies.

ARRC's vegetation control involving the use of herbicides on land owned or managed by ARRC must be conduct in compliance with state requirements.[89] Reasonable public notification, including written notice posted on the application site, is required when pesticides and broadcast chemicals are applied in a public place.[90] A "public place" means "(1) common areas of an apartment building or other multi-family dwelling; (2) that portion of a government office or

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[82] *See* 45 USC 1203.
[83] AS 42.40.350
[84] AS 42.40.350(b).
[85] Dan Frerich aff. at 2.
[86] Exc. 641-642.
[87] Frerich aff. at 3, 6.
[88] Exc. 642.
[89] AS 42.40.440.
[90] AS 46.03.320(c).

facility to which access is not ordinarily restricted to employees; and (3) plazas, parks, and public sports fields."[91]

The railroad right of way is not government facility to which access is not ordinarily restricted to employees. ARRC takes active steps to exclude the general public from ARRC's right of way. ARRC fences portions of the right of way located in busy areas.[92] Additionally, ARRC posts "no trespassing" signs at all road crossings and known points of access.[93] Finally, ARRC issues warnings to individuals trespassing in the right of way.[94] All of these steps signify to the public that the railroad right of way is not for general use. The fact that individuals partake in activities within the right of way does not make it a "public place" as those individuals do not have a right to be within the right of way. Therefore, AS 46.03.320 does not apply to spraying under the Permit.

E. Is the issuance of a pesticide permit a disposal of an interest in state land under Article VIII, § 10?

The Alaska Constitution provides that "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law."[95] Pursuant to this constitutional provision, the legislature enacted the Alaska Land Act.[96]

ACAT argues that as a revocable land use permit, the issuance of the Permit is subject to the public notice requirement under Article VIII, § 10. The court reviews this issue under the substitution of judgment standard. ACAT's argument relies on two cases, *Alyeska Ski Corp. v. Holdsworth*[97] and *Northern Alaska Environmental Center v. State, Dept. of Natural Resources*.[98] Both cases are distinguishable from the present case.

Alyeska Ski Corp. is distinguishable as it involved the lease of state lands. The court held that Department of Natural Resources' actions made under AS 38.05.075 (relating to leasing

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[91] *Id.*
[92] Frerich aff. at 1.
[93] Frerich aff. at 1-2.
[94] Frerich aff. at 2.
[95] Alaska Const. art. VIII, § 10.
[96] AS 38.05.005-.370; *Moore v. State*, 553 P.2d 8, 21 (Alaska 1976).
[97] 426 P.2d 1006 (Alaska 1967)
[98] 2 P.3d 629 (Alaska 2000).

procedures), and regulations promulgated thereunder, were subject to judicial review.[99] The court reached its conclusion in light section 10, article VIII of the Alaska constitution which prohibits leasing of state owned lands unless made pursuant to public notice.[100] Here, the Permit does not involve the leasing of any state lands and thus *Alyeska Ski Corp.* is not applicable.

In *Northern Alaska*, the Department of Natural Resources issued a grant of rights-of-way for the construction of an electric transmission line from Healy to Fairbanks utilizing $43.2 million in funds appropriated from the legislature.[101] To case turned on whether the permit was functionally revocable and thus subject to the Alaska Land Act.[102] The court concluded that although the permit was revocable by its terms, the permit was not functionally revocable due to the enormous expenditure of resources."[103]

The permit at issue here is remarkably different than the permit at issue in *Northern Alaska*. The Permit is revocable and does not involve the enormous expenditure of resources which would make it not functionally revocable. Therefore, *Northern Alaska* is inapplicable to the discussion at issue here. The Permit is not a disposal of an interest in state land pursuant to Article VIII, § 10.

Even assuming that the Permit constitutes a disposal of an interest in state lands, ACAT argues that the public notice requirement of AS 46.03.320(c) applies. However, as the court discussed above, the Permit does not involving the application of herbicides in "public places" and the requirements of AS 46.03.320(c) do not apply.

F. Did the DEC arbitrarily compile the administrative record and did the DEC violate ACAT's due process rights by requiring it to pay the costs to prepare the record?

