Thomas S. Waldo
Olivia Glasscock
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907.586.2751
E: twaldo@earthjustice.org
E: oglasscock@earthjustice.org

Attorneys for Plaintiffs Southeast Alaska Conservation Council; Alaska Rainforest Defenders; Center for Biological Diversity; Sierra Club; Defenders of Wildlife; Alaska Wilderness League; National Audubon Society; and Natural Resources Defense Council.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION COUNCIL; ALASKA RAINFOREST DEFENDERS; CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB; DEFENDERS OF WILDLIFE; ALASKA WILDERNESS LEAGUE; NATIONAL AUDUBON SOCIETY; and NATURAL RESOURCES DEFENSE COUNCIL, *Plaintiffs*, v. UNITED STATES FOREST SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE; DAVID SCHMID, in his official capacity as United States Forest Service Region 10 Regional Forester; and EARL STEWART, in his official capacity as Forest Supervisor for the Tongass National Forest, *Defendants*.	Case No. 1:19-cv-00006-SLG

PLAINTIFFS' REPLY BRIEF UNDER LOCAL RULE 16.3(c)

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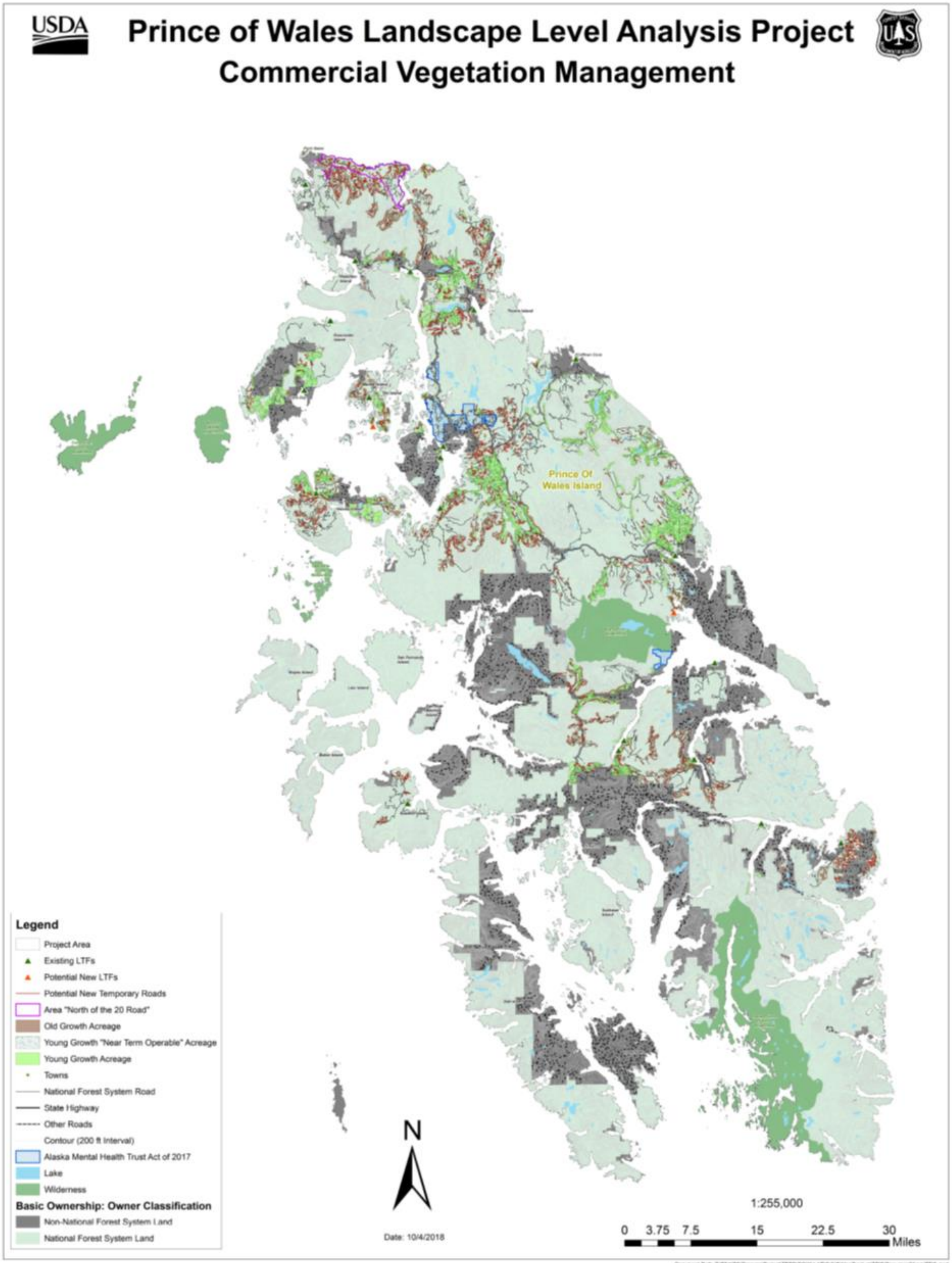
INTRODUCTION