The contents of an agency record include:

> the permit application and supporting documentation, written and electronic correspondence concerning the proposed action, additional information submitted by the applicant to the department, public comments and information submitted to the department on the proposed decision, tapes or transcripts of any public

[99] *Alyeska Ski Corp*, 426 P.2d at 1011.
[100] *Id.*
[101] 2 P.3d at 631.
[102] *Id.* at 639.
[103] *Id.*

> hearing, the department's decisional documents, and other materials that the department considered or relied upon in making the department's decision.[104]

A person wishing to obtain a copy of the agency decision record "shall pay the cost of gathering and certifying the agency decision record, including the reasonable cost of transcription of the tapes of any public hearing or other permit conference."[105] A person may also request a waiver of fees and "the department will waive all or part of the cost of gathering and certifying the record if the requestor demonstrates, to the department's satisfaction, an inability to pay those costs."[106]

ACAT argues that the cost of the agency record was arbitrarily compiled and that requiring ACAT to pay for the compilation of the record violates due process. The court reviews the compilation of the agency record under the reasonable basis standard and the due process issue under the substitution of judgment standard.

1. Compilation of the Agency Record

The DEC did not arbitrarily compile the agency record. The DEC is required to include a multitude of documents when compiling the agency record. Given the complexity of the issues involved and the time and scope of the administrative proceedings, the administrative record was a significant volume. The compilation of the agency record required a significant investment of staff time to compile the voluminous record.

To ACAT's benefit, the DEC voluntarily reduced the overall cost to ACAT by a significant amount. The DEC recognized that the compilation process was not as efficient as it could have been due to using a new contractor. Moreover, despite ACAT's assertion, the fees credited to the independent contracted amounted to small portion of the overall costs; only three hours of work were charged to the contractor at $140/hour. Most of the cost came from the lower cost employees. The court finds that the complication of the agency record was reasonable.

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[104] 18 AAC 15.237(c).
[105] *Id.*
[106] *Id.*

2. *The DEC did not violate ACAT's due process rights by charging ACAT for the costs of preparing the agency record*

The DEC's decision to waive only a portion of the costs to prepare the administrative record did not violate ACAT's due process rights. An agency may require the payment of filing fees or transcript costs so long financial hardship does not preclude access to the court.[107]

In *Bustamante v. Alaska Workers' Compensation Bd.*, the Supreme Court held that it was an abuse of discretion to dismiss a case without providing a litigant with alternative options to paying a mandatory filing fee.[108] The superior court dismissed Bustamante's workers' compensation administrative appeal due to his failure to pay for the preparation of the transcript of the Workers' Compensation Board proceedings.[109] The superior court denied Bustamante's request for a waiver of costs indicating it did not have the power to do so, as the court stated that "[a]ll costs and fees that can be waived have been waived."[110]

The Supreme Court held that it was an abuse of discretion to dismiss the case without providing Bustamante with alternative options.[111] The Supreme Court said that the superior court could have waived the prepayment of the transcript costs requirement or required the appellant to narrow the designation of needed transcripts.[112] The court noted that "Appellate Rule 604(b)(1)(B)(iv) allows the superior court to deviate from the ordinary procedure requiring prepayment upon a showing of good cause."[113] The court concluded that "the size of a party's bank account should not foreclose that party's opportunity to be heard."[114]

Similarly, in *Varilek v. City of Houston*, the Supreme Court held that "refusal to offer any alternative to a $200 filing fee for administrative actions amounts to an unconstitutional denial of due process to indigent claimants."[115] Varilek sued the Mat–Su Borough and City of Houston claiming that their enforcement of certain land use ordinances violated his constitutional

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[107] *See Bustamante v. Alaska Workers' Compensation Bd.*, 59 P.3d 270, 273 (Alaska 2002); *Varilek v. City of Houston*, 104 P.3d 849, 855 (Alaska 2004).
[108] 59 P.3d at 273.
[109] *Id.* at 271.
[110] *Id.* at 273.
[111] *Id.*
[112] 59 P.3d at 273.
[113] *Id.*
[114] *Id.*
[115] 104 P.3d at 855.

rights.[116] The superior court dismissed the claim because Varilek failed to exhaust his administrative remedies prior to bringing suit.[117] Varilek asserted that he was unable to exhaust his administrative remedies because he was unable to pay the Borough's mandatory $200 administrative filing fee.[118] Since the superior court did not determine whether Varilek could afford the filing fee, the Supreme Court remanded the case to require the superior court to make factual findings on Varilek's ability to pay the fee.[119]

These cases indicate that a litigant can be required to pay certain costs of the litigation prior to bringing an administrative appeal without violating the litigant's due process rights. To avoid violating due process, there must be a mechanism for a litigant to demonstrate his or her inability to pay the required costs. Under 18 AAC 15.237(c), the DEC allows a person to obtain a waiver of costs if that person demonstrates an inability to pay those costs.