The government's brief (Doc. 12) proposes an interpretation of applicable laws that would rewrite the most basic requirements for a site-specific environmental impact statement (EIS) as interpreted for decades by the courts, by the Council on Environmental Quality (CEQ), and by federal agencies. The government argues that a nominally site-specific EIS is adequate if it discloses a vast, over-inclusive area in which various proposed activities could take place and assesses a "worst-case" scenario fully implementing all potential activities (though in undetermined locations). Doc. 12 at 30-32. What the government has described could potentially be proper for a programmatic plan, *see* 40 C.F.R. § 1508.18(b)(3), but no court has ever upheld such an approach in a site-specific project EIS. *See id.* § 1508.18(b)(4). A site-specific project, as its name suggests, requires an EIS identifying the specific site of an actual project, together with a detailed analysis of its impacts and alternatives. If the government were to succeed with the approach it advocates, it would eliminate the practice—engrafted in the National Environmental Policy Act (NEPA) since its passage—of requiring site-specific EISs for projects implementing programmatic plans. It would make EISs much less useful to the public and result in uninformed decisions.

For all three claims in this case, the government argues that a single record document it calls "the Map" provides all the location-specific detail required by law. Doc. 12 at 10, 28-29, 38, 42. This document falls far short of that standard. It is a single map applicable to all the alternatives in the Final Environmental Impact Statement (FEIS) and covering all 2.3 million acres in the project area, an area more than 100 times the size of Manhattan Island. *See* 833_2178; 833_2167 at 001460-61 (FEIS at 2-3). At the scale reproduced below, *see infra* p. 3, it is inscrutable. Zoomed in many times on a computer screen, "the Map" begins to reveal the boundaries of the 125,529 acres of old growth and young growth potentially available for logging and the 643 miles of potential new permanent and temporary roads in the Prince of Wales Project (the Project). 833_2167 at 001481 (FEIS at 23, Tbl. 2).

But "the Map" does not show where any logging or road construction will actually occur. Within these vast outlines, the Project authorizes up to 42,635 acres of logging and up to 164 miles of new roads. *See* 833_2426 at 000440-41 (ROD at 1-2) (selecting Alt. 2); 833_2167 at 001481 (FEIS at 23, Tbl. 2 (Alt. 2)). "The Map" displays neither any proposed timber sale configurations within this huge range nor any alternatives to them.

Nor does "the Map" display critical environmental features, such as forest structure, habitat connectivity and fragmentation, karst, streams and riparian habitat, wetlands, rare plants, cultural resources, subsistence uses, or habitat values for the broad diversity of species present. *See* Doc. 10 at 29-34. The only natural features displayed on "the Map" are lakes and—when magnified—contour lines. 833_2178. That minimal information for the project area as a whole—not tied to any potential future timber sale—


USDA
Prince of Wales Landscape Level Analysis Project
Commercial Vegetation Management
Prince Of Wales Island
Legend
Project Area
Existing LTFs
Potential New LTFs
Potential New Temporary Roads
Area "North of the 20 Road"
Old Growth Acreage
Young Growth "Near Term Operable" Acreage
Young Growth Acreage
Towns
National Forest System Road
State Highway
Other Roads
Contour (200 ft Interval)
Alaska Mental Health Trust Act of 2017
Lake
Wilderness
Basic Ownership: Owner Classification
Non-National Forest System Land
National Forest System Land
N
Date: 10/4/2018
1:255,000
0 3.75 7.5 15 22.5 30
Miles

falls far short of what is required to provide the informed decisionmaking and meaningful public participation demanded by NEPA in a site-specific EIS.

In fact, "the Map" does not even show the worst-case or maximum-impact scenario on which the government relies throughout its brief. Doc. 12 at 10-11, 17, 24, 30-37. In reality, there is no single worst-case scenario. Even the maximum level of logging (42,635 acres) and road-building (164 miles) could be distributed in countless combinations around the 125,529 acres allowed in the Project. Depending on where that maximum level of logging and roadbuilding were to be concentrated or distributed over the next 15 years, it would have dramatically different impacts on subsistence users in different communities, on wildlife, and on other attributes of the human environment.

There is a role for this kind of EIS in NEPA: the programmatic EIS. *See generally 'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1094 (9th Cir. 2006). Agencies may prepare general programmatic plans to which site-specific projects may "tier." *Id.* For national forests, the National Forest Management Act (NFMA) requires programmatic land and resource management plans, 16 U.S.C. § 1604, 36 C.F.R. § 219.2(b), often called forest plans. Like the Prince of Wales Project, these plans: govern activities over a period up to 15 years, 36 C.F.R. § 219.7(a); define broad areas where logging is allowed, *id.* § 219.7(e)(1)(v); set maximum logging levels, *id.* § 219.11(d)(6); and define generally applicable rules to protect affected resources when implementing timber sales. These rules are called "standards" and "guidelines" in a forest plan, *e.g.*, *id.* §§ 219.8(a), 219.10, 219.11(d), and they serve the equivalent function of the "Activity Cards" here. 833_2426 at 000469 (ROD at 30). *See generally Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 966 (9th Cir. 2003) ("These plans operate like zoning ordinances, defining broadly the uses allowed in various forest regions, setting goals and limits on various uses (from logging to road construction), but do not directly compel specific actions, such as cutting of trees in a particular area or construction of a specific road."). Indeed, the 1.8-million-acre Prince of Wales Project area is bigger than most national forests. *See* U.S. Forest, Serv., Land Areas of the National Forest System As of September 30, 2011 (Nov. 2011), https://www.fs.fed.us/land/staff/lar/LAR2011/LAR2011_Book_A5.pdf (listing national forests). To evaluate potential impacts, the EIS for a programmatic forest plan—like the Prince of Wales FEIS here—assumes full implementation, recognizing that details will not be known until specific project-level decisions. *See* 833_2079 at 071185-86 (2016 Plan FEIS at 3-2 to 3-3).

While the Prince of Wales Project purports to be site-specific, in reality it is structured in every respect like a programmatic plan for the principal timber-producing area of the Tongass. This is not lawful. When implementing a programmatic plan, the agency must prepare a site-specific EIS disclosing the actual impacts of and alternatives to any actual proposed project. *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1408 (9th Cir. 1985); *see generally Alaska Wilderness Recreation & Tourism Ass'n v.*

Morrison, 67 F.3d 723, 728 (9th Cir. 1995) (explaining relationship of plan to project). Here, that will never occur. The Record of Decision (ROD) directs agency staff to implement "the project-specific work without the need for additional NEPA analysis." 833_2426 at 000692 (ROD at 253). Lacking a site-specific EIS, the Project violates NEPA, section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), and the Tongass forest plan.

ARGUMENT

I. The Project does not comply with NEPA, because the Forest Service does not provide site-specific information in the FEIS.

A. The approach adopted by the Forest Service for this Project would upend foundational NEPA principles and case law.

The law is clear: NEPA's twin aims of informed agency decisionmaking and public participation require a detailed statement of the impacts of agency activity, and agencies do not have the authority to determine the specificity required by NEPA. *City of Tenakee Springs v. Block*, 778 F.2d at 1407 (citing *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982)); *WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 922-25 (9th Cir. 2015). The Forest Service asserts it has precisely that authority here by undertaking an approach that provides the public and the decisionmaker minimal information during the NEPA process. It relies instead on post-decisional, post-NEPA processes to provide the essential site-specific information about already authorized activities and their impacts. This violates NEPA and decades of foundational case law.

The holding in *City of Tenakee Springs v. Block* applies directly to this case, and the government fails in its attempts to argue otherwise. The government argues that an EIS is adequate if it discloses a large area within which logging and road construction "may" take place, Doc. 12 at 26-27, but that is exactly what *City of Tenakee Springs* rejected. The court held that an EIS "indicat[ing] that timber might be harvested and roads might be built" in a particular watershed was not adequately site-specific to satisfy NEPA. *City of Tenakee Springs v. Block*, 778 F.2d at 1408. There is no principled basis for distinguishing that case from this.

Based on the subsequent district court opinion in *City of Tenakee Springs v. Courtright*, No. J86-024, 1987 WL 90272, at *3 (D. Alaska June 26, 1987), the government questions whether the court in *City of Tenakee Springs v. Block* meant location and timing were unclear for the entire 750,000-acre project area or only unclear within the watershed at issue. Doc. 12 at 27. It makes no difference, because the FEIS here survives neither interpretation. It fails to provide site-specific information about activities or impacts in any watershed, let alone the project area in its entirety.

Moreover, the court in *Courtright* held that even detailed information about road and harvest configurations was not by itself sufficient if "the information is not sufficiently correlated with environmental factors, such as distribution of fish and wildlife populations, to facilitate public discussion of the configurations." 1987 WL 90272, at *4. Here, the FEIS is even more deficient. In *Courtright*, at least, there were detailed "alternative road and harvest configurations." *Id.* The FEIS here contains no such configurations and, as a result, there is little or no correlation of the impacts from authorized activities to site-specific environmental features. *See* Doc. 10 at 28-36.

Contrary to the government's assertion, *Stein v. Barton*, 740 F. Supp. 743 (D. Alaska 1990), reinforces this conclusion. Coming on the heels of the *Tenakee Springs* losses, *Stein* finally upheld a site-specific Tongass timber sale EIS where "[t]he FEIS contain[ed] comprehensive, detailed quantitative and qualitative descriptions of the logging and roading plans for each harvest unit." 740 F. Supp. at 749. "The nine-volume FEIS employs a combination of annotated topographic maps, textual, and tabular data to describe the project alternatives and their impacts on cognizable values within the affected areas." *Id.* The FEIS here contains nowhere near that level of site-specific information. It does not even disclose the locations of harvest units, never mind provide detailed plans, maps, or correlations to impacts. The court rejected an argument that exact timetables were required, *id.*, but Plaintiffs here do not fault the FEIS for lack of timetables.

Tellingly, the government does not cite a single case upholding an EIS lacking site-specific details. Instead, it relies on *Alliance for the Wild Rockies v. Weber*, 979 F. Supp. 2d 1118 (D. Mont. 2013), and *WildEarth Guardians v. Conner*, 920 F.3d 1245 (10th Cir. 2019). Doc. 12 at 25. Neither case is apt, because neither case involved an EIS. Both courts upheld agency findings that the proposed actions, regardless of their specific locations, would have no significant environmental impacts. This obviated the need for greater site-specific analysis. *All. for the Wild Rockies*, 979 F. Supp. 2d at 1124-25; *Conner*, 920 F.3d at 1250-51; 42 U.SC. § 4332(2)(C); 40 C.F.R. § 1502.3. Where, as here, significant environmental impacts demand an EIS for a site-specific project, the agency must disclose with specificity where it intends to undertake the project, what the impacts will be, and what alternatives are available. *City of Tenakee Springs v. Block*, 778 F.2d at 1408; *City of Tenakee Springs v. Courtright*, 1987 WL 90272, at *4; *Stein*, 740 F. Supp. at 749. Neither of the government's cases has a thing to say about the site-specificity requirements in an EIS.

B. The Forest Service may not substitute a "worst-case" scenario for a meaningful analysis of the actual project, its impacts, and its alternatives.

Nor has any court upheld the use of a worst-case scenario as a substitute for analyzing the actual impacts of an actual project, as the government proposes here. Doc. 12 at 30-32. Under a prior CEQ regulation, agencies were required to project worst-case scenarios to evaluate specific kinds of impacts where more certain information was unavailable or too costly to obtain. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-55 (1989). In 1986, CEQ replaced that regulation with a more flexible methodology for dealing with unobtainable information, which the Supreme Court upheld. *Id.* at 354-56; *see* 40 C.F.R. § 1502.22.

Neither the former worst-case approach nor the new methodology has any application here. In the present case, the problem is not scientific uncertainty, nor is it about information the agency cannot obtain. Rather, the inability to assess actual impacts here is due simply to the fact that the Forest Service has not yet decided where to log and build roads. That information is not too costly to obtain, which is a prerequisite for invoking both the old worst-case rule and the current rule. *Robertson*, 490 U.S. at 354; 40 C.F.R. § 1502.22(b). Indeed, the Forest Service will inevitably obtain that information before it can implement the actions, since the missing information includes the location of the specific actions themselves. It is not infeasible to determine the location of a specific timber sale and study its impacts. The Forest Service has been doing it for Tongass timber sales since *Stein v. Barton* was decided nearly 30 years ago.

What the Forest Service is attempting to do here is substitute the worst-case approach for a study of an actual timber sale. That is contrary to the plain language of the regulation, 40 C.F.R. § 1502.22(a), and finds no support in any case law. The government cites *Protect Our Communities Foundation v. Jewell*, No. 13CV575, 2014 WL 1364453, at *9 (S.D. Cal. Mar. 25, 2014) to support its proposition that a conservative analysis satisfies NEPA. Doc. 12 at 31. But the EIS contained site-specific information about the location of the wind farm at issue: The uncertainty was about how much noise the turbines would emit. *Id.* at 8-9. The court issued a narrow holding that the agency did not violate NEPA by selecting the noise-emission modeling approach that would reflect the maximum possible level of noise emissions. *Id.* The agency there was not substituting the worst-case analysis for site-specific decisions.

As discussed in the Introduction, the Forest Service has failed even to analyze the worst case in a meaningful way, because it has not made the siting decisions required to do so. *See supra* p. 4. Use and enjoyment of the project area varies widely among Plaintiffs and other members of the public. *See e.g.*, Doc. 10 at 20-22. They have actual interests in knowing where authorized activities will take place—not simply in knowing the generalized worst-case impacts for the island as a whole.

The government's asserted desire to respond to "changing ground and market conditions," Doc. 12 at 31-32, does not excuse the obligation to assess site-specific impacts in an EIS. As an initial matter, there is no reason to believe that any physical conditions on the ground will change. The Tongass is a rainforest not susceptible to fires or outbreaks of insects or disease, and the government's brief cites no claim in the record that these or any other physical conditions would preclude site-specific analysis. That was not the basis for the Forest Service's decision. It is true, of course, that market conditions will inevitably change over the 15-year life of the project, 833_2167 at 001448, but changing market conditions have existed in all forests for all time (and indeed for any other economic activity) without abandoning requirements for site-specific analysis. The Forest Service made the task of responding to markets more difficult by choosing such a lengthy project scope rather than a typical site-specific timber sale, but that choice does not obviate the agency's obligation to provide site-specific analysis in the EIS. *City of Tenakee Springs v. Block*, 778 F.2d at 1407.

C. The implementation plan, Activity Cards, and design criteria do not contain the site-specific information required by NEPA.

The government's reliance on the implementation plan to remedy the lack of site-specific detail in the FEIS, Doc. 12 at 29-30, 32, is misplaced. As explained in Plaintiffs' opening brief, the implementation plan lacks the detailed requirements and safeguards of an EIS. Doc. 10 at 25-28. Among other things, it provides no analysis of impacts, no alternatives, no discussion of competing points of view, no ROD, and no objection process. *Id.* at 26-27. The government's entire response—that baseline data already exists, Doc. 12 at 30—misses the point completely and addresses none of these shortcomings.

Nor do Activity Cards save the FEIS. They are inherently not site-specific, because they describe activities, not locations. The government effectively acknowledges this when it states: "The Activity Cards are site-specific *to the Project Area*." Doc. 12 at 29 (emphasis added). The project area includes approximately 1.8 million acres of federal land. 833_2167 at 001460 (FEIS at 2). This use of "site-specific" deprives the term of any meaning and is inconsistent with the basic requirement of NEPA to disclose where an action will actually occur. *E.g.*, *City of Tenakee Springs v. Block*, 778 F.2d at 1408. The "design criteria" cited by the government, Doc. 12 at 29, suffer from the same shortcoming—they are general criteria that do not disclose where any particular logging or road construction will occur. 833_2167 at 001492 (FEIS at 34).

II. The lack of site-specific information violates ANILCA section 810.

For the same reasons the FEIS violates NEPA, it also violates section 810 of ANILCA. As explained in Plaintiffs' opening brief, ANILCA section 810 requires at least as much site-specificity as NEPA in the evaluation of impacts of and alternatives to a proposed action. *See* Doc. 10 at 36-39. Importantly, the government does not dispute this basic principle. Rather, the government makes the same argument it attempts under NEPA: The maximum-effect scenario is good enough, and location-specific information is thus not required. Doc. 12 at 36-37, 41.

This approach is perhaps even less helpful for subsistence users under ANILCA than it is for general environmental effects under NEPA. The government cites a table in the FEIS disclosing that—in the worst case for the selected alternative—three unspecified Wildlife Analysis Areas may drop below 50 percent habitat remaining and that the action may therefore have a significant restriction on subsistence uses of deer. Doc. 12 at 37. That, together with "the Map," is supposed to provide sufficient information. *Id.* at 38.

This scale of information is of little or no value from the practical perspective of a subsistence user. As pointed out in Plaintiffs' opening brief, and not refuted by the government, subsistence activities are inherently location-specific. Doc. 10 at 31, 37-39. People care about the places they use for subsistence and how the action will affect those places and nearby habitat. Displaying one giant map covering 2.3 million acres, of which nearly 43,000 acres may be logged anywhere within over 125,000 acres opened by the

Project throughout the island, conveys next to nothing about what might actually happen, or how the project will affect wildlife and people, or what the alternatives might be. ANILCA requires the agency to evaluate these considerations. 16 U.S.C. § 3120(a). The failure to do so violates the statute.

The hearing and finding requirements of subsections 810(a)(2) and (3) reinforce the need for meaningful site-specific evaluation under the first sentence of section 810(a). 16 U.S.C. § 3120(a). To meet the statute's hearing requirement, the government relies on the post-decision "workshops" to take place under the implementation plan when site-specific choices are made. Doc. 12 at 38. But those workshops will occur without the benefit of a site-specific analysis of impacts or alternatives, and without any new findings or right of appeal. *See* Doc. 10 at 27-28. Similarly, the findings required by section 810(a)(3), 16 U.S.C. § 3120(a)(3), will never be made with the benefit of knowing how much will be logged from what locations on this huge island over the next 15 years, how much timber might be in demand that would necessitate harm so far in the future, or what the impacts or alternatives of any particular timber sale configurations might be. This renders the non-site-specific, 15-year findings in the ROD an empty exercise. *See* Doc. 10 at 38-39. The findings at issue in *Hoonah Indian Association v. Morrison*, 170 F.3d 1223 (9th Cir. 1999), do not help the government here, because they were based on actual site-specific timber sales considering specific alternatives with different sizes and locations. *See id.* at 1229 (describing alternatives considered).

The government takes much credit for Forest Service's decision not to allow logging in the "North of 20 Road" area. Doc. 12 at 38. To put this in perspective, that area is displayed in "the Map" on page 3 of this brief. It is a tiny sliver, barely visible, on the northernmost fringe of the island—a token gesture to create the impression of responsiveness. Whatever its merit, it does not cure the lack of site-specific information in the FEIS.

III. The Forest Service violated the forest plan and NFMA by failing to include unit cards in the draft and final EISs.

A. "The Map" and Activity Cards cannot substitute for the site-specific information in unit cards, because they do not include "timber harvest units."

The forest plan's requirement to provide "timber harvest unit cards" with NEPA documents is unambiguous, and it is similarly unambiguous that those cards must provide site-specific information about resource concerns and protection measures. 833_0404 at 063265 (2016 Plan at 4-68 (TIM3.I.C)). The Forest Service asserts that a single map of the entire 1.8 million acre project area ("the Map") and Activity Cards that have no site specificity together serve as "unit cards" required by the forest plan. Doc. 12 at 44. This argument disregards the plain language of the standard.

By relying on a single map that shows no "[t]imber harvest units," the government reads the word "unit" completely out of the standard. 833_0404 at 063265 (2016 Plan at 4-68 (TIM3.I.C)). The forest plan leaves the Forest Service some discretion as to how to prepare timber harvest unit cards, but any defensible interpretation of the standard must give meaning to the word "unit." *See United States v. Nature*, 898 F.3d 1022, 1024 (9th Cir. 2018) (("We construe regulations, like statutes, to give effect to every word when possible.") (citing *Duncan v. Walker*, 533 U.S. 167, 175 (2001))). This is a "traditional tool" of statutory construction that the Court must apply, and it reveals that the unit card standard is not "genuinely ambiguous." *Kisor v. Wilkie*, 588 U.S. ___, 139 S. Ct. 2400, 2415 (2019). The government's interpretation is therefore entitled to no deference. It would impermissibly allow the Forest Service to interpret the standard "to create *de facto* a new regulation." *Id.*

The same failure applies to the government's assertion that Activity Cards "'document resource concerns and protection measures' *at the Project level*." Doc. 12 at 42-43 (emphasis added). The standard, by its plain terms, does not apply "at the Project level"—it applies at the harvest unit level. The complete sentence selectively quoted in the government's brief, *id.*, reads "*Timber harvest unit cards* will document resource concerns and protection measures." 833_0404 at 063265 (2016 Plan at 4-68 (TIM3.I.C)) (emphasis added). The government's interpretation, again, ignores the word "unit."

Moreover, this interpretation appears for the first time in the government's brief and is an impermissible post hoc rationalization. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962); *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1050 (9th Cir. 2010) ("Defendants' post hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself.”). Throughout the record, in the ROD, and in implementation, the Forest Service uses the term “unit card” exactly as Plaintiffs do, referring to cards displaying timber harvest units with site-specific resource features. The ROD states plainly that unit cards will not be prepared until site-specific implementation after the ROD: “Unit cards would be developed for any timber sales when site-specific locations are determined.” 833_2426 at 000484 (ROD at 45); *see also, e.g., id.* at 000460-61, 000693, 000697-98 (ROD at 21-22, 254, 258-59) (describing implementation of unit cards and distinguishing them from Activity Cards). Accordingly, in post-ROD implementation, the agency has posted “unit cards” online with maps and resource features consistent with the longstanding usage of that term, but for the fact that they were not available in the FEIS. *See* U.S. Forest Serv., Prince of Wales Landscape Level Analysis Project Out-year Plan Draft Unit Cards, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd622075.pdf (last visited Aug. 23, 2019). Indeed, the government’s brief itself cites the correct, longstanding usage on the first page: “‘Unit cards’ contain a map and narrative description of a specific area of forested land from which timber will be harvested.” Doc. 12 at 9. Only in the argument section of the brief, many pages later, does the government shift to its argument redefining the term by reference to “the Map” and Activity Cards.

In short, the record reflects a consistent use of the term “unit card” by the agency since at least the 1997 forest plan and continuing through implementation in this case.

Nowhere in the record does the Forest Service use the term "unit card" in the manner advanced in the argument section of the government's brief. It is an improper post hoc rationalization.

In rejecting Plaintiffs' comments and objections, the Forest Service offered different justifications from the new interpretation in the government's brief. The agency below relied first on the alleged "intent" of the provision and later on the Chief's rescission of a guidance document. *See* Doc. 10 at 40-41.[1] The government's brief makes no attempt to defend either of those positions, but instead offers yet a third defense, advancing an interpretation of "unit card" that ignores units and is inconsistent with the agency's own usage throughout the record and post-record implementation. These ever-changing positions highlight the obvious: The FEIS violated the forest plan in failing to include unit cards.

B. The failure to provide unit cards was prejudicial error.

The failure to provide unit cards prejudiced Plaintiffs, because it prevented analysis of any actual site-specific actions and deprived Plaintiffs and other members of the public from reviewing or commenting on the units or the missing analysis. The burden to show prejudicial error does not "impose…a particularly onerous requirement." *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009). The Ninth Circuit subsequently

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[1] Plaintiffs' opening brief contains a typographical error in its citation to the Forest Service response to objections asserting the rescission of the guidance document. Doc. 10 at 41. The correct citation is 833_2440 at 000020.

considered the *Shinseki* holding as it applied to review of agency action, and made clear that this did not redefine the definition of harmless error, which "requires a determination that the error 'had no bearing on the procedure used or the substance of the decision reached.'" *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1091-92 (9th Cir. 2011) (notice requirements "reflect the desirability of the interactive process itself" and failure to adhere was prejudicial to plaintiffs); *see Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 571 (9th Cir. 2016) ("[W]ith baseline conditions inadequately established, the public was not able to tailor its comments to address concerns" and plaintiffs were prejudiced by the agency's failure).

Plaintiffs do not have to show that if the unit cards had been provided, the ultimate choices about whether to authorize the Project or where to locate logging activities would have changed. The harm is in the lack of public process. Unit cards are required in EISs, *see* 833_0404 at 063265 (2016 Plan at 4-68 (TIM3.I.C)), and thus are integral to the analysis of site-specific impacts and alternatives available for public review. The history of the unit card standard, undisputed by the government, underscores the importance of unit cards to ensuring the public has sufficient information to provide input during the project planning process. *See* Doc. 10 at 11-14. Plaintiffs were prejudiced by the lack of unit cards that would have given them the opportunity to provide meaningful input on logging locations, impacts, and alternatives.

IV. The Court should grant the requested remedy.

Contrary to the suggestion in the government's brief, Doc. 12 at 47-49, the violations alleged in this case go to the heart of the processes required by NEPA, ANILCA, and the forest plan, requiring vacatur. All three claims address the systematic failure to provide site-specific information about the location of activities, their impacts, or their alternatives. This is not a technicality that can be explained by the agency on a remand without vacatur. All three claims require a new and fundamentally different EIS.

That the government asserts vacatur would be disruptive does not make it so. *Id.* at 48-49. The government cites no facts to support its assertion, providing no basis to accept it or even to grant supplemental briefing.

The unsubstantiated claim that timber sale revenues are needed for restoration and recreation, *id.*, is not plausible, because Tongass timber sales lose money. Timber sale costs are about 15 times greater than revenues, leading to losses averaging over $20 million per year. Ex. 15 (Taxpayers for Common Sense).[2] Even if a money-losing sale could somehow pay for a restoration project, it would make no sense to allow such a

[2] Plaintiffs submitted Exhibit 15 to the record in their timely comments on the draft EIS and again in their timely objections to the draft ROD. 833_1603 at 005343; 833_1905; 833_2387 at 000408. For some reason, the agency failed to include this exhibit in the administrative record filed with this Court. It does not matter, because Plaintiffs introduce it here solely for purposes of relief. *E.g.*, *Idaho Conservation League v. Guzman*, No. CV 4:10-26-E-REB, 2011 WL 13134014, at *4 (D. Idaho Nov. 1, 2011) (holding court not limited to record in addressing relief).

trade-off: It would allow permanent, irreparable harm to proceed for the purpose of paying to ameliorate it.

The government asserts with no citation of authority, and contrary to local rules and practice, that relief is premature and should be addressed in supplemental briefing. Doc. 12 at 47. This assertion is without support and would be prejudicial to Plaintiffs. The local rules establish a comprehensive briefing schedule that does not include bifurcated proceedings. L.Civ.R.16.3(c). Accordingly, the parties stipulated to a briefing schedule that did not bifurcate, except for a preliminary injunction. Doc. 6. This Court entered a scheduling order accordingly. Doc. 7.

Thus, the government should not be heard to complain now that it lacks sufficient pages. Doc. 12 at 49. It could have sought more pages or bifurcated proceedings when stipulating to the scheduling order. Plaintiffs complied with the rule and with this Court's order by submitting declarations and devoting a substantial portion of their opening brief to relief, within page limits, making a complete factual and legal case. Doc. 10 at 20-22, 43-47. The government made a strategic choice to devote more pages to the merits of the claims, with no basis to assume it was entitled to supplemental briefing on remedy. To grant the government's request would unfairly prejudice Plaintiffs.

CONCLUSION

For the foregoing reasons, the Court should grant the relief requested in Plaintiffs' opening brief, Doc. 10 at 43-47.

Respectfully submitted this 23rd day of August, 2019.

s/ Thomas S. Waldo
Thomas S. Waldo (AK Bar No. 9007047)
Olivia Glasscock (AK Bar No. 1809072)
EARTHJUSTICE

Attorneys for Southeast Alaska Conservation Council; Alaska Rainforest Defenders; Center for Biological Diversity; Sierra Club; Defenders of Wildlife; Alaska Wilderness League; National Audubon Society; and Natural Resources Defense Council.

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this brief contains 5,179 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limit of Local Civil Rule 7.4(a)(1).

Respectfully submitted this 23rd day of August, 2019.

s/ Thomas S. Waldo
Thomas S. Waldo