ACAT and Alaska Survival submitted a joint request for a waiver of costs pursuant to 18 AAC 15.237(c).[120] In order to evaluate the request for a waiver, DEC requested additional information, such as tax returns, balance sheets and budgets, from ACAT and Alaska Survival.[121] In response, ACAT and Alaska Survival indicated that it would be burdensome for the parties to produce those documents.[122] Instead ACAT and Alaska Survival requested information on waiver requests in other cases.[123] DEC repeated its request for financial information and informed the parties that it would process their additional requests as public records requests under the Public Records Act.[124] DEC provided the requested documents to ACAT.[125]

DEC denied ACAT's and Alaska Survival's request for a waiver. The DEC determined that based on the parties' federal tax returns and the affidavits filed with their request for a waiver, the parties were financially capable of paying for the record.[126] The DEC assigned the

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[116] *Id.* at 850.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 855.
[120] Exc. 435.
[121] Exc. 437.
[122] Exc. 438.
[123] *Id.*
[124] Exc. 440.
[125] Exc. 445-446
[126] Exc. 448.

cost to the parties on an equal basis which each party paying half.[127] The ALJ upheld the agency's decision denying the waiver request.

The waiver is determined based upon an individual or corporation's financial ability to pay. After receiving the financial information from the parties, the DEC determined that the groups could pay.

While ACAT was required to pay for the preparation of the agency record prior to appealing the issuance of the Permit, ACAT was afforded the opportunity to seek a waiver. ACAT and Alaska Survival sought a waiver but DEC reasonably determined that those parties did not qualify for a waiver. The DEC provided ACAT with a mechanism to seek a waiver from paying the required costs to prepare the agency record. ACAT was not entitled to an absolute waiver from fees and DEC properly proceeded under 18 AAC 15.237. Therefore, requiring ACAT and Alaska Survival to pay the costs of preparing the agency record did not violate due process.

G. Did the compiling and certification of the agency record through DEC's regulations, instead of Alaska's Public Records Act, violate equal protection?

Under the Public Records Act, "[a] public record that is subject to disclosure ... remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation ... involving a public agency."[128] "[W]ith respect to a person involved in litigation, the records sought shall be disclosed in accordance with the rules of procedure applicable in a court or an administrative adjudication."[129] The term "involved in litigation" means "a party to litigation or representing a party to litigation, including obtaining public records for the party."[130]

ACAT argues that it was denied equal treatment to the agency record due to its status as a litigant. ACAT argues that it should not have been required to pay for the certification of the agency record and should have been allowed to compile the record under the Public Records Act. The court reviews this argument under the substitution of judgment standard.

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[127] Exc. 448
[128] AS 40.25.122.
[129] *Id.*
[130] *Id.*

ACAT broadly argues that it was denied equal protection because it was not allowed to proceed under the Public Records Act. ACAT has failed to demonstrate, however, that it attempted to seek agency records that were otherwise available through a public records request. Rather, ACAT is now arguing after-the-fact that the agency record should have been prepared through the Public Records Act. However, there is nothing in the record to indicate that sought the agency record through the Public Records Act.

The only records ACAT received under the Public Records Act were records regarding DEC's decision to waive fees for other appeals. Those records are different than the agency record ACAT sought to compile.

ACAT argues that the Alaska Supreme Court's decisions in *Brady v. State*[131] and *Copeland v. Ballard*[132] demonstrate the Supreme Court's openness to an equal protection challenge under the litigant exception to the Public Records Act. However, in *Copeland* and *Brady*, the litigants who sought records under the Public Records Act were denied access due to their status as litigators. The case at issue here is distinguishable where ACAT did not seek any records about the agency record through the Public Records Act. Therefore, the DEC did not err in requiring ACAT to compile the agency record under 18 AAC 15.237.

IV. CONCLUSION

For the reasons stated above, the decision upholding the Permit is AFFIRMED.

Dated at Palmer, Alaska on this 29th day of June 2012.

I certify that on 6/29/12
a copy of this document was sent to:
☐ CSED ☒ Attorney(s) of Record Bratton Currie Stibitz/Reeves Behrend
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☐ Other
At the address(es) of record:
Rec'd in: TSolheim
Deputy Clerk

Kari Kristiansen
Superior Court Judge

[131] 965 P.2d 1 (Alaska 1998).
[132] 210 P.3d 1197 (Alaska 2009